

EVIDENCE  
Midterm  
Fall, 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.

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Question 1

The IRS in litigation over whether a gift of art was made to Al, offers evidence that Bea, who was near death at the time, sent a note to Al which said she would send him her painting to hang forever in his private collection. The note at trial is:

- A. Admissible as a statement of intent to prove conduct.
- B. Inadmissible as a statement of intent to prove conduct.
- C. Admissible as not being hearsay.
- D. Inadmissible hearsay.

Question 2

On the issue of joint tenant Joan’s insanity, in litigation over the validity of a purported conveyance by Joan to Al, Bo testifies he repeatedly heard Joan say that she was the Queen of Sheba. Joan’s repeated statements are:

- A. Inadmissible because Bo lacks personal knowledge.
- B. Admissible declaration of the bearer’s state of mind.
- C. Inadmissible hearsay.
- D. Admissible either as not hearsay or as an exception if hearsay.

Question 3

Dee was hurt when the flame arrestors in her new sports car exploded causing her car to go over the edge of a new, elevated expressway. She sues the manufacturer of the car and the State Highway Authority for her injuries. She seeks burn damages and other personal injury damages. Over proper objection should the court permit a witness to testify that Dee jumped out of the wrecked car while screaming to the witness, “My hands hurt like they were covered with burning tar!”

- A. Yes, as a declaration of a past bodily condition.
- B. Yes, as a declaration of a present bodily condition.
- C. Yes, as a declaration of a present bodily condition only if the witness was a doctor.
- D. Yes, as an exception to the Hearsay Rule, but only if the witness was a medical person and the statements were made for the purpose of diagnosis or treatment.

Question 4

The Dean said to her secretary, “I’m going to lunch, record all my calls as usual.” School policy provided a standard log book to record messages when an employee was not present to

receive a call. While the Dean was out, Ann, the wife of a faculty member, called. The Dean's secretary recorded the following message: "Ann called and said Bill had just landed at National and was going to take a cab to Cabin John." A taxi driver was found murdered in his cab. The taxi was parked in Bethesda, a town between the airport and Cabin John. Bill was charged with murder. The prosecution moved to admit both the secretary's phone log entry as well as the taxi driver's own fare log stating his destination as Cabin John. Which of the following statements is correct?

- A. Both entries will be admitted under the business record exception to the Hearsay Rule.
- B. Secretary's entry will be admitted as a record of regularly conducted business activity.
- C. Secretary's entry will be admitted because Ann's statement meets the hearsay exception for declarant's state of mind.
- D. Secretary's entry will not be admitted because it is hearsay within hearsay.

#### Question 5

In a suit by Bea against Abe, to prove that Abe was in the saloon on Christmas Eve, Bea places Gene on the stand. When Gene denies ever being in the saloon and denies any memory of even seeing Abe on Christmas Eve, Bea offers Gene's grand jury testimony that he was drinking with Abe in the saloon on Christmas Eve. The grand jury testimony is:

- A. Admissible only to impeach Gene.
- B. Admissible because it's not hearsay.
- C. Inadmissible because Gene is available.
- D. Inadmissible hearsay.

#### Question 6

In a conspiracy trial against Lou, resulting from Bob and Lou stealing a yacht, a state witness testifies that when Lou and Bob, who is alleged to be an unindicted co-conspirator, saw all the police waiting when they drove the yacht up to the pier, Bob jumped off the yacht and ran away. Lou objects that evidence of Bob's jumping and running is hearsay and inadmissible. In response to the hearsay objection, the court should:

- A. Overrule because the jumping and running is a nonverbal admission against party.
- B. Overrule because Bob's statement is not a statement and therefore not hearsay.
- C. Sustain because Bob's conduct is nonverbal hearsay offered for the truth of the implied consciousness of guilt.
- D. Sustain if Bob is available as a witness.

#### Question 7

Al dies after a cruise ship vacation for two with Bea, paid for by Al. Al's executor files an action, on behalf of the takers under Al's will, against Bea to recover half the cost of the vacation. A witness is to testify that he saw Al nod his head up and down in response to Bea's asking if Al would pay the entire cost of the vacation if Bea quit school to join him. If Al's executor properly objects to the entry of the witness's testimony as to Al's nodding his head, because it is hearsay, the court should rule that it is:

- A. Admissible because it is only nonverbal conduct and therefore not a hearsay statement.

- B. Admissible but only as an exception to the hearsay rule.
- C. Admissible because it is a statement but not hearsay.
- D. Inadmissible hearsay.

Question 8

In a civil battery suit where Ann's defense is self defense, a witness for Ann testifies that a few hours after the fight, Ann said, "I hit him hard only after he jumped me from behind." The statement is:

- A. Inadmissible hearsay.
- B. Admissible as a declaration against interest.
- C. Admissible as a declaration of state of mind.
- D. Admissible because not hearsay.

Question 9

Joe is prosecuted for rape of Jean. On the issue of the identity of Jean's attacker, the prosecution seeks to introduce testimony of Joe's roommate that Joe left town immediately after the rape. Such testimony would be:

- A. Inadmissible as irrelevant because its probative value is speculative and uncertain.
- B. Admissible as a hearsay exception.
- C. Inadmissible hearsay.
- D. Admissible non-hearsay.

Question 10

In an action against Don for killing Lin, Don claims self defense. A witness testifies that one hour before the fatal fight the witness saw and heard Jake saying to Don that Lin had told Jake she was coming to kill Don at 4:00 pm. The evidence is:

- A. Admissible non-hearsay.
- B. Inadmissible double hearsay.
- C. Admissible state of mind declaration.
- D. Inadmissible hearsay.

Question 11

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 administrator's witness testifies that after the accident, the witness heard Tom say, "That woman ran me off the road." The statement is:

- A. Non-hearsay.
- B. Hearsay.
- C. A party opponent admission.
- D. A declaration against interest.

Questions 12-15 are based on the following fact situation:

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.

12. 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. Lou's testimony is:
- A. Inadmissible because irrelevant.
  - B. Inadmissible because hearsay.
  - C. Relevant and admissible either as non-hearsay, or under state of mind exception to the hearsay rule.
  - D. Non-hearsay, but inadmissible because Lou had no personal knowledge.
13. The testimony of Jon's secretary, that Jon had told her on the day of his death that Lin had threatened him with bodily harm. The testimony is:
- A. Admissible under the state of mind exception to the hearsay rule.
  - B. Admissible as reflecting on the credibility of Lin.
  - C. Inadmissible hearsay.
  - D. Inadmissible because Jon did not say when the threat had been made, and hence its relevancy is offset by risk of prejudice to accused.
14. The testimony of a police officer that he was on patrol in Lin's neighborhood, when an unknown young woman ran up to him shouting, "Help! There is a terrible fight going on at Lin's house!" This testimony is:
- A. Inadmissible hearsay.
  - B. Inadmissible because identity of hearsay declarant unknown, and therefore trustworthiness unreliable.
  - C. Hearsay, but admissible as a spontaneous utterance.
  - D. Hearsay, but admissible as an official police record.
15. Further testimony by the officer, that on arrival at Lin's house ten minutes later, he found Jon lying on the ground outside still alive; that Jon said calmly, "I have been lying here thinking, Lin hit me from behind...but I'll get even if it's the last thing I ever do," and that Jon thereupon lapsed into unconsciousness and died. This testimony is:
- A. Hearsay, but admissible as declaration against interest.
  - B. Inadmissible hearsay.
  - C. Inadmissible because irrelevant, there being no showing that the accused Lin, was the "Lin" to whom Jon was referring.
  - D. Hearsay, but admissible under the state of mind exception.

#### Question 16

Art is a passenger with driver Bill, his employee, in Art's delivery truck making a final delivery. The truck hits Dee's car, with Art winding up in Georgetown University Hospital for six months. Dee hires you to sue Bill but not Art since she has hopes of marrying him. You file suit against Bill and when you get a trial date, you subpoena Art to testify and also subpoena a hospital orderly who overheard Art talking in the hospital, hearing Art say that they had been going too damn fast but loved driving that way.

Art gets out of the hospital, but he leaves the country two days before trial and has totally disappeared. You offer the orderly's testimony regarding Art's statement in the hospital. The statement will be:

- A. Inadmissible because the statement is not against declarant's interest.
- B. Admissible because the statement is against declarant's interest.
- C. Inadmissible hearsay.
- D. Inadmissible because not within the orderly's personal knowledge.

Questions 17 and 18

A bystander witness testifies that she saw someone drive a red car into plaintiff's car. Seeking to elicit testimony that will allow defendant to argue that defendant was actually driving a blue car and didn't hit plaintiff at all, defendant's counsel asks the witness on cross examination whether or not she told the police when they arrived at her house the day after the accident, that she saw a red car hit plaintiff and a blue car driven by defendant narrowly miss hitting plaintiff. Plaintiff's counsel objects in the proper manner that such testimony would be inadmissible under the hearsay rule. The witness's statement to police is here most likely:

- A. Admissible as a prior inconsistent statement.
- B. Inadmissible hearsay.
- C. Admissible as describing a present sense impression.
- D. Inadmissible because of lack of personal knowledge.

Under the facts given above, assume the witness testified instead that she saw that the red car which hit plaintiff was being driven by defendant. Assume that defendant's counsel asked her the same question on cross and the court admitted the question and answer, which was that, yes, she had made such a statement at the time to police. If defense counsel attempts over objection to rely on such testimony to argue that his client was in the blue car, he should:

- A. Not be permitted to so argue because the testimony was not admissible for such purpose.
- B. Be permitted because the testimony was admissible for such purpose.
- C. Be permitted because once in evidence the testimony can be used to argue anything inferable therefrom.
- D. Not be permitted because of Rule 403.

Question 19

In a murder case against Al where self defense is asserted, Al puts on a witness to testify that a few hours after Bea's killing, Al had said, "I killed her after she viciously attacked me." The statement is:

- A. Admissible as a declaration of state of mind.
- B. Admissible as an admission by a party opponent.
- C. Admissible as a declaration against Bea's interest.
- D. Inadmissible hearsay.

Questions 20 and 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."

If Sue attempts to use the report as evidence that Mo was driving too fast, the evidence is most likely:

- A. Admissible under the business records and the present sense impression exceptions.
- B. Inadmissible because the recorder lacks personal knowledge and the informant is under no business duty.
- C. Admissible under the business records and excited utterance exceptions.
- D. Inadmissible because the evidence is multiple hearsay and not all components come under the hearsay exceptions.

If Mo objects only to the officer's statement observing that the informant appeared "stressed out," the statement will most likely be:

- A. Admitted as a past recollection recorded.
- B. Not admitted because levels of psychological stress are not subject to lay opinion.
- C. Admitted as a business record.
- D. Not admitted because the officer admits on the stand he has no personal knowledge concerning her stress and no informant told him she was stressed.