

EVIDENCE
Final Examination 1989
Professor Thomas Mack

This is a “closed book” exam; you may not possess, use, or even have near you any notes or any materials with writing on them other than the FRE provided with the exam. Apply the Federal Rules, not common law. DO NOT write your name or identify yourself in any manner other than placing your social security number on your examination book. If you use more than one “blue book,” number the books in sequence and place your social security number on each book. Give a brief explanation of your conclusions; cite to the appropriate federal rule. No Rule 403 analysis is required in answering any question.

1. The IRS sues Mo for back taxes allegedly due as “cabaret” taxes on a tavern. The tax has been assessed because the tavern allegedly permitted dancing, making it a “cabaret.” Mo denies any dancing took place. An IRS agent testifies he interviewed Curly last week, that Curly was Mo’s partner in owning and operating the tavern during the relevant tax years, that Mo was no longer in partnership with Curly at the time of the interview, that Curly stated that there was dancing during the relevant years. Mo’s attorney objects on grounds of hearsay to Curly’s statement. Would Curly’s statement be admissible? Explain.

2. A physician, who often did work for Employer’s insurance company, was asked, in anticipation of litigation, to examine and report on injuries sustained by worker on the job, caused by a machine made by Beaco. The report was prepared in the ordinary course of the doctor’s business. The doctor’s report is offered in evidence by the worker in his lawsuit for negligence against Beaco, who is also insured by the same insurance company. Beaco objects on hearsay grounds. What would you respond as worker’s attorney?

3. Ken was tried for conspiracy to bribe a public official, allegedly converting money received for that purpose to his own use. In his defense, Ken attempted to show he had plenty of his own money, lessening the credibility of the charge that he would convert other’s money to his own use. To bolster his defense, he attempted to introduce a telex from the vice president of a foreign bank. The telex said Ken had withdrawn a large amount in 1987 of money he had previously deposited in 1985. The telex had been sent to the prosecutor in response to a subpoena of the bank’s actual deposit-withdrawal records of the defendant. As prosecuting attorney, what would your objection, if any, be? Explain the basis of any objection.

4. Betty Crocker wrote a letter to the New York Times saying that Fannie Farmer didn’t know how to cook and had hired a ghostwriter to write her cookbooks. Fannie sued Betty for libel. At trial, Fannie called her neighbor, James Beard, who testified to Fannie’s great reputation for good cookery. He also said that in his opinion her apple pan dowdy, which had won the blue ribbon at the Culinary Institute Bakeoff in June of 1981, was the best he had ever tasted. Are these statements admissible?

5. Mary was hurt in her kitchen when her automatic blender appliance flew apart, a piece hitting her in the head. She sues the maker of the blender. Over proper objection, should the court permit a witness to testify that Mary walked into the living room where the witness was

sitting, and calmly announced, with blood dripping from her ear that a large piece of glass had just entered her ear? Explain.

6. Don is prosecuted for the attempted rape of Dora. On the issue of the identity of Dora's attacker, the prosecution offers a witness who will testify that she knows Don left town immediately after the rape took place. The Defense objects. Admissible? Explain.

7. In an action against Jerry for causing Bea's death, Jerry claims self defense. A witness for Jerry testifies that a day before the fatal encounter, the witness saw and heard Mary tell Jerry that Bea had told Mary that Bea was going to Jerry's saloon to blow Jerry away with her gun. Admissible? Explain.

8. Billy Lucas is on trial for murder. The police investigation centered largely around Billy's brother, Martin. The night after the killing, MacWilliams (Mac) talked to Martin. Martin said that Billy sold dope to a guy in a Cadillac at about 10 pm. At 10:30, the same guy came back in the same car and yelled at Billy that the amount of dope was "short." Billy threatened the guy with a pistol, the guy spit at Billy's face and Billy shot him. After talking to Martin, Detective Mac got a warrant and arrested Billy. Martin told the same story to the grand jury. Billy was indicted. At trial, the prosecutor called Martin and Martin said he didn't know who did the killing, that lots of people were around the car that night, and could have done it, and that he (Martin) never saw Billy with a gun on the night in question. The prosecutor, after laying the proper foundation, asks Martin whether or not on the night after the killing he (Martin) had told Detective MacWilliams that Billy had done the killing. Admissible? Explain.

9. Art is on trial for criminal assault. Art's lawyer calls Mary as a witness for Art. Mary testifies that Art's reputation in the community for peace and good order is very good and that in her opinion, knowing and observing him for a long time, Art is a peaceable fellow. On cross examination, the prosecutor asks Mary whether she knew or ever had heard of Art's year-old arrest for check forgery. Defense counsel objects. Admissible? Explain.

10. Assume in the above trial, Mary testified on direct that Art was honest and trustworthy. The prosecutor objects. The judge sustains the objection. Is the ruling correct or incorrect? Why?

11. Sue sues Don for the wrongful death of Lou, Sue's husband. On the issue of damages, Sue seeks to introduce a long and passionate love letter, written to her by Lou shortly before he died. Don objects that the letter is hearsay and irrelevant. How would you respond as Sue's attorney? What do you conclude as to admissibility?

12. Bert is defendant in a suit by his employer over Bert's alleged conversion of his employer's office equipment. Bert seeks to elicit from witness Gail that Bert has an excellent reputation for honesty and trustworthiness. Employer objects. Admissible? Explain.

13. In the above trial, employer seeks to introduce Cal, one of Bert's former employers. Employer proffers that Cal's testimony will be that Cal fired Bert when Bert was caught by Cal carrying bricks in a wheel barrow and putting them in his car, that Cal later heard that Bert built

a small house with building materials stolen from Cal's business. Bert objects. Admissible? Explain.

14. John thinks he's about to be sentenced to life imprisonment. His lawyer overhears him saying to Harriet that he's going to give his sports car to Jake. John dies. In later litigation over ownership of the car, John's lawyer is called as a witness and asked to recount what he overheard John say to Harriet. Would John's response be admissible? Explain.

15. The president of A company said to her secretary, "I'm going out, take my calls." As usual, the secretary recorded the call messages that day on a printed pink slip. The vice president of B company called A's president and left a message, fully recorded by the secretary on a pink slip, that the B company was breaking its lease at their current space and was looking for another company to move in so he could keep his office landlord happy. In later litigation between A company and that same landlord, you are asked by A's lawyer whether, if relevant, the slip and written message are admissible. Explain your response.

16. In a suit by the law school against Zeke to prove Zeke was a trespasser who damaged school equipment, the school calls Joe to the stand. Joe denies he saw Zeke in the library. Trying to show Zeke is lying and to prove Zeke was in the building, the school offers Joe's grand jury testimony (which is not subject to cross examination) that he did see Zeke in the library on the night in question. Admissible? Explain.

17. After Tom's death in a car accident, his administrator and his wife file survival and wrongful death actions. In attempting to prove that Tom didn't die immediately but was conscious and suffering after the accident, the witness heard Tom say, "That woman ran me off the road." Is the statement admissible? Explain.

18. Lin is on trial for the murder of her business partner, Jon. It is established that Jon died as a result of brain injuries caused by a skull fracture. State witness Lou testifies that on the day before Jon's death, he overheard a violent argument between Lin and Jon in which Lin accused Jon of "stealing" from the company. Is Lou's testimony admissible? Explain.

19. In the above trial, the testimony of Jon's secretary is offered that Jon had told her on the day of his death that Lin had threatened him with bodily harm. Is the testimony admissible? Explain.

20. Gary dies in a plane crash. The administrator of his estate files an action against Art to recover damages which he feels Gary was entitled to, from Art having kept a painting of Gary's without compensating Gary. Joan is on the stand as a witness and will respond affirmatively to each of two questions from Art's attorney, the first whether she heard Art ask Gary could he have Gary's painting and the second, whether she saw Gary nod his head up and down in response. If the administrator objects on grounds of hearsay to each question, what would you respond as Art's attorney?

21. Sue sues Mo for negligence. She offers in evidence a standard accident report used by police to record information and observation at the scene of an accident. The officer who filled

out the report testifies he filled out the form at the scene of the accident, accurately and carefully, as he always does. The report contains a statement by the owner of a shop in front of which Sue and Mo's cars hit each other. The owner is recorded as saying to the officer, who arrived 15 minutes after the accident, "I'll tell you exactly what I saw as I saw it. The whole thing happened right in front of my eyes. The man is driving very fast, the woman going slow, and they hit. The blood is everywhere and I can still barely stand up or talk because I can't stand seeing such things. I'm shook, very shook." The report further states the officer's opinion that the shopkeeper appeared to be "stressed out." When asked on the stand about whether the shopkeeper was excited, the officer testifies, "I have no idea. I can't remember everything about that evening. I don't even remember being there." Is the report admissible as proof that Mo was driving too fast?

22. If Mo objects only to the officer's statement observing that the informant appeared "stressed out," will the statement be excluded? Explain.