EVIDENCE
Spring 2018
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. Further, odd abbreviations are distracting.

Question 1 [Prince's Drive]

[Note: For background on the facts, see "Parents Just Don't Understand," by DJ Jazzy Jeff & The Fresh Prince (1988), *available at* https://www.youtube.com/watch?v=jW3PFC86UNI]

This question asks about eleven pieces of evidence. The simplest way to organize an answer was to address each piece in turn. Other schemes were fine so long as answers managed to discuss all the evidence at issue.

(1) ***Prince's Mother's Testimony.*** The evidence here is best divided into two parts. Because her testimony would be pure propensity evidence, it would normally be barred by Rule 404(a)(1). This is a criminal trial, however, meaning that Prince (the defendant) can offer evidence of his own character under Rule 404(a)(2)(A), so long as the character trait is "pertinent." In a case with a reckless driving charge, being "careful" is pertinent, meaning Mom may testify about her opinion of Prince's care. But she cannot testify (at least not during direct examination) about specific acts, such as Prince using his seatbelt.

[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.

See Rule 405(a).[2] Nor can Rule 406 be used to admit the specific acts evidence; the acts at issue in this case (fast driving) are too dissimilar from the acts about which Mom would testify (*e.g.*, looking both ways while crossing the street). This is character evidence, not habit.

(2) ***The Gum Chewing.*** Although Prince has opened the door to evidence of his own character (assuming Mom has testified), the prosecution may introduce character evidence only concerning the same trait Prince put at issue. Chewing gum at school and getting suspended may be obnoxious, but it does not rebut evidence that one is a careful person in the context of physical safety. This is generic "bad acts" evidence, not evidence related to care. It is barred by Rule 404.

(3) ***The Professor.*** The proposed expert testimony is likely inadmissible for two reasons. First, the professor is an expert on engineering cars, not driving them. Absent additional information, he may not be qualified to testify about urban driving. More important, the jury does not need an expert to know that "driving 90 miles per hour on a city street is extremely dangerous." Accordingly, the testimony would not "help the trier of fact to understand the evidence or to determine a fact in issue." *See* Rule 702.

(4) ***The Girl's Wonderful Traits.*** The testimony by the mother of the alleged victim is likely inadmissible. First, it's probably irrelevant (or, at minimum, a waste of time). It is just as unlawful to endanger the welfare of a mean child as a kind one. The girl's kindness, generosity, and diligence are not material. Second, Prince has not opened the door to character evidence concerning the victim. *See* Rule 404(a)(2)(B). There is nothing in the facts to suggest that Prince will attack the victim's character.[3]

(5) ***Cross-Examining the Girl's Mother.*** If the girl's mother testifies, then she can be impeached on cross-examination with specific acts of her prior dishonesty. *See* Rule 608(b). (If she does not testify, perhaps because the testimony in item (4) is excluded, then her character is not relevant.) Assuming she has been called by the prosecution, the defense may ask about her alleged embezzlement. Embezzlement is a dishonest act, and the defense needs only a good faith basis for believing that it occurred to make the question proper.[4]

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[2] Note that no character trait is "an essential element" of any crime charged in this case. *See* FRE 405(b). One need not be a reckless person generally to commit reckless driving.

[3] Note that even if Prince testifies about the girl's behavior in his parents' car, the door remains closed. Her behavior with Prince is not character evidence (or "other acts" evidence) at all but is instead part of the story at issue.

[4] Note that no conviction is needed. Rule 609 concerns proof of convictions. Dishonest acts not leading to criminal convictions are covered by Rule 608.

(6) ***The Insurance.*** Chances are, this evidence is inadmissible. It is hard to see a relevant use of the insurance evidence (especially Prince's knowledge of its existence) other than to suggest that Prince acted recklessly because he knew about the insurance. "Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully." Rule 411. Even if the prosecution claims to offer evidence only of casualty insurance (which is not barred by Rule 411), the relevance is minimal, and its use risks the sort of impermissible inference prohibited by the Rule. Some combination of Rules 411, 402, and 403 should exclude the evidence.

(7) ***Prince's Plan.*** Because Prince has been charged with car theft, his plan to return the car before his parents ended their vacation is relevant. Recall that theft is often a specific intent crime. Prince's plan—assuming the jury believes his story—would negate the *mens rea* needed for a conviction (intent to permanently deprive). I realize that the theft statute was not provided. Students who said the evidence might be relevant depending on the statutory language received full credit, as did those who assumed the statute mimicked the common law. Students who declared the evidence irrelevant without discussing possible elements of the theft offense lost points, as did those who suggested that the evidence was inadmissible because of Prince's bias in favor of his own case.[5] Note too that as a criminal defendant, Prince enjoys wide latitude if he wishes to take the stand in his own defense. (Also, if Prince recounts his own prior plans, there is no hearsay issue. His own thoughts do not constitute some kind of out-of-court statement.)

(8) ***Prince's Assessment of his Speed.*** Because he was in the car, Prince has personal knowledge of how quickly he was driving. He need not be an expert to opine (or just guess) about his speed, and his guess would be useful to the jury. *See* Rule 701. In particular, the testimony could help rebut the evidence in the police report. The jury of course may disbelieve his testimony as self-serving. That goes to weight, not admissibility.

(9) ***The Police Report.*** This report is hearsay. It was written out of court and is relevant only if true. Because the officer is available to be cross-examined, the testimonial report's admission does not create a Confrontation Clause problem. Accordingly, if the prosecution can find a hearsay exception, the report is admissible. (Chances are the radar gun is not a declarant for purposes of the hearsay rule, so we have only one layer of hearsay to manage.)

The best hope for the prosecution is probably Rule 803(5), which concerns a "recorded recollection."[6] Under that rule, the report could be read to the jury if (1) it concerns

[5] Note that the question asks if evidence is admissible, not if using it is wise. Students were free to offer advice (*e.g.*, that Prince taking the stand opens him to cross-examination, which could be dangerous). But doing so was savvy only after answering the question actually asked on the exam.

[6] Note that the "recorded recollection" exception is distinct from using evidence to refresh the recollection of a witness.

something the officer once knew about but now cannot remember, (2) the officer wrote it while the events were fresh in the officer's mind, and (3) the report accurately reflects what the officer once knew. Chances are the officer can testify to everything needed to establish these requirements, in which case the document may be read aloud.

Note that Rule 803(8) will not work because this is a criminal case. Rule 803(6) is unlikely to work because judges are wary of using the business records exception to sneak public records into evidence against criminal defendants.

Note too that if the officer reads the report silently and then claims to remember the events at issue, *see* Rule 612, the officer would then be free to give live testimony about what happened on the day of Prince's arrest.[7]

(10) ***The Girl's Demeanor.*** First, this is not character evidence. Second, it is of questionable relevance. Good answers discussed how it might or might not be material to any charged offense. Perhaps the girl's lack of obvious distress undermines an endangerment charge. Then again, perhaps her reaction to driving at 90 miles per hour is not relevant to assessing whether Prince put her in danger. If the evidence is relevant, the passerby is likely qualified to offer a lay opinion. *See* Rule 701.

(11) ***The Officer's Words.*** This testimony is relevant to show possible bias of the officer against Prince. The officer appears hostile to Prince, which might suggest a willingness to falsify a police report or to give false testimony. The officer's words are not being offered for their truth. The defense doesn't want to use the statements to prove that Prince cannot afford the car, nor that evidence of his parents' ownership "won't help" him. The evidence is therefore not hearsay. No hearsay exception is needed.

Question 2 [The Will Dispute]

Is the will real?

The first part of this question asks how you would prove that the disputed will is real. Note that the question did not ask how it could be authenticated. That question is related but not identical. Your job is to convince the trier of fact that the item is truly genuine, not merely to get it into evidence. Strong answers suggested many tactics.

Because the will was almost certainly signed, evidence concerning the signature's handwriting could help establish legitimacy. One could call a witness familiar with Delilah's handwriting to testify that the will's signature looks like hers. One could show the jury the will along with something

[7] This would not create any hearsay issues, although it might undermine the officer's credibility.

Delilah is known to have written (such as the letter discussed below), or one could show these items to a handwriting expert. Good answers presented at least some of these options.

Further, good answers suggested other possibilities. The facts are spare, and students could use their imaginations. For example, perhaps a lawyer drafted the will and could testify that Kent's document matches what the lawyer created. Perhaps witnesses can be found who saw Delilah sign the will. Perhaps it is recorded somewhere in a government office.

Other ideas included "distinctive characteristics" such as the stationery on which the will was written or typed, evidence concerning where Kent found the document, unusual turns of phrase, and chain of custody. In addition, testimony from friends and relatives of Delilah could support a claim that she intentionally disinherited her daughter in favor of Kent.

The letter

The letter is relevant to prove that Delilah was competent around the time she allegedly executed the will.[8] Kent's argument would be that if she could write a letter about boring topics, could correctly address it, and could do whatever else was needed to get the letter to her friend, then surely Delilah was of sound mind that day.[9] Her competence is demonstrated by the letter, but she does not *assert* her competence. Accordingly, the letter is not hearsay if offered to show that Delilah was competent when she wrote it. (Also, the Confrontation Clause is not relevant to this civil case.)

In addition, the letter is relevant because it (probably) contains Delilah's handwriting, which can then be used to prove the will genuine. This use is also not hearsay.

Question 3 [Use of Depositions at Trial]

This question provided the text of a Missouri rule and asked students to compare that rule to the relevant provision of the Federal Rules of Evidence. Good answers stated what the relevant Federal Rules are and explained how they differ from the Missouri rule. These answers then offered some arguments in favor of the Missouri rule and some in favor of the FRE. Students who advocated for one option and gave no consideration to counterarguments left points on the table.

[8] The issue presented in this case is somewhat similar to that of *Wright v. Tatham*, an 1838 Exchequer Court decision that inspired the novel *Bleak House*. The Federal Rules of Evidence, which require an "assertion" as part of all hearsay, would give a result different from that handed down long ago in England.

[9] A few students seemed to think Delilah would offer the letter under a theory that if the letter mentions no will, it implies that no genuine will was executed that day. But perhaps the letter was written before the will, or perhaps Delilah did not feel like mentioning the will to her friend. In any event, the main relevance of the letter's text is to show Delilah's mental capacity.

The key federal provisions are FRE 804(b)(1) (the "former testimony" exception) and FRE 801(d)(1)(A), which concerns prior inconsistent statements of trial witnesses.

Under Rule 804(b)(1), a statement by an unavailable declarant is admissible if it "was given as a witness at a trial, hearing, or **lawful deposition**, whether given during the current proceeding or a different one; and … is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination" (emphasis added).

This exception is narrower than the Missouri rule,[10] which does not require that the declarant be unavailable, nor does it require that the party against whom the evidence is now offered have had a "similar motive" during the deposition. (In one way, the federal rule is broader than the Missouri rule, which does not reference a party's "predecessor in interest." But this difference is minor in comparison to the ways in which the Missouri exception covers more evidence.)

Under Rule 801(d)(1)(A), after a witness testifies, a prior statement by that witness is not excluded by the hearsay rule if the statement "is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or **in a deposition**" (emphasis added). Also Rule 801(d)(1)(B), which concerns prior *consistent* statements by trial witnesses, could cover some deposition testimony.

In federal court, prior deposition testimony by trial witnesses (who generally are not "unavailable" as defined by Rule 804(a)) is mostly inadmissible hearsay. The federal rule preferences live testimony and mostly makes a deposition admissible for its truth only if the declarant either (1) contradicts the deposition testimony at trial or (2) cannot testify at trial about what the jury needs to know. By contrast, the Missouri rule allows a lawyer to use live testimony, deposition testimony, or both.

Plausible arguments in favor of the Missouri rule include: (1) it is simpler and more predictable, (2) depositions are pretty reliable and ought to be admissible against parties who attended them or had notice of them, (3) the rule encourages depositions, which help move cases along and settle them, (4) the rule promotes judicial economy, (5) the rule saves time of witnesses who can skip trials when lawyers use deposition testimony, (6) with modern video technology, juries can observe the demeanor of deponents, and (7) depositions occur before trials, meaning the events are fresher in the minds of witnesses during depositions than at trial.

Plausible arguments in favor of adopting the federal scheme include: (1) adopting it would promote uniformity with neighboring states as well as among federal and state courts in the adopting state, (2) live testimony is good, and it should be encouraged, (3) relatedly, it is important for juries to watch witnesses testify live, when possible, so that they can observe demeanor, (4) trial testimony is more formal than deposition testimony and will be taken more seriously by witnesses, (5) the

[10] That is, the federal exception admits less hearsay than does the Missouri rule.

federal rule reduces the risk of a Confrontation Clause problem possibly caused by the Missouri rule,[11] (6) the Missouri rule lacks the "similar motive" requirement, which is important to fairness,[12] and (7) the federal rule allows hearsay when necessary (when the declarant is not available), which is a sensible compromise.

Final comment: This document contains 3,059 words, including footnotes (as well as 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. When I exclude this paragraph, the word count of the document equals 3,000.

[11] This problem is more theoretical than real. If a witness is unavailable at trial, there should not be a Confrontation Clause problem if the defendant had a prior opportunity to cross-examine. *See Mattox v. United States* (1895); *see also Crawford v. Washington*. And if the declarant is at trial available for cross-examination, then there is certainly no Confrontation Clause problem. *See United States v. Owens*, 484 U.S. 554 (1988) (Fisher casebook at 469). But fear of unjust results that contradict the spirit of the Clause could nonetheless support an argument against a proposed rule of evidence.

[12] *See, e.g.*, *United States v. Duenas*, 691 F.3d 1070 (9th Cir. 2012) (casebook at 475) to see the importance of similar motive in an actual case (involving a suppression hearing transcript).