EVIDENCE SYLLABUS
PROFESSOR TALBOT-FALL 2006

Page references are to Trial Evidence by Mauet and Wolfson, 3rd Ed. Pages designated "FYI" will not be discussed in class or tested on your examination.

FRE in these assignments stands for the Federal Rules of Evidence and CEC stands for the California Evidence Code. Both the FRE and CEC with legislative history are included in Federal & California Evidence Rules by David W. Miller. All assignments of FRE rules require you to also read the Notes related to the particular rule. These are in the back of the Miller book starting at page 139. Code sections designated "FYI" will not be discussed in class or tested on your examination.

1. As you can see there is no casebook for this course. There are, however, assigned cases. Many of these cases are leading cases in evidence law that almost every evidence casebook contains. You are required to read and brief these cases, and be prepared to present your brief in class. You can find these assigned cases in any legal data base. Also, most of them can be found by using Google. There is no real need to read the notes or footnotes to the cases, unless there is a point that you think needs clarification that may be footnoted.

2. Grade adjustments for class work are possible for this course.

3. Final Exam. The exam will be, for the most part, based on the FRE. Any essay question and most of the multiple choice questions need to be answered under the FRE. No more than 10% of the multiple choice questions will be based on the California Evidence Code. HOWEVER!! The exam will test the rules regarding privileges generally under the CEC, and the 10% limit does not apply to questions involving privileges. Also, if there is a privilege issue in an essay question, that issue, should be answered according to the California Evidence Code. (These instructions about privilege will also be written on the exam, and explained in class, so don't worry about them now.)

4. You will only be assigned those sections of the CEC where there is a significant difference from the FRE and that I think you should know for exam purposes. I will ONLY discuss in class those sections of the CEC that are assigned. The reason for this is that when, in the past, students were responsible only for the FRE many still found Evidence to be a difficult course. I do not want to add to the burden by assigning too many CEC sections and have you wrestling with the language differences for too many rules, (particularly when the results in a given situation might be essentially the same under both the FRE and CEC.) You can see me to discuss any of the unassigned sections of the CEC during office hours or other times.

5. Bar exam questions, Problems and Witness Examinations.

(Dates: 20Y1 is one year ago; 20Y2, two years ago, etc. Otherwise follow instructions in the witness examinations or on page 36 of this syllabus.)

a. Bar Exam Questions. I have included some typical bar exam questions relating to the syllabus topics so you can become familiar right from the start with what the California state bar has tested. Do not try to answer these questions until after the classroom discussion of the particular topic. The Bar Exam Questions will simply be labeled Question 1, Question 2, etc. Unless otherwise instructed answer these questions under the FRE.

b. Problems. These problems can be found on the CD which comes with the Mauet and Wolfson textbook. ALL are responsible to prepare for all roles in each assigned problem for the class when we discuss the particular topic to which the problems relate. This includes the arguments both to support and oppose the objections in the problem, and the role of the judge who will issue the ruling. (Use FRE for these problems.)

c. Witness Examinations. These assignments are designed to help you see how the rules work in the court room context. The witness examinations need only to be prepared by those specifically assigned to prepare them. Other students should look at the witness examination assignments before the class to be better able to follow what students who present the direct and cross examinations are doing. Unless otherwise instructed conduct these examinations under the FRE.

There are instructions for witnesses and attorneys relating to the witness examinations at the end of this syllabus. What a witness does to prepare is crucial to making the witness examination a good learning experience for everyone---so witnesses must be sure to look carefully at these instructions.

ASSIGNMENTS

I. TRIAL OVERVIEW AND TRIAL OBJECTIONS

Read 9-27 (FYI 1-8: author's analysis) (FYI 29-43; 447-468)
FRE: 103; 104 (a), (b), (c), (e); 105; 611(a), (c); 615; 1101 (a), (b), (d)
CEC: 766; 772; 767; 765
Problems: 2.4 (Analyze under FRE 807 and FRE 103 (a))

Witness Exam.

WALTER v. JONES

James Walter was walking across Elm Street at its intersection with Tenth Avenue on April 15th, 20Y1, a clear, dry day. Elm Street, which runs east and west, is forty (48) feet wide. Tenth Avenue measures thirty-six (36) feet across at the point of its intersection with Elm. Walter was crossing from south to north in the west cross-walk. When he left the south curb of Elm Street, the traffic light was in his favor. At that time, there was an eastbound bus stopped near the corner in the lane adjacent to the south curb. When Walter reached approximately the center of Elm Street, he was struck by the right front fender of an eastbound sports car being operated easterly on Elm Street, a one way street on which traffic moves east. The intersection is a standard one, with right angled corners.

Walter suffered a fracture of the left femur and brought suit against Clara Jones, operator of the sports car. While Walter was still lying in the street, Miss Jones told him that she had been behind the bus but that, after becoming impatient at the long delay while the bus was discharging its passengers, she took advantage of her car's maneuverability and pick-up and swerved from behind the bus, across the intersection.

Plaintiff Atty. At the trial you represent Walter in his suit against Miss Jones. Conduct a direct examination of Walter, limiting your self to the question of liability.

Defense Atty. Make appropriate objections.

II. RELEVANCE AND DIRECT EXAMINATION OF WITNESSES

Read 81-91
FRE 401, 402, 403, 612
CEC:
Cases: Old Chief v. United States, 519. U.S. 172, 117 S. Ct. 644 (1997); Ballou v. Henri Studios, 656 F. 2d 1147 (1981).
Problems: 2.8, 5.7; 5.9

Question 1

Paul has commenced an action in intentional tort against Don, alleging injuries suffered from stab wounds inflicted by Don, and seeking damages. At the trial by jury, Paul was called as the first witness and the following questions were asked and answers given:

[Direct examination of plaintiff Paul]

Q: What is your name?

A: Paul Jones.

Q: Where do you live?

A: 637 Broadway, here in town.

[1] Q: And you've lived there for the past eight years?

A: That's right.

Q: What do you do for a living?

A: For the past four years I've been the assistant dean at the College of Law.

Q: Directing your attention to January 11th of this year at about 8:00 a.m., where were you?

A: I was standing in the reception office of the law school.

Q: Tell the jury what happened when you were standing there.

[2] A: Well, the first thing I remember is that a student, Bonnie Brown, said, "Paul, here comes Don, and he seems to be pointing at you."

Q: Then what happened?

A: I noticed that defendant Don was rushing toward the office, screaming at me and waving his arms.

[3] Q: O.K., what happened after he rushed toward you screaming and waving a knife?

A: Well, I just turned and ran down the hall.

[4] Q: I see. So you didn't say anything to him and you didn't provoke him in any way?

A: Yes, definitely. I didn't know what had gotten into him.

[Paul proceeded to testify about the chase, the attack, and its aftermath.]

Q: Where were you interviewed by the police?

A: At the hospital.

Q: And did you tell them anything different from what you have told the jury today?

[5] A: No, I told the police exactly what I've said here. I have had a clear recollection of what happened ever since that day.

[Paul was then examined about his damages.]

Q: How much were your medical expenses?

A: I don't remember specifically.

[6] Q: Would it refresh your recollection if I told you it was $27,520?

A: No, but it's on the bill from the University Hospital.

Q: Showing you the bill, do you now remember the specific amount?

[7] A: (Reading from the bill) Yes, it says here $27,520.

[Cross-examination of plaintiff Paul]

[8] Q: You testified that you didn't know what had provoked Don, but the day before the incident you expelled six of his students for no reason, changed the lock on his office, and scraped the parking sticker off his car. Isn't that correct?

A: That's not right.

Q: You would agree that Don and you had your differences?

[9] A: No, we always got along well, and when he came after me that morning he had a lethal weapon.

At each of the nine indicated points, what objection or objections, if any, should have been made, and how should the court have ruled? Discuss.

Witness exam: From Ballou v. Henri.

A. Defense Atty. Conduct a direct examination of Eisenhower concerning Eisenhower's observations on June 14, 1977. (See instructions for dates at page 36 of syllabus.)
B. Plaintiff Atty. Make the appropriate objections and cross examine Eisenhower

III. TANGIBLE EVIDENCE; AUTHENTICATION AND BEST EVIDENCE RULE

Read 319-339, 355-360
FRE: 106, 901(a) and (b)except for (b)(8); 902 (4), (6), (7); 903; 1001-1006; 1008
CEC
Cases: Seiler v. LucasFilm Ltd. 808 F. 2d 1316 (9th Cir. 1986)
Problems: 10.2

Witness Exam One:

State v. John Martin: (Robbery)

A. Prosecution. Direct of Rubenstein, using the diagram to illustrate the testimony
B. Defense Atty. Make the appropriate objections and cross-examine Rubenstein.

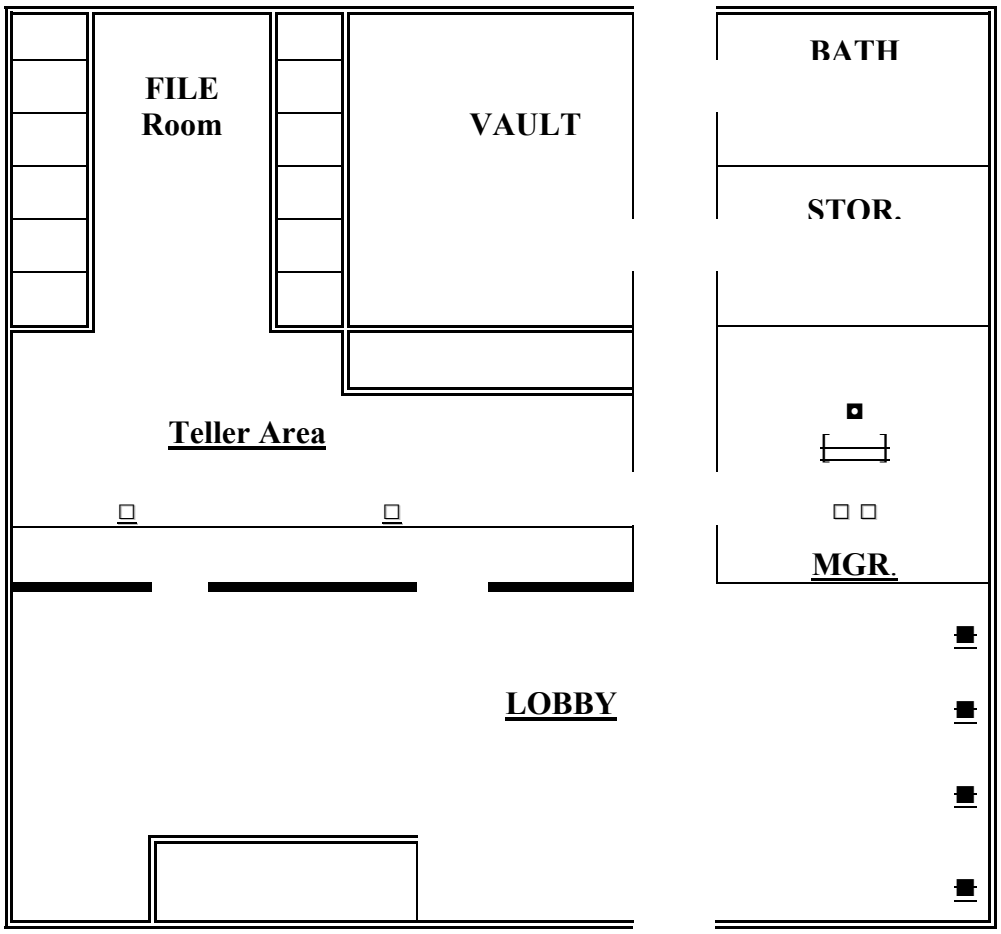
Arthur Rubenstein is the manager of Wells Fargo Bank. One year ago today, at about 10:00 a.m., Mr. Rubenstein was at his desk in his office in the rear of the bank when he heard a gunshot.

He jumped up, ran to the door of his office, and looked out. He saw a man with a handgun, whom he now identifies as the defendant, John Martin. The defendant, was standing about 20 feet away, at one of the teller's windows.

Rubenstein says that the defendant turned his head, looked momentarily right at him, then turned around and ran through the lobby and out the bank's front door.

Diagram of Wells Fargo Bank that was robbed

Diagram scale Approximately: 1" = 10'



Witness Exam Two:

State v. Crosby

A. Prosecution. Direct of Smith assuming Smith and Crosby had not talked on the telephone before January 15, 20Y1.
B. Defense Atty. Make the appropriate objections and cross-examine Smith.

The charge is extortion. John Smith is the complaining witness. The defendant is Ed Crosby. Smith has worked with Crosby at Ajax Widget Works for the past five years.

Smith will testify that on January 15 of last year, at 6:00 p.m., Crosby called him and told him that unless Smith paid him $500.00 by the end of the week, he (Crosby) would put sugar in the gas tank of Smith's new Cadillac.

Assume that the conversation occurred when Crosby called Smith at Smith's home.

IV. OPINION AND COMPETENCE

Read 45-54; 59-66
FRE: 601-606; 701
CEC
Cases: Commonwealth v. Holden, 390 Pa 221, 134 A 2d. 868 (1957) **DISSENT ONLY**
Problems: 4.12; 4.13; 4.10; 4.2

Witness Exam: (Based on police report of defendant Early charged with drunk in public.

POLICE REPORT

DRUNK IN PUBLIC/HOLD FOR COURT				Mon., 12/13/20Y1-2010 hrs.
Presidio & Sacramento Sts.	F	1		Mon., 12/13/20Y1-1010-2015 hrs.
Police Communications				
Public Street			Drunk in public	
Alcoholic beverages				
F-114	3F 38	917	Presidio & Sacramento Sts.	12/13/20Y1-2010 hrs.

1. ROs were informed by Police Communications that several of the merchants in the area of Presdido & Sacramento Sts., had complained that an intoxicated person was disturbing their patrons. This individual was described as a NMA wearing a blue jacket. ROs responded and observed the below booked suspect EARLEY stopping passerbys and walking in and out of shops and restaurants in the area. ROs noted that the suspect EARLEY matched the description broadcast by Communications. ROs detained the suspect and noted that he was extremely unsteady on his feet and that his breath had a heavy odor of alcoholic beverage. ROs also noted that the suspects's speech was extremely slurred. When asked what he was doing in the area, the suspect stated that he was looking for the Greyhound Bus Station. ROs determined that the suspect was intoxicated beyond the point where he could care for his own safety and well being, and that he was being a public nuisance. While talking with the suspect, he stated to ROs that he had just been released from the County Jail yesterday (12/12/76). The suspect was transported to Co. F and booked "Hold for Court" as per para. #2. Signed: Officer Lacey

Prosecution. Examine Officer Lacey and introduce the information in the police report concerning observations of the defendant.
Defense Atty. Make the appropriate objections and cross examine the witness

V. INTRODUCTION TO CROSS EXAMINATION: SCOPE AND PRACTICAL TIPS.

Read 372-376
FRE 611 (b)

CEC: 772(c); 776 (a) and (b) (FYI 780)
Cases
Problems

VI. RELEVANCE RULES

Read 250-267; 118-121
FRE: 407; 4.08-411.
CEC
Cases: Simon v. Kennebunkport, Supreme Judicial Court of Maine, 417 A 2d. 982 (1980);
Problems: 8.1; 8.26; 8.3; 8.5.

Witness Exam #1: From Simon v. Kennebunkport

A. Plaintiff Atty. Introduce the testimony of Quevillon about Quevillon's observations of the condition of the sidewalk and similar happenings.

B. Defense Atty. Make the appropriate objections and cross examine Quevillon.

Witness Exam #2: From Mauet Problem 8.1

Plaintiff Atty. Call eyewitness E as a rebuttal witness to testify about E's observations about the plaintiff's injury from the sliding door and the fact that the door was propped open for the remainder of the cruise.
Defense Atty. Make the appropriate objections to E's testimony and cross examine E.

Witness Exam #3.

Auto accident. Robert (R), driver of car which struck Paul (P), jumps out of R's car runs to over to P immediately after the accident. R says to P: "I very sorry. I feel terrible. I don't know how it happened but it must have been my fault. Go to any hospital you want and I'll take care of all of the bills." P runs up $26,000 in hospital bills. R refuses to pay and says the accident was P's fault. Date of accident: August 12, 20Y1. Facts of accident. Location Fulton near Parker. P jogging across Fulton Street from St. Ignatius church, north to south, from between parked cars and not in crosswalk. P wearing dark clothes. Accident occurred at 10 p.m.

Plaintiff Atty. Have P testify to the accident and R's comments to P immediately after the accident.

Defense Atty. Make the appropriate objections to P's testimony and cross examine P.

Question 2

Parks, a patron of Delta Theatre, after watching the motion picture, started to descend a carpeted stairway leading to the men's room. He fell halfway down the stairs and broke his leg. Two months later he sued Delta for his injuries, alleging that his foot had caught in a tear in the carpet which he could not see in the dim light and that Delta had negligently permitted the carpet to remain in its dangerous condition. Delta denied there was any defect in the carpet and alleged that Parks had fallen because he was

intoxicated.

The following evidence was admitted at trial:

1. Parks introduced testimony of Carter that a week after the accident Carter was called to lay a new carpet and that the old carpet had been removed before his arrival.

2. Parks was permitted to testify that at a settlement conference Parks offered to compromise his claim for $15,000 and Prex, president of Delta responded, "it was our fault, but $5,000 is our top offer."

3. After Parks' son Peter told the court that "good little boys always tell the truth," Peter testified that he was with his daddy when his daddy fell and that his daddy had caught his foot in a tear in the carpet.

4. Delta introduced testimony of Martin, manager of the theater, that he had walked up and down the same stairway where Parks fell on the day of the accident at least 12 times and he didn't catch his foot in any tear.

5. Delta introduced testimony of Adams that he had sat next to Parks; that Parks had spoken to him just before Parks left his seat; that Adams followed Parks as he was going down the stairway and saw Parks fall; that in his opinion Parks was intoxicated and that his impression was that Parks fell because of his intoxication.

Assuming that in each instance all appropriate objections were made, did the court err in admitting items of evidence 1 through 5? Discuss.

VII. CHARACTER, HABIT EVIDENCE

Read 92-105; 128-132
FRE 404 (a) (1) and (2); 405; 406; 412
CEC
Cases: Michelson v. United States, 335 U.S. 469, 69 S. Ct. 213 (1948)
Problems: 5.13; 5.14; 5.15; 5.21; 5.22; 12.26

Witness Exam: Dan, a prison inmate is charged with aggravated assault upon Fred, a fellow prisoner. The prosecution theory is that Dan and Tom, another inmate, assaulted Fred and stabbed him numerous times. Dan's defense is that his only part in the incident was to break up a fight between Fred and Tom. Dan calls Walter, an inmate and Dan's cellmate who did not witness the fight, to testify that he has known Dan for three months and that, in his opinion, Dan has a reputation for nonviolence. Prison—San Quentin; Date of incident—June 11, 20Y1; Dates that Walter knows Dan---March 11, 20Y1 to June 11, 20Y1. At that time Dan transferred to other prison.

Defense Atty. Conduct the direct examination of Dan
Prosecution. Make appropriate objections and cross examine Dan

VIII. OTHER BAD ACTS (CRIMES) EVIDENCE

Read 105-118; 124-125; (FYI 125-128)
FRE; 404 (b); 412 (if not above); (FYI 413-415)
CEC. (FYI --1101 (b))
Cases: Huddleston v. United States, 485 U.S. 681, 108 S. Ct. 1496 (1988)
Problems: 5.16; 5.21; 5.47; 2.2

Witness Exam 1: From Huddleston v. United States. Assume the defendant contacted Karen Curry by telephone, and that her testimony, as reported in the case, is from this telephone conversation.

Prosecution. Introduce evidence of the conversation through Mr./Ms. Curry who has spoken previously with the defendant, but never over the telephone.

Defense Atty. Make appropriate objections and cross examine the witness Curry

Witness Exam 2. Dave (D) is charged with grand theft from the person of V(Vitale) on a date 6 months prior to the witness exam in class. D's defense is alibi. V has testified that he is 85 years of age; that D approached him on the street, D said he was celebrating the birth of a boy, put his arm around V, offered him a cigar and then left; and that immediately thereafter V noticed his wallet from his hip pocket was missing with its contents of $250.

A. Prosecutor. Call George (G)to testify that he is 84 years of age, that two months after the incident between D and V (above) , he was approached on the street by D who told him he was celebrating the birth of his first boy, offered him a cigar, put his arm around his waist, and asked for some street directions; that D pushed him slightly and then left; that G immediately felt for this wallet in his hip pocket and it was missing with its contents of $250; and that he ran after D, saw him get into a car but could not catch him.

B. Defense Atty. Make appropriate objections and cross examine the witness G.

Question 3

In a rape prosecution of Roe, the victim, Tess, testified that she was raped at about 11 p.m. on Wednesday night, September 15, 20Y1 by a man with a large brown blemish on his left arm, who drove a silver BMW. At the trial by jury the following events also occurred:

1. For the prosecution, Flo, a women neighbor of Roe, testified that Roe was a vicious bully who hated women.

2. For the prosecution, Detective Cable testified that on receiving Tess'

report, he arrested Roe, "who was a previously convicted rapist who had a blemish and drove silver BMW."

3. As its first witness, the defense called Terry, who testified that he is familiar with Roe's reputation in the community for obedience to the law and that it is very good.

4. On cross-examination Terry was asked, "Have you heard that in 20Y8 Roe was convicted for rape?"

5. As its second witness the defense called Sam, a neighborhood resident who patronized the Land's End Tavern. Sam testified: that he had known Roe for about 2 years; that he (Sam) had been in the Land's End Tavern drinking on Wednesday nights between 10:30 p.m. and 11:30 p.m. on at least 12 occasions in the 6 months prior to the rape of Tess; and, that Roe had always seen Sam drinking there on those occasions.

Assume that all appropriate objections were made.

Were the items of evidence (1) through (5) properly admitted? Discuss.

IX. CROSS EXAMINATION AND IMPEACHMENT

Read 376-424
FRE: 608; 609; 607; 104(d); 404 (a) (3); 613
CEC: 787 ; 1235; 770; 788
Cases: State v. Oswalt, 62 Wis. 2d 118, 381 P.2d 617 (1963); Luce v. United States, 469 I/S/ 38. 105 S. Ct. 460 (1984)
Problems: 12.25; 12.27; 12.23; 12.21; 12:20

Witness Exam #1:

A. Defense Atty. In State v. Oswalt conduct a direct examination of Mr./Ms. Ardiss as to Oswalt's alibi

B. Prosecution. Make the appropriate objections and cross-examine.

Witness Exam #2:

D, Gary, is charged with the murder of his wife, Mary, who died from bleeding caused by a single gunshot in her back. Prosecution charges that Gary fired the weapon in anger following a domestic quarrel. The killing took place exactly 6 month ago from the date Gary will testify in class. (These facts are loosely based on United States v Owens, United States Court of Military Appeals, 1985, 21 M.J. 117. If you cannot find the case, it is not really that important to handle the witness examination.)

A. Defense Atty. Direct examination of Owens as to the accidental nature of the shooting. Gary, an experienced hunter and marksman, claims that he had been standing in front of his house examining his rifle and that he had chambered a round that cleared the

weapon by his accidentally pulling the trigger. He claims this was a tragic accident. As to the job application described below, Gary claims that the omissions were accidental.

B. Prosecution. Make the appropriate objections and cross-examine, including prior bad acts. The prosecution has an application that Gary had filled out when he applied for a job 3 years ago (from the date he testifies in class.) The application was for a position with the security department of a department store. On this application Gary in an answer to a question about prior criminal arrests or convictions did not say that he had a conviction for possession of marijuana and marijuana paraphernalia 5 years ago. In this same application he had also omitted both that he had been arrested that same year for assault and battery on his previous wife Jennifer and that he had been convicted in that same year for carrying a .22 caliber pistol without a permit. (Be sure to bring in a paper to simulate the job application)

Question 4

While traveling north through an intersection governed by a traffic light, Ann's car was struck on the driver's side by a dark blue sports car which sped from the scene of collision.

Rick, the only pedestrian eyewitness, saw the sports car as it left the scene, and wrote down the license number XJY-134. It was determined that Dave owned the car with the license number XJY-134.

Ann commenced a negligence action against Dave seeking compensation for property damage and personal injuries to herself. Dave's answer alleged that his car was not involved in the accident, but if it was, it was used without his knowledge or permission. Dave counterclaimed, alleging that Ann was negligent.

At the jury trial, the following occurred:

(1) Ann testified about the accident and her injuries. Over objection on cross she was asked, "Isn't it true that in 20Y5 you were convicted of assault with intent to commit murder?"

(2) Ann's next witness Rich testified about the car's license. Over objection, on cross he was asked "Are you the Rich who operates a house of prostitution?"

(3) Officer Don, who came upon the scene and wrote the accident report testified next for Ann. He stated that two miles before the accident, a blue sports care with license number XJY-134, sped by him at 75 (the speed limit is 55 mph). On cross, over objection, he is asked, "Isn't it true that you did not issue a speeding ticket to the driver of XJY-134 at any time?"

(4) Ann then called Walter, who over objection stated that he knew Ann's reputation for honesty in the community where she lived, and it is excellent.

(5) On cross-examination over Ann's objection, Walter was asked if he had heard that two months previously Ann had been indicted for falsification of her income tax return. Walter answered that he had not.

Assuming all appropriate reasons for admission and exclusion were timely presented by Counsel, did the court properly rule on the various objections? Discuss.

X. WHAT IS HEARSAY

Read 133-150
FRE: 801 (a), (b), (c); 802
CEC (prior inconsistent---1235)
Cases: United States v. Zenni, 492 F. Supp. 464 (1980)
Problems: 6.8; 6.7; 6.2; 6.4;

Witness Exam #1 In United States v. Zenni

A. Prosecution. Direct examination of government agent who answered telephone. Have the agent testify about one of the telephone calls received while conducting the search.
B. Defense Atty. Make the appropriate objections and cross-examine the witness.

Witness Exam #2. Mauet Problem 6.4

Prosecution. Present arresting police officer's testimony
Defense Atty. Make the appropriate objections and cross-examine the witness.

Morgan, Evidence Exam, Summer Term, 1946, Harvard Law School

Which of the following is hearsay?

(Answer under FRE. If an answer would be different under CEC assigned sections, indicate that.)

1. On the issue of whether X and D were engaged to be married, D's statement to X, "I promise to marry you on June 1, 1931."

2. On the issue of the sanity of D, a woman, D's public statement, "I am the Pope."

3. On the issue of D's adverse possession of Blackacre, D's assertion, "I am the owner of this farm."

4. On the issue of X's provocation for assaulting Y, D's statement to X, her husband, "Y ravished me."

5. On the issue of D's consciousness after the attack, D's statement, "X shot me, as he often threatened to do."

6. On the issue of identity of the shooter, D's statement in 5.

7. On the issue whether X made threats to shoot D, D's statement in 5.

8. On the statement of X's knowledge of speedily impending death, D's statement to X, "You only have a few minutes to live."

9. In 8, X's out of court statement, "I realize that I am dying."

10. On the issue of whether a transfer of a chattel from D to X was a sale or gift, D's statement accompanying the transfer, "I am giving you this chattel as a birthday present."

11. On the issue in 10, D's statement the day following the transfer, "I gave you the chattel as a birthday present."

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14. On the issue in 10, D's statement the day following the transfer, "I gave you the chattel as a birthday present."

15. On the issue of D's ill-feeling toward X, D's statement, "X is a liar and a hypocrite."

16. On the issue of reasonableness of X's conduct, in the shooting of Y by X, D's statement to X, "Y has threatened to kill you on sight."

17. On the issue in 16, Y's reputation, known to X, as a violent, quarrelsome man.

18. Action for malicious prosecution of P by X on the charge of murdering Y. On the issue of probable cause, P's reputation as a gangster, known to X.

19. In 18, Y's reputation, known to X, as a quiet, peace-loving citizen.

20. On the issue of the terms of a contract with T negotiated by D, D's statement, "I am making this offer to you, as the agent of P."

21. On the issue whether D was the agent of P, the statement in 20.

22. As tending to prove that X was suffering from tuberculosis, the fact that D, a physician, ordered X to a tuberculosis sanitarium for six months, concealing from X and X's relatives the character of the hospital.

23. As tending to prove X's honesty, the mere fact that D, X's employer, promoted him from the position of order clerk to cashier.

24. As tending to prove D's guilt of the crime of killing X, the fact that D fled under suspicious circumstances immediately after X's murder, in order to draw suspicion upon himself.

25. As tending to prove X's insanity, the fact that he was confined in an insane asylum.

26. As tending to prove forgery of a will by X, D's angry statement to X, "Well, I never forged a will, anyway!"

27. As tending to prove D's guilt of a particular criminal act, the fact that D fled under suspicious circumstances immediately after the criminal act was committed, solely in order to escape.

28. On the issue of whether a transfer of a chattel from D to X was a sale or a gift, D's statement accompanying the transfer, "Here is your birthday gift."

29. As tending to prove that X was suffering from disease T, the mere fact that D, a physician, treated him for disease T.

30. On the issue of D's adverse possession of Blackacre, D's statement, "I paid X $5000 for this farm."

31. To show that X was ill, W offers to testify that X complained of pain in his chest.

32. In a contest of a will on the ground of forgery, to show testator's feelings toward X, the sole legatee, W offers to testify that testator had X arrested for forgery.

33. In 32, for the same purpose, W offers to testify that testator ordered his superintendent to discharge X from testator's employ.

34. In 32, for the same purpose, W offers to testify that testator falsely charged X with the crime of bigamy under such circumstances that testator must have known the charge to be false.

35. Action for $500, the price of an automobile. Plea, payment. On the issue of payment, W offers to testify that he saw defendant hand plaintiff a $500 bill, and say, "This is the payment for that car."

36. In 35, on the issue of payment, W offers to testify that on the following day [defendant] said to [plaintiff]: "I was glad to be able to pay you cash for that car."

37. Action for conversion of an automobile. To prove value, plaintiff offers a receipt for the purchase price, $5000, signed by the dealer from whom he bought it.

38. Action for personal injuries by a guest in an automobile against the owner. Defense, contributory negligence and assumption of risk. W offers to testify that an hour before the accident, in the presence of plaintiff, defendant, a mechanic said: "The spindle on that front wheel may break at any moment." If offered to show the spindle defective.

39. The testimony in 38 offered as tending to show assumption of risk.

40. As tending to show that D had never repaid a loan, W offers to testify that P hired W to collect the sum from D.

44. As tending to show that D had a revolver at an affray, W offers to testify that as D passed W's house, W called his wife's attention to a revolver sticking out of D's pocket.

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48. As tending to show that D had never repaid a loan, W offers to testify that P hired W to collect the sum from D.

***

50. W testified that he saw D do act X, could not remember the date, but within an hour thereafter reported to M. M offers to testify that at 3:30 p.m. of June 1, 1944, W told M that he had just seen D do act X. M's testimony is offered to fix the time.

51. To prove that the defendant committed the crime, the prosecution offers a confession made to police officers.

52. To prove that the defendant committed the crime, the prosecution offers evidence that the defendant remained silent after being arrested for the crime.

53. To prove that the defendant committed the crime, the prosecution offers into evidence a certified copy of a prior judgment of conviction for the same offense.

54. To prove that the defendant committed the crime, the prosecution offers a witness to testify that he was present and observed the jury return a verdict of guilty in a prosecution of the defendant for a similar prior defense.

55. To prove that her husband was insane, a wife offers evidence that he lived in a nest in the top of a tree for the last five years.

56. In an action for breach of contract, the plaintiff offers into evidence an advertisement conceded to be that of the defendant offering a reward for certain information which the plaintiff claims to have provided.

57. To prove that the defendant committed a crime, the prosecution offers evidence that the F.B.I. offered a reward for his capture.

58. In an heirship proceeding, the claimant testifies that the deceased was his father.

59. To prove paternity, the plaintiff offers evidence that the defendant referred to the child as "my son."

60. To fix the time of a murder, the prosecution offers a witness who testifies that minutes after he heart the shot, he heard a clock chime three times.

61. To prove adultery, the husband offers proof that a house guest after a visit had described to one of his cronies a birthmark that the accused wife has on an intimate part of her anatomy. The existence of the mark has previously been testified to by the husband while the wife has testified that only her parents and her husband knew of the mark.

62. To prove that a couple is married, a witness is offered to testify that he heard the exchange of nuptial vows.

63. To prove notice of a defect in the defendant's car in a personal injury suit, the plaintiff introduces evidence of the defendant's past attempts to repair his car.

64. In a common disaster case, in order to establish survivorship, evidence is offered that after the accident one of the victims was heard to cry: "I'm alive."

65. In a prosecution for the theft of valuable homing pigeons, evidence is offered that when the defendant's pigeon coop was opened, all of the birds flew to the home of the victim.

66. In a prosecution for sale of pornography, the prosecution offers one hundred letters sent to the defendant's post office box, each of which says, in substance, "Send me some of those dirty books."

67. Personal injury case. To show pain and suffering, plaintiff calls a nurse who testifies that the plaintiff was screaming when he was brought to the hospital.

68. In a divorce case, after the husband has testified that his wife was always nagging him at the top of her voice, the wife calls a neighbor to testify that she never heard any nagging.

69. In a paternity suit, the mother takes the stand and when asked to identify the father of her child, she points to the defendant.

70. To prove that defendant is the father of her child, the mother offers a letter in evidence from defendant's attorney in which the attorney states that his client has admitted he is the father of the child.

71. Personal injury litigation. Plaintiff testifies that there was a sign facing the intersection toward the direction that the defendant had come from without stopping and that sign said: "STOP".

72. To prove that the insured under a life policy is dead, his wife offers a death certificate.

73. In a plagiarism suit, the plaintiff testifies that he caught the defendant in his apartment copying portions of the plaintiff's typed manuscript in longhand on a sheet of paper.

74. Murder prosecution. To support a self-defense claim, defendant introduces witnesses who testify that before the killing defendant told them he was afraid of the victim.

75. To show that defendant was home and thus could have killed his wife the prosecution calls her paramour who testifies that when hubby was gone and the coast was clear, the wife always pulled down a shade on a particular window but when he was home the shade was always open. The prosecution calls a neighbor who testifies that on the night of the murder the shade was open.

XI. ADMISSONS

Read 159-172
FRE; 801 (d)
CEC: 1220
Problems: 6.22; (6.25 or 6.26); 6.27

Witness Exam #1. Mauet Problem 6.22
Prosecution. Officer Byrne's testimony
Defense Atty. Make the appropriate objections and cross-examine Officer Byrne

Witness Exam #2. Mauet Problem 6.26
Plaintiff Atty. Your witness is the customer in the restaurant who can testify as to what the cook said.
Defense Atty. Make the appropriate objections and cross-examine the witness

XII. HEARSAY EXCEPTIONS: PRESENT SENSE IMPRESSIONS; EXCITED UTTERANCES

Read 173-176 (to 3.); 183-190
FRE: 803 (1), (2); 104 (a)
CEC: 1240; 1241
Problems: 7.3; 7.9

Witness Exam: Personal Injury Suit. A, a pedestrian, sues X for damages arising out of being struck by X's automobile. X's defense is that he was in the curb lane in his red car and that a blue car passed him in the next lane, struck A, knocking her into the air and onto his red car, and then sped away. Date of accident: April 11, 20Y1; Time of Accident 11:30 a.m. Place of accident. In front of Law School autos heading west.

Plaintiff Atty. Introduce the following evidence: B, an ambulance driver, will testify that she arrived on the scene ten minutes after the accident, and saw A lying on the ground; that A appeared to be in great pain but not in shock; that B said to A, "Relax now, and take it easy," and that A then said, "Oh, my god! Help me! That red car hit me while I was in the crosswalk."

Defense Atty. Make the appropriate objections and cross examine.

Question 5

[DO NOT LOOK AT THIS PROBLEM AT THIS TIME.
WE WILL USE PART OF IT AS A PRACTICE EXAM]

Peter suffered a head injury when the car he was driving collided with a car owned by Moses (a Rolls Royce) and driven by Adams, Moses' chauffeur. Peter sued Moses, alleging that the accident was due to the negligence of Adams who was driving on business for Moses. Moses denied the negligence of Adams, and also alleged that at the time of the accident Adams was solely on his own business. He further asserted the accident was solely due to Peter's negligence.

At the trial the following items of evidence were received in behalf of Peter, over Moses' objections.

(1) Testimony of Officer Jones, who arrived at the scene of the accident 20 minutes after it occurred, that Adams said to him, "I was going to the drug store on an errand for Moses when the accident happened."

(2) Peter's next witness, Bob, testified that he arrived at the scene within minutes after the accident, heard Peter moaning, and heard Peter say "That car went through a red light and hit me."

(3) Testimony of Dobbs who was permitted to state that Moses had asked him to testify falsely that he had seen the accident and that it was Peter's fault.

(4) Baker, an insurance investigator for Moses' insurance company, testified that one month after the accident during his investigation he said to Moses, "Adams actually was working for you when he had the accident, wasn't he?" and Moses turned and walked away without answering.

(5) Fred testified that he was walking with Joan two blocks away from the accident when Adams drove past them in the Rolls Royce. Over objection he was permitted to state that Joan said: "That Rolls is going to be in an accident if that driver keeps driving like that."

Assuming all appropriate reasons for admission and exclusion were timely presented by Counsel, did the court properly rule on the various objections? Discuss.

XIII. HEARSAY EXCEPTIONS: STATE OF MIND; PHYSICAL CONDITION

Read 190-200
FRE: 803 (3); 803 (4)
CEC: 1252
Cases: Mutual Life Insurance v.Hillmon, 145 U.S. 285, 12 S. Ct. 909 (1892); Shepard v. United States, 290 U.S. 96, 54 S. Ct. 22 (1933)
Problems: 7.13; 7.20
Additional Problem:

Donovan is being prosecuted for murder. The defense is accident. Donovan claims he and the victim were cleaning Donovan's hunting rifles when a rifle accidentally discharged, killing the victim.

The state wishes to offer testimony about the following statements that the victim made before the victim's death:

a. The victim told a friend, "I hate Donovan."
b. The victim told a friend, " Donovan has been stalking me. He threatened to kill me."

1. What objections and motions should be made?
2. What arguments could defense counsel make to support the objections?
3. What arguments could the prosecutor make to oppose the objections?
4. What are the proper rulings.

Witness Exam: From Mutual Life Insurance v. Hillmon.

Defense Atty. Use Walters' sister's fiancé as the witness who will claim familiarity with Walters' handwriting. Introduce Walters' letters to his sister about his intent to go to Crooked Creek with Hillmon to prove that Walters went with Hillmon to Crooked Creek. (Be sure to bring in actual letters to introduce into evidence.)

Plaintiff Atty. Make the appropriate objections and cross examine the witness.

Question 6

Charlie has brought an action against Homer for personal injuries from an automobile accident in which Homer's car negligently driven by his nephew Robert, struck the car in which Charlie, a retired businessman, was parked. Liability is premised on a statute making owners of automobiles liable for the negligent actions of those driving with the owner's consent. Homer denies both consent and the negligence of Robert.

Charlie offered the following items of evidence:

(1) Dr. Flo who testified that she was on duty at the hospital when Charlie arrived at the hospital; that Charlie complained of severe pain in the stomach and head; and that when asked what happened, Charlie said he was hit by a speeding car driven by a drunken lunatic.

(2) Testimony of Dr. Medic, that he had first seen Charlie the day before trial, solely for the purpose of examining him in preparing himself to testify and that, during such examination, Charlie complained to him of a severe headache from which he was then suffering and had suffered ever since the accident.

(Defendant in turn offered the following items of evidence:)

(3) Testimony of Homer's wife Fran that 3 days before the accident Homer told her that his nephew Robert was a nincompoop and a crook.

(4) Testimony of Homer's friend George that at 4 a.m. on the day of Homer's accident, Homer had told George that right after breakfast, Homer was going to take his car and go fishing at a mountain lake about 200 miles away.

Assume that timely and appropriate objections were made to items 1-4. In overruling each objection did the trial court err? Discuss.

XIV. HEARSAY EXCEPTIONS: DYING DECLARATION; FORMER TESTIMONY; STATEMENTS AGAINST INTEREST

Read 176-179 (4); 200-216
FRE 804 (a); 804 (b) (1)-804 (b) (3)
CEC: 1292, 1230; 1242; 1291
Cases: Soles v. State 97 Fla 61, 119 So. 791 (1929)
Problems 7.6; 7.47; 7.48

Witness Exam. (From Soles v. State)

Prosecution: Introduce testimony of the sister of victim Clifford Long concerning the statement Clifford Long made to his father about Carl Soles.

Defense Atty. Make the appropriate objections and cross examine the witness.

Question 7

Dick is sued for conversion of jewelry by Gambel's Jewelry Store. The plaintiffs theory of the case is that Phil, an employee of Gambel's saw Dick enter Gambel's, loiter about, reach behind the counter seize jewelry and flee by car. Phil called police officers who arrested Dick after a high speed chase. This occurred on May 24, 20Y1.

Dick was criminally prosecuted for theft. A criminal trial was had, but the jury disagreed and, before a re-trial of the criminal case, this suit came to trial.

1. The plaintiff offers into evidence a properly authenticated transcript of testimony by Officer Oats given during the previous trial of Dick for theft based on the high-speed chase from Gambel's. Oats' testimony was that during that chase and while Dick's car was passing over a bridge, two objects were ejected from Dick's car window and into the river below. It is stipulated that Dick was represented by counsel at the earlier trial and that Oats is now deceased.

2. Wilmer was called by the defendant. Over timely objection, Wilmer was allowed to testify that on May 25, 20Y1, a man named Jesse Capone told him that he, Jesse, had stolen the jewelry from Gambel's on May 24th.

3. The defendant next called Dr. Jones who testified she was on duty at a hospital when Jesse Capone was brought in with knife wounds. Dr. Jones testified over objection that Jesse told her, "I believe I am about to die, and I make this statement with no hope of recovery. I stole jewelry from Gambel's on May 24, 20Y1." Dr. Jones testified that Jesse died 20 minutes after the statement.

Discuss the propriety of the Court's rulings. Assume all appropriate objections were timely made.

XV. HEARSAY EXCEPTIONS: BUSINESS RECORDS; RECOLLECTION RECORDED; (PUBLIC RECORDS---IF TIME PERMITS)

Read: 339-355 (includes public records)
FRE: 612; 803 (5); 803 (6); 803 (7)
CEC:
Cases: Johnson v Lutz, 253 N.Y. 124, 170 N.E. 517 (1930); Palmer v. Hoffman 318 U.S. 109, 63 S. Ct. 477 (1943)
Problems: 10.12; 7.42

Witness Exam. Suit by A against B arising out of an automobile accident. A police report prepared by Officer Smith who responded to the scene contained the following statement. " I arrived a few minutes after the accident and Officer Jones told me that she had gotten there just before I did and asked the Chevrolet driver what had happened and that he had said, ' I fell asleep at the wheel and I don't rightly know.'" Date and Time of Accident: March 11, 20Y1; 10 a.m. Place of Accident: Fulton and Parker. North side of street.

Plaintiff Atty. Introduce the report using Officer Smith as a witness. Officer Smith does not accurately remember what Officer Jones said about the accident and is very familiar with police department record keeping procedures. (Be sure to bring in a simulated police report)

Defense Atty. Make the appropriate objections and cross examine the witness.

Question 8

One evening while Dan was driving along the highway he ran into Sam's car. A number of people witnessed the accident and the police were called. When a police officer arrived, he arrested Dan for driving while under the influence of an intoxicating beverage. Sam sues Dan for personal injuries. At the trial, the following occurs:

1. Sam attempts to introduce the report of a police investigation made by the arresting officer who is not available as a witness at the trial, which concludes that; "Based upon my interrogation of witnesses at the scene, it is my conclusion that Dan had consumed a large quantity of beer, and it was the influence of such beer that caused him to lose control of his car and run into the utility pole."

2. Sam calls Brown and asks him if he saw the accident. Brown says yes but he has forgotten the details. Sam then, over objection by Dan showed Brown a newspaper account of the accident and asked him if that refreshed his memory. Brown said it did, and then proceeded to tell what he recalled of the accident.

3. Dan calls Fred, an insurance investigator, who testified that he interviewed Sam the day after the accident and asked him about his injuries but does not remember what Dan said; that however, he had immediately made a note of what Sam told him and incorporated it in his written report. Fred verified the accuracy of his report and read it aloud. The report stated that Sam said he felt fine and suffered no injury in the accident. Upon Dan's request, the report was introduced into evidence.

Discuss any reasonable objections which might be made to such evidence, and how, if at all, these objections may be avoided.

XVI. HEARSAY EXCEPTIONS: CONFRONTATION CLAUSE LIMITATIONS AND REVIEW.

Read 179-181
FRE
CEC
Cases: Crawford v. Washington 541 U.S. 36 (2004)
Problems: 7.1; 7.5; 7.8

McNaughton, Evidence Exam, Harvard Law School, First Semester, 1960-1961

50 HEARSAY QUESTIONS

(Answer under FRE. If an answer would be different under CEC assigned sections, indicate that.)

Each of the following questions has two parts. (a) Is the item hearsay? Answer "Yes" or "No." And (b), if hearsay, under what exception or exceptions might the item reasonably fall? In the blank following the question, write one of the following three things: (i) "Not applicable" (or "N/A") if the item is not hearsay; (ii) "None" if the hearsay link falls under no exception; (iii) the appropriate hearsay exception(s) under which the hearsay link might reasonably fall.

SPECIAL INFORMATION: (1) Even if the facts given are insufficient to supply all of the prerequisites of an exception, you should mention the exception if the facts given reasonably suggest and are not inconsistent with it. (2) Treat past recollection recorded, the business entry statute and present sense impression as separate exceptions to the hearsay rule. If the item is multiple, or "totem pole," hearsay, indicate in some appropriate way which exceptions (if any) apply to which hearsay link.

Hearsay?
(Yes or No) ___

___ 76. Prosecution of D for killing V. On the issue of D's fear of V, W1 testifies that he heard W2 say to D, "V has knifed three people in the last year."
Exception(s)_____
_____)

___ 77. Same as 76 except the issue is whether V or D was the aggressor.
Exception(s)_____
_____)

___ 78. On the issue whether P and D are bound by a contract, W testifies to D's statement to P, "I accept your offer."
Exception(s)_____
_____)

___ 79. Action P v. D for injuries sustained when P fell through termite-eaten boards on D's porch. (a) to prove that P was involved in such an accident, P offers the testimony of W: "D said that when he got home from work he heard that P had gone through the porch and that he thought it was too bad."
Exception(s)_____
_____)

___ 80. __ (b) to prove that P was involved in such an accident, P offers the testimony of W that N, a neighbor who had been on the porch with P, came rushing across the lawn shouting to D, "P has fallen through your porch"
Exception(s)_____
_____)

___ 81. __ (c) to rebut evidence by D that he had no knowledge of P's alleged accident until 18 months after it was supposed to have occurred, P offers the testimony in 80.
Exception(s)_____
_____)

___ 82. __ (d) to prove that P was involved in such an accident, P offers the transcript of D's testimony in prior litigation between him and his insurance company: "The boards on the porch were so weak that P went right through them."
Exception(s)_____
_____)

___ 83. Same as 79 except that W is dead and P is offering a transcript of W's testimony, to the indicated effect, given in a prior trial of the same cause.
Exception(s)_____
_____)

___ 84. As tending to show that D had a revolver in his possession, the state offers the testimony of W that, as D passed W's house, W called her husband's attention to a revolver sticking out of D's pocket.
Exception(s)_____
_____)

___ 85. On the issue whether plaintiff's decedent (V) was still alive after his car was struck by the first of two cars, W (who was still in V's car with V) testifies that, before the second car struck, V said, "My head hurts."
Exception(s)_____
_____)

___ 86. On the issue of the existence of injuries to V's head caused by the first car, the testimony in 85.
Exception(s)_____
_____)

___ 87. On the issue of the sanity of D, a woman, W testifies that D on numerous occasions said publicly, "I am the Pope."
Exception(s)_____
_____)

___ 88. On the issue of D's guilt of the crime of killing V, W testifies that D told him that he (D) fled the scene immediately after V's murder.
Exception(s)_____
_____)

___ 89. On the issue of X's sanity, W testifies that X was confined to an insane asylum.
Exception(s)_____
_____)

___ 90. On the issue whether a transfer of a fountain pen from defendant (D) to plaintiff (P) was a sale or gift, P testifies that D made a statement accompanying this transfer, "I am giving you this pen as a birthday present."
Exception(s)_____
_____)

___ 91. In 90, P testifies instead that D, the day following the transfer, said, "I gave you the pen as a birthday present."
Exception(s)_____
_____)

___ 92. In 90, P testifies instead that D, the day before the transfer, said, "I plan to give you the pen as a birthday present."
Exception(s)_____
_____)

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___ 94. On the issue of the plaintiff's (P's) having cancer, N (a nurse) testifies for D that E, a doctor, gave P X-Ray treatments.
Exception(s)_____
_____)

___ 95. In 94, N testifies instead that she heard E tell P that P had cancer.
Exception(s)_____
_____)

___ 96. In 94, instead of using N's testimony, D offers in evidence the hospital record containing a notation made by E to the effect that he had found a malignant tumor in P.
Exception(s)_____
_____)

___ 97. Same as 96 except that the hospital record contains a notation by the hospital receptionist to the effect that P, on entering the hospital, said that he had "a cancerous tumor."
Exception(s)_____
_____)

___ 98. On the issue of X's good eyesight, W testifies that Y, X's commanding officer, assigned X to the position of lookout on the ship.
Exception(s)_____
_____)

___ 99. Action P v. D. On the issue of P's knowledge that D was in the city, D offers X's testimony that Z said to P, "D is in the city."
Exception(s)_____
_____)

___ 100. The testimony in 99 offered to prove that D was in the city.
Exception(s)_____
_____)

___ 101. Action P v. D. To prove that D was present in the city, D offer's W's testimony that P said, "I know that D is in the city."
Exception(s)_____
_____)

___ 102. On the issue of witness W1's hostility toward defendant (D), W2 testifies for D that W1 said to D in an angry tone, while D remained silent, "Well, at least I've never stolen money from my employer like you have!"
Exception(s)_____
_____)

___ 103. On the issue of D's stealing money from his employer plaintiff (P) offers the evidence in 102.
Exception(s)_____
_____)

___ 104. To prove the license number of the car involved in a hit-run accident, P offers a crumpled slip of paper on which appears the number EE2468 and the testimony of a woman that, though she cannot now recall the number of the car, she did, while the number was fresh in her mind, write the number down on the piece of paper offered in evidence.
Exception(s)_____
_____)

___ 105. To prove the license number of the car involved in a hit-run accident, P offers a photograph of a retreating automobile bearing the license plate EE2468 and the testimony of a woman that, though she cannot now remember the number of the car, she did know it at the time and that she took the photograph offered in evidence of the accident car as it left the scene.
Exception(s)_____
_____)

___108 On the issue of the speed of a locomotive, P introduces the tape printed by an automatic speed-recording device in the train.
Exception(s)_____
_____)

___ 109. On the issue of D's guilt of a crime, P offers a moving picture of D re-enacting the crime.
Exception(s)_____
_____)

___ 110. On the issue of the voluntariness of D's confession, P offers the moving picture in 109.
Exception(s)_____
_____)

___ 111. On the issue of D's good faith in discharging X, an employee (W) testifies that the police chief told D that X had been caught burglarizing a store.
Exception(s)_____
_____)

___ 112. On the issue of D's good faith in discharging X, an employee, D testifies that W told him (D) that the police chief told W that X had been caught burglarizing a store.
Exception(s)_____
_____)

___ 113. On the issue of D's good faith in discharging X, an employee, W testifies that the police chief told W that he (the police chief) had told D that X had been caught burglarizing a store.
Exception(s)_____
_____)

***

___ 115. Action P v. D. W1 testifies for P that D's car was going "over 50 miles an hour." To impeach W1, D offers the testimony of W2 that W1 said a day after the accident that D was going "slow."
Exception(s)_____
_____)

___ 116. The evidence in 115 offered by D to prove that he (D) was going slowly.
Exception(s)_____
_____)

___ 117. In 115, W2 is a police officer with no present recollection of W1's statement, so D offers the officer's (W2's) accident report, made up the day after the accident, containing the alleged W1 statement.
Exception(s)_____
_____)

___ 118. To prove that X was ill, W testifies that X, at the time, complained of a pain in his chest.
Exception(s)_____
_____)

___ 119. Action P v. D for $800, the price of a used automobile. Plea, payment. On the issue of payment, W testifies that he saw D hand P $800 in cash and say, "This is the payment for that car."
Exception(s)_____
_____)

___ 120. Action P v. D for conversion of a new automobile. To prove value, P offers a receipt for the purchase price, $3000, signed by X, the dealer from whom P bought it.
Exception(s)_____
_____)

___ 121. Same as 120 except X is D.
Exception(s)_____
_____)

___ 122. Action for personal injuries by a guest in an automobile against the owner. On the issue of contributory negligence and assumption of risk, W testifies that an hour before the accident, a mechanic said to the owner in the presence of the guest, "The spindle on that front wheel may break at any moment."
Exception(s)_____
_____)

___ 123. The evidence in 122 offered to show that the spindle was defective.
Exception(s)_____
_____)

___ 124. As tending to prove title to Blackacre in defendant (D) by adverse possession under claim of title, D offers the testimony of W that plaintiff (P) said to his sister, "I've been down to the town meeting, and D is telling everyone that he owns Blackacre."
Exception(s)_____
_____)

___ 125. Action P v. D. To prove that A was an agent of D's, P offers the testimony of W that A said, "I am an agent of D's."
Exception(s)_____
_____)

XVII. EXPERTS.

Read: 287-318 (*Be sure to read Advisory Committee note to 2000 Amendment: Pages 242-245 Miller)
FRE: 702-706; 803 (18)
CEC: 721 (b)
Cases: Frye v. United States 54 App. D.C. 46, 293 F, 1013; Daubert v. Merrill Dow Pharmaceuticals, Inc. 509 U.S. 579 (1993)
Problems: 9.4, 9.16, 9.29; 12.24

Witness Exam. Problem 9.16 (Witness police officer Jones)

Prosecution. Introduce testimony of Jones as to Jones' experience, D's arrest, the evidence seized and Jones' opinion

Defense Atty. Make appropriate objections and cross examine Jones.

Question 9

Paul sued Acme Motor Company for personal injuries suffered when the brakes on his Acme automobile failed while he was driving down a mountain road August 19, 1986. The complaint alleges that Acme had manufactured and sold the automobile in a defective condition and that the defect posed an unreasonable risk to Paul. The case was tried before a jury on a cause of action based on liability for defective product.

Defendants deny that their automobile was defective, and allege that Paul's injuries came from his negligent driving.

At the trial the following occurred:

1. Baker, qualified expert automotive engineer called as a witness by Paul, testified over objection that based upon his training, experience and

examination of Paul's car, it was his opinion that Acme's design and construction of the automobile permitted the brakes to overheat and fail after only a few hours of operation on a warm day.

2. Baker was extensively cross-examined over objection about a bulletin published by the Society of Automotive Engineers. The bulletin stated the brakes in the Acme automobile would overheat and fail only if the car was driven at excessive speeds for several hours.

3. Paul testified that on September 29, 1986 he had written and mailed a letter detailing the accident and his injuries to Art Ajax, president of Acme Motors. Over objection Paul was permitted to identify and introduce a letter signed by Art Ajax which began, "responding to your letter of September 29, 1986." Paul further testified that one page was missing. After explaining that his file clerk had inadvertently burned the missing page, Paul was allowed, over further objection, to testify from memory that on that missing page Ajax admitted liability and offered Paul $20,000 to settle the case.

4. Acme called Walker, a land surveyor by profession, who over Paul's objection was permitted to testify that he came to the scene of the accident immediately after hearing the crash, that he saw skidmarks obviously made by Paul's car and that, from the looks of those marks and measurements of them that he made, he estimated that the speed of Paul's car just prior to the accident was over 60 miles per hour.

Assume that all appropriate objections were timely made. Was the court correct in each of the above rulings?

XVIII. PRIVILEGE; JUDICIAL NOTICE

Read 267-285; 361-364;
FRE: 501; 201
CEC: 911; 916; 917; 950-957; 958, 959; 963; 956.5; 1016; 970-973; 980-985
Cases: Trammel v. United States 445 U.S. 40, 100 S. Ct. 906 (1986); Clark v. State 159 Tex Cr. R. 187, 261 S.W. 2d 339 (1953)
Problems; 8.15; 8.17; 11.2 (answer privilege questions under CEC)

Witness Exam: D is charged with exploding a destruction device, causing great bodily injury to V. V testifies about a bomb in a package exploding as he opened the package. While testifying, V draws on the blackboard a diagram of the bomb. Date of occurrence (overhearing of B's statement to lawyer): September 26, 2006; Place of Occurrence: San Francisco Hall of Justice, Department 15.

Prosecution: Introduce the testimony of B, the court bailiff. B can testify that while V was drawing the diagram, B was seated near the far end of the jury box and heard D tell his lawyer: "It was not quite like that."

Defense Atty. Make the appropriate objections and cross-examine.

Question 10

Dave was on trial charged with the murder of Grace, by pushing her over a cliff on the night of March 19, 1996. The prosecution's theory of the case is that Dave, married to Carol and having an affair with Grace, became enraged when Grace became pregnant. Dave's contention was that Grace had jumped and committed suicide despite his efforts to restrain her, which were hindered by a stormy, rainy night.

The following events occurred at the trial by jury.

1. Dave's wife, Carol, voluntarily testified for the prosecution that Dave returned home on the night in question, (March 19, 1996) in an agitated state with scratches on his arm.

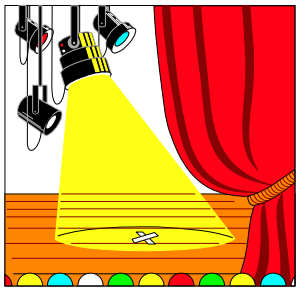
2. Attorney Nate testified that Dave came to his office before he was arrested for Grace's murder and said to him, "I (accidentally) pushed my girlfriend over a cliff. I was angry and couldn't help myself. I want to tell the police that she was depressed because she was pregnant and jumped. Do you think that story will work?" Nate further testified that he then refused to represent Dave.

3. The defense requested the court to take judicial notice that it rained all night in the place in question on March 19, 1996. In support of its request the defense offers for the court's inspection a report from the National Weather Service. The court then took judicial notice of the above.

Discuss the propriety of the trial court's rulings assuming all appropriate reasons for admission and exclusion of the above items of evidence were given by counsel.

Evidence Professor Talbot

INSTRUCTIONS FOR WITNESS EXAMINATIONS



ATTORNEY INSTRUCTIONS

Make sure you give some background for the witness and create a setting before having a witness testify to the event in question. Examine the witness as if this was a real case and the witness' credibility is important to the jury. Do not create unusual situations for credibility, i.e. none of your witnesses should be a judge or a member of the clergy.

Please substitute a name for initials in problems based on hypotheticals. Also, use the correct sex of the actual witness testifying, e.g., if you are a man that witness will be Don; if a woman Donna. Also, make up details including actual locations and witness backgrounds as per instructions to witnesses.

WITNESS INSTRUCTIONS

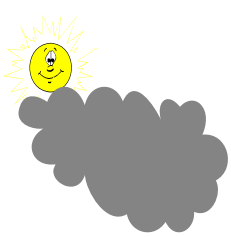
In this course, for witness examinations to be successful learning experiences for everyone, the witness' approach to role playing is as important as the lawyer's in court performance. When you are a witness you must become the person you are playing.

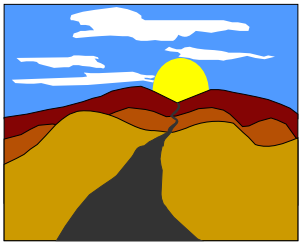
1. Learn your story.

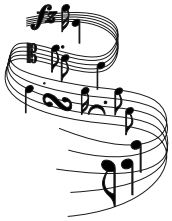
Learn your story before talking to counsel. Your story is either in the Mauet and Wolfson problems, an assigned case or in other materials in this syllabus. Do not change your story between the witness preparation with the attorney and the in class testimony.

2. Details

The details of your testimony must be worked out even before your attorney prepares you to testify. These details are the trickiest part of your assignment as witness.

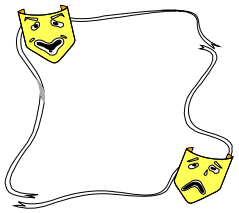






The facts in the case being used for an exercise are only the very basic facts. In real life, every happening is surrounded by countless details---the size of objects, the angle of the sun, the texture of a rug, the exact lighting conditions, the socks worn on the day in question, etc. These details that are part of events you testify about are extremely important because, it is the details that make a witness credible and believable.

Of course, to totally create and explain any real-life event for a jury would require you to know and communicate thousands of individual facts. This never really happens in court---no one really remembers everything and even if they did a trier of fact would be bored to death listening to it all. For our purposes, you must add enough facts to the incident in question in order to make it feel like a real event. To help your partner get the most out of this course, you should think out the important details that would have existed in real life before he/she prepares you testify.



3. <u>Character</u>.

You must also create a character to testify which includes background material. You should be a real person other than yourself when you are interviewed and you testify. The background material for your character should be constructed before you are interviewed by counsel.

Here are some guidelines for the construction of a character to testify:

a. Sometimes the case supplies the basic information about your background, sometimes it doesn't. In any event, you must think of a "back story" for your character. In order to be believable this back story should be as close as possible to yourself or to someone you know well. It should also include as many facts that you know from first hand experience.

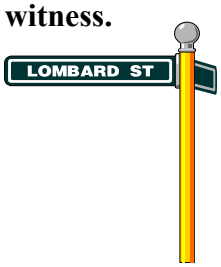
b. Decide what the witness you are playing was doing immediately before and after the incident in question.

c. Decide why the witness remembers the incident in question.

d. Do not create an unusual character in your performance as a witness.

e. Be prepared to answer any question about a matter which you would reasonably have had knowledge as the character you are playing.

f. Gender and names. If the witness in the problem assigned is a man and you are a woman, or vice versa, just change the name and gender of the witness to fit your situation. If we are using a hypothetical and the name is a letter, like B, make up a name for the witness.



4. <u>Location</u>.

Unless you are given a specific location in the witness exam, choose a location in the Bay Area that you are familiar with for the details of the location in the problem. Go to the location and learn the details of that location so that you can testify in a believable way. If there is to be a cross-examination in the problem,

please inform opposing counsel of the location at least several days prior to the class examination. If the location is one where opposing counsel would reasonably have access just the information about the location is enough. It there is no reasonable access, and it is necessary, please arrange access for opposing counsel to that location.

5. <u>When you don't know the answer</u>.

If you are asked a question to which the witness you are playing would not reasonably have known the answer, or would have forgotten the answer, just say "I don't know" or "I don't remember." Do not create hasty stories to deal with these questions.

6. <u>Witness reactions</u>.

React as best you can as how the witness you are playing would react. If you feel the witness would be dishonest or willing to cheat on the truth you may do so. If as the witness you are playing, you are sympathetic to one party and hostile to another, you should react accordingly when you testify. When answering a question real life witnesses often try to help or harm the examiner's case without committing perjury. This depends on their biases. You may have such biases as the witness.

7. <u>Questions</u>.

After you have been prepared to testify, you may have questions that arise during the preparation. Take notes for classroom discussion.

8. <u>Serious questions</u>.

If you have any serious questions concerning the witness role or facts consult me. (Tel. 422-6218) Please contact me as soon as possible if there are such questions.

9. <u>Dates</u>.

Unless you are given a specific date in the witness exam, assume the incident(s) that you are testifying about took place a year ago. So if the case

indicates, February 14, 1989--you will replace that with February 14, 2005. If no dates are given, use a reasonable date or dates from last year. If several days are mentioned in the case, make the most recent the last year (2005) and adjust the other dates accordingly. E.g., if the dates of February 14, 1989 and June 20, 1988 are both important in the problem, adjust these dates to Feb. 14, 2005 and June 20, 2004. If dates are designated with Y1, Y2, etc., Y1 is one year ago, Y2 is two years ago, etc.

10. <u>Use of Notes</u>.

You must memorize your story. You will not be permitted to read a witness script while you are testifying. You may be permitted to refer to your notes occasionally if there is a proper foundation to refresh your recollection.