

UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW

FINAL EXAMINATION: EVIDENCE
COURSE # 36822
SPRING SEMESTER 2006
FRIDAY, MAY 5, 2006

TIME: 3 hours, 30 minutes

There should be eight pages in this examination, including this one. Make sure that you have them all as soon as the examination begins. This examination is **partially open book**. You may only bring the casebook and a Federal Rules of Evidence pamphlet, each of which you may annotate. You should not attach anything to either, except that on the casebook you may attach a tab saying "FRE" to identify the page where the rules are found, and another saying "ACN" to identify the page where the committee notes are found.

This examination consists of nine short essay questions. Read each question in its entirety before you start answering. In grading, the questions will be weighted approximately -- but not exactly -- equally. More weight will be given to questions with more issues, which are not necessarily the longer questions. As a benchmark, you should expect to spend an average of 20 minutes per question. You are allowed an extra 30 minutes to read and analyze the questions. **BUDGET YOUR TIME.**

In analyzing the questions, please address each issue reasonably raised by the facts presented even if rendered moot by your analysis of some other issue. Some questions identify the grounds for the objection; and in others one of your tasks is to determine what objections could reasonably be made. Assume that each case is in federal court and governed by the Federal Rules of Evidence. Unless expressly invited to do so, please do not make any arguments based on the catchall hearsay exception in FRE 807 or on the Confrontation Clause. Credit can only be given for analysis that is set forth in the answer booklet; unexplained conclusions will not suffice. If you find it necessary to make an assumption of fact, state your assumption and continue with your answer. Please write legibly. Answers that are not legible cannot receive credit. In addition, good organization and clear expression will be rewarded in grading.

END OF INSTRUCTIONS
DO NOT TURN PAGE UNTIL TOLD TO DO SO BY PROCTOR

1. Douglas Desperado was prosecuted for illegal importation of drugs. In her opening statement, Desperado's lawyer told the jury that the evidence would show that the government had persecuted him for years, but frequently had to desist because it had "no evidence defendant had committed a crime."

The government's first witness was Arnold Agent, a Drug Enforcement Agency (DEA) agent who had been responsible for the investigation of Desperado. On direct examination, Agent described his investigation of Desperado in connection with the current charges against him. On cross examination, Desperado's lawyer questioned Agent in detail about a DEA investigation of Desperado from 2001 through 2004, which Agent also headed. The cross-examination concluded with Agent's admission that 2001-04 investigation was closed in 2004 due to lack of evidence.

Before re-direct examination, the prosecution made an offer of proof to the court that it intended to elicit from Agent the reason why the 2001-04 examination had been closed -- Ike Informant, who had supplied the information on which the DEA had relied, told Agent that he would no longer cooperate because he was afraid Desperado would kill him for doing so. Desperado immediately objected to any reference to what Informant said under FRE 403, 404, and 802.

How should the court rule on Desperado's objection to Agent's testimony about what Informant told him?

2. Perpetual Methodist Church sued Disbelief City in U.S. District Court challenging Disbelief's denial of a license to operate a daycare center on property the church owned in a residential area of Disbelief. The church asserted that the city had improperly imposed a burden on its exercise of religion in violation of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc. The Act forbids local governmental regulation that "substantially burdens" a "religious exercise" unless there is a compelling governmental interest to justify the regulation. A key issue is whether the proposed activity of the church constitutes "religious exercise," which looks to whether the proposed activity is important for religious objectives.

At the time the church's request for a license for its child care facility was under consideration by the city, Pastor Pius of the church wrote to Bishop Benevolent of the Conference of the United Methodist Church for the multi-state area in which Disbelief City is located. The pastor described the church's plans for the child care center and requested assistance from the Bishop and the Conference if it became necessary to pursue relief in court. The Bishop wrote back that the child care center

"seems to look more like a commercial venture and less like a religious function, thereby justifying the government's compelling interest in limiting traffic, noise, and congestion in a residential neighborhood." The city wants to use this letter as evidence during the upcoming trial. Relying on FRE 701 and 802, the church has moved to exclude the letter from evidence.

How should the motion to exclude the letter be decided?

3. Defendant was prosecuted in 2005 for being a felon in possession of a gun under 18 U.S.C. § 922(g)(1). In 1993, defendant had been convicted of three separate drug-related felonies, and he was released from the resulting prison sentences in 1997. Before trial, he filed a motion in limine proposing that he would stipulate that he had been convicted of a felony that made it a crime for him to carry a gun and, on that basis, asked the court to forbid the prosecution from bringing up any other information about the prior convictions whether or not he took the stand. The district court denied the motion, ruling that the prosecution could introduce the nature of the three convictions whether or not defendant took the stand.

At trial, the prosecution introduced evidence of defendant's three convictions during its case in chief. Defendant then took the stand and denied he had possessed a gun on the occasion charged. On cross-examination, the prosecution obtained defendant's admission that he had three drug convictions. Defendant was convicted and appealed. He argues that the district court erred in permitting introduction of the prior convictions during the prosecution's case in chief, and in permitting cross-examination of him regarding the prior convictions. Besides countering defendant's claims of error, the prosecution also argues that, because defendant took the stand (thereby making impeachment with the priors proper), under *Luce v. United States* he should not be permitted to challenge on appeal the ruling permitting it to introduce evidence of the priors to establish that he was a felon.

How should the appellate court resolve defendant's objections to the district court's rulings on admitting his prior convictions?

4. Petra Perez, a citizen of El Salvador, sued Daniel Dominante in U.S. District Court, invoking the Torture Victims Protection Act, 28 U.S.C. § 1350. Perez claimed that her husband Pedro was summarily executed by thugs acting under Dominante's command. It is undisputed that in 1989 Pedro Perez was abducted from his home in El Salvador by armed men in Treasury Police uniforms and that his bullet-riddled body, bearing marks of

torture, was later found dumped beside a road. Dominante served at the time as El Salvador's Director of Treasury Police. From 1980 to 1991, there was a civil war in El Salvador. It was ended by a 1991 agreement between the government of El Salvador and the main "liberation" force that called for the establishment of a "truth commission" to investigate disappearances and El Salvador and "identify the responsible parties."

In 1992, the United Nations Truth Commission on El Salvador was established, including among its members a former President of Colombia, a former Foreign Minister of Venezuela, an American international law professor and a former president of the Inter-American Court of Human Rights. The Truth Commission interviewed hundreds of people involved in activities in El Salvador between 1980 and 1991 and made forensic examinations of materials from across the country. After several years of work, it issued a ten-volume report detailing what it had been informed about many disappearances. Regarding plaintiff's husband Pedro Perez, the report says that he "was abducted by Treasury Police operatives," and that "Treasury Police, acting under the command of Daniel Dominante, aided and abetted the torturers and murderers of Pedro Perez." Plaintiff intends to rely at trial on the Truth Commission Report.

Dominante has made a motion in limine to exclude the Truth Commission report on hearsay grounds. How should the motion in limine be decided?

5. Paul Plaintiff was seriously injured in a single-car accident at midnight on a Saturday at a curve on Highway 136. He sued Sloppy Construction Co. in U.S. District Court, alleging that the accident was caused by debris left on the highway by one of Sloppy's trucks. Sloppy has moved for summary judgment, claiming that the evidence offered by Plaintiff is inadmissible and should not be considered. Two pieces of evidence are involved:

(a) The accident left Plaintiff unconscious, and he was taken to a hospital where he was put into intensive care. By the time his deposition was taken in the lawsuit, Plaintiff testified that he could not recall whether there was debris on the roadway where he lost control of his car. In opposition to Sloppy's motion for summary judgment citing his deposition, however, he submitted his wife's affidavit. According to the wife's affidavit, when Plaintiff awoke in the intensive care unit of the hospital she asked him what had happened and he said "I hit some rocks in the road. All I know is that I hit a bunch of gravel and lost control of my truck."

(b) Plaintiff has also submitted the affidavit of Marcia Merchant, who owns a hardware store near the curve where the accident occurred. In her affidavit, Merchant said that "on the day of the accident, there was debris on this curve where Plaintiff had his accident." Though she did not see it, she explained that her customers were constantly complaining about the debris left on the road spilled by Sloppy's trucks. On the Saturday of the accident, many of them told her "Sloppy's done it again; there's a big pile of rocks and dirt right on the road."

It is uncontested that Sloppy's work crews went off the job at 4:30 p.m. on Friday and did not resume work until the following Monday morning. Sloppy moves to strike both the wife's affidavit and Merchant's affidavit, citing among other things FRE 401, 602, and 802. How should the motion to strike be decided?

6. Tommy Turncoat entered the country illegally 20 years ago and became a major drug dealer. Two years ago he made a deal with the Drug Enforcement Agency (DEA) under which he would cooperate with the DEA in developing evidence against other drug dealers and DEA would keep silent about the fact that Turncoat had lied on his application for U.S. citizenship when he said he had not committed any crimes. In return for his cooperation, Turncoat was also paid a fee of 20% of any money or other assets forfeited to the government as a result of his efforts. Turncoat provided the primary evidence introduced at the trial of David Defendant for drug dealing. Two evidentiary disputes have arisen:

(a) Turncoat recorded a number of conversations he had with Defendant about drug dealing. There were gaps in the recordings, partly caused by mechanical problems, and some words were unintelligible, but Turncoat testified that they were accurate in what was intelligible. There may have been some erasures, he added, but that was only regarding topics unrelated to drug dealing. He could not recall what was said on the parts that were erased or unintelligible. Defendant objected to admission of the tapes under FRE 106 and 901, noting that the missing material might be exculpatory, but the district court overruled his objections and admitted the recordings into evidence.

(b) In cross-examining Turncoat, Defendant sought to introduce details about his fee arrangement with the DEA and also about DEA's agreement not to tell INS that Turncoat had lied on his citizenship application. The prosecution objected, and the court would only allow Defendant to ask "Isn't it true that you've got a deal with the DEA under which you are compensated for aiding its prosecution in this case?" Turncoat answered yes.

Defendant was convicted, and on appeal argues that the admission of the recordings and the limitation on his cross-examination of Turncoat were erroneous. How should the Court of Appeals rule?

7. In 1973, Southern Pacific Co. authorized Dominant Pipeline Co. to build a pipeline across Southern Pacific's land in return for Dominant's agreement to pay an annual fee of \$1 million. In 2005, Predatory Land Co. sent a bill to Dominant for the \$1 million fee for use of the pipeline, claiming that Southern Pacific had assigned its rights to receive the fee to Predatory. Dominant did not pay, and Predatory sued it for breach of contract. Dominant made a discovery request for the assignment agreement between Predatory and Southern Pacific, and Predatory objected that the agreement contained proprietary information. When Dominant moved to compel discovery, the court allowed Predatory to produce a redacted version of the agreement, with certain provisions obscured. The visible portions of the redacted agreement nowhere clearly state that Southern Pacific is assigning its right to the annual fee from Dominant.

Dominant moved for summary judgment on the ground that there was no admissible evidence that Southern Pacific had assigned its rights to Predatory. Predatory responded by providing (1) the redacted copy of the agreement it had produced through discovery, (2) the affidavits of Terry Treasurer, its Chief Financial Officer, and Arnold Assignor, Southern Pacific's Chief of Operations, stating that Southern Pacific had assigned its right to the fee to Predatory, and (3) what its memorandum in opposition of the summary judgment motion says is a two-page "excerpt" of the Southern Pacific-Predatory agreement including a paragraph stating that Southern Pacific has assigned the right to collect the fee to Predatory. Dominant objects on grounds of authentication and the original writing rule to consideration of any of these items.

How should the court rule on Dominant's objection to the items submitted by Predatory?

8. Donald Drury, a prominent doctor in Atlanta, Ga., was prosecuted for violating the federal murder-for-hire statute by trying to procure the murder of his wife Mary. According to the prosecution's case, the plot began when Arnold Agent, a friend of Drury's who was an agent of the FBI, moved into the Drury home while separated from his (Agent's) wife. Agent testified that, during this period, Drury repeatedly urged Agent to find him someone to "take care" of Mary because he "couldn't stand her" any more. Agent testified he told his FBI superiors about these requests and, eventually, his superiors told him to give Drury

the phone number of another FBI agent, Killer Kozlowski, as a possible hit man. Kozlowski testified that Drury contacted him and gave him details on Mary's movements and appearance, stating that Kozlowski should "do the job" if Mary refused to sign their divorce papers. Drury later called Kozlowski again and told him that Mary had refused to sign, so that Kozlowski should go ahead. At this point, Drury was arrested.

At trial, Drury told a very different story. He said that he had told Agent he was concerned that Mary was having an affair and that he wanted someone to find out whether that was so. Agent told him he could participate in an FBI training program by pretending to seek a murder for hire, with the result that FBI agents would place his wife under surveillance and provide him a detailed report. According to Drury, his actual arrangements with Kozlowski were solely about surveillance, the murder-for-hire aspect being entirely an FBI role-playing exercise. During cross examination, the prosecutor heaped scorn on Drury's testimony, pointing up contradictions, asking whether Drury seriously expected the jury to accept this story, and saying at one point regarding a TV program, "Is that where you got the idea for this surveillance story?" Mary Drury testified that there had been no talk of divorce between her and her husband, and that their marriage was fine. Two evidentiary disputes arose:

(a) Drury sought to call Ted Turner, a long-time friend of his and well-known Atlanta celebrity, to testify that Drury had an exemplary reputation for truthfulness.

(b) Drury sought to call his son as a witness to testify that, immediately after his arrest, Drury told the son about the surveillance exercise.

The prosecution objected to testimony by Turner or the son on the ground that they constitute improper bolstering of Drury's testimony and, as to the son's proposed testimony, that it would violate FRE 802. How should the court rule?

9. Pauline Portia, an attorney, was arrested for obstructing justice at a neighbor's house when the police insisted on searching the neighbor's house for the neighbor's son, for whom they had an arrest warrant. The arresting officers testified at Portia's criminal trial that she had stood in their way as they entered the house, shouting that they would be liable for improper police behavior unless they departed immediately, and refused to desist when they warned her she would be arrested for obstructing justice unless she stopped. On cross examination, they denied that they had drawn their guns during the incident. Portia was acquitted of obstructing justice.

Portia then sued the arresting officers for violation of her fourth amendment rights by arresting her without probable cause. She sought damages for harm to her law practice, and for emotional distress. At trial, she testified that the officers burst in with drawn guns and no warning, and that she had done nothing more than ask whether the officers had a warrant. She also offered in evidence notes taken by a doctor she consulted when she was released from custody after her arrest, which stated:

Portia reports that she was at a neighbor's house, where she often visits, and was watching TV after having dinner with her neighbor when police arrived with drawn guns. The police manhandled her, handcuffed her with her hands behind her and intimidated her with a drawn gun pointed at her face. She added that she had done nothing to provoke the officers' violent reaction to her. Examination indicated abrasions to the patient's wrists. She was prescribed a tranquilizer to aid in sleeping and advised to avoid unnecessary excitement for several days.

Defendants object to receipt of the doctor's notes under FRE 802.

How should the court rule on defendants' objection?

[End of examination]

MEMORANDUM

TO: Evidence students, Spring 2006
FROM: Rick Marcus
RE: The exam.
DATE: June 5, 2006

This memorandum is designed to acquaint interested students with what I was looking for and what I found on the examinations. It is not a model answer. I wrote the questions and have read all your answers. It also does not note all points for which students received credit. Sometimes people brought up points that seemed worthwhile to me even though they were not the ones for which I was looking, and I gave credit for those points.

A few words about grading method: I assigned essentially the same number of points for each question, as indicated in the instructions. I then read all the answers to the first three questions, shifted to a different order of reading answers and read all the answers to the second trio of questions, and again shifted the order of reading and read the remaining three answers. For each answer, I assigned a numerical score from zero to 20. I wrote that score after a number indicating the question to which it referred on the front of the answers. I then totalled the scores and, using the total raw scores, assigned grades as follows:

<u>Score</u>	<u>Grade</u>	<u>No. of people</u>
118-20	A+	2
102-13	A	6
92-95	A-	7
85-89	B+	12
78-84	B	10
68-76	B-	14
59-66	C+	7
51-58	C	7
46-48	C-	2
35	D	1

From time to time, but not with any particularity regularity, I wrote some comments on exam answers. Some of these ask how students could say certain things in light of what the question

said. In some, I expressed uncertainty about how certain legal arguments could be employed. I was not consistent about doing this (there were a lot of answers to read, particularly after I first finished 90 Civ. Pro. exams).

I also occasionally noted what I considered grammatical mistakes. I think it is important to develop better habits on those matters. I did not give any weight to those in assigning scores.

With that background, we proceed to the questions themselves:

1. This question was prompted by United States v. Carmichael, 373 F.Supp.2d 1293 (M.D. Ala. 2005).

A major insight that I hoped people would convey is that the propriety of inquiry into other investigations of D depended entirely on his decision in defense to bring them up first. I cannot imagine that the court would have allowed P to bring up the earlier investigation on direct while AA was on the stand. But that investigation seemingly was a central feature of the cross-examination, as foretold by D's opening statement. This may give P's rebuttal evidence considerable probative value due to D's manner of defending. Indeed, D's lawyer ended the cross with AA's admission that the earlier investigation was closed for lack of evidence.

The central question is whether D's approach makes the rebuttal evidence sufficiently important to the case to overcome the manifest and manifold prejudice to D that would result from letting it in. This might be attacked under either FRE 404 or 403. Under 404, it may be that a court would view this evidence as tarring D as a violent man, and thus an attack on character forbidden by 404(a). Probably P has a good response to this by stressing the way in which D has defended, which shows that the evidence is relevant to something other than character -- the asserted persecution D has suffered at the government's hands. That is not, of course, a listed alternative reason for such evidence to be relevant under FRE 404(b), but the list is not exhaustive and D's tactics have clearly injected this issue into the case.

The fact that 404(b) would be satisfied leads to a 403 inquiry, however. Certainly this evidence could be extremely prejudicial to D. Not only does it portray him as a violent man, it also indicates that he is trying to intimidate those who assist the authorities, and perhaps that he was conscious of his guilt of the earlier drug charges. Altogether, that sort of use of the evidence is what 404(a) is designed to prevent, and therefore a proper counterweight to the legitimate use of the evidence authorized under 404(b).

Perhaps D has elevated the subject to such importance that the court should allow in the whole story AA could tell. But I thought people should explore whether it would suffice to permit only a partial story. For example, AA could be limited to testifying that the informant had refused to cooperate any further, and that as a result the investigation had to be closed. P could argue that this is insufficient; only by showing that this development was reportedly brought on by D himself could the jury fully appreciate what happened, it might argue. But (as mentioned again in relation to hearsay below) all II said was that he was afraid of D, not that D made any specific threats or did anything specific to get II to stop cooperating. So the court could conclude that only a more limited presentation would be allowed from AA.

This possibility has a bearing on the hearsay objection, although there are many ways to solve the hearsay problem. In the first place, it is worth noting that this is not, as many said, a double hearsay situation. There is no assertion that D said anything to II, but only that II said he was afraid. And the purpose for which it is used fits right into the effect on listener nonhearsay use. The issue raised by D's defense calls for an explanation why the government abandoned the earlier investigation. The answer is that II said what he said; that's an archetype of effect on listener. It is also, probably, within 803(3) in the sense that it conveys II's current fear of D and intention to cooperate no longer.

Some other things seemed to me off point on hearsay. This is not a situation in which the circumstantial evidence of state of mind/consciousness of guilt argument works because what it shows D conscious of is guilt of another crime, not the one for which he is now charged. If the prosecution can't offer proof that D has committed other crimes (that's FRE 404), then how can it offer proof that he exhibited consciousness of guilt of them?

Neither is this a good situation for use of FRE 804(b)(6), which a number of you used even though we did not study it in the course. There is no showing of unavailability. Indeed, in the actual case on which this problem was based the informant was called as a witness during the trial to testify about what he told the agent.

2. This question was prompted by Grace United Methodist Church v. City of Cheyenne, 427 F.3d 775 (10th Cir. 2005).

One issue is whether this should be excluded as hearsay. There seemed to me no nonhearsay use; the city's purpose in offering the evidence is to show that the child care project was not a core religious activity. The main way around the hearsay objection would be to rely on FRE 801(d)(2), particularly (C) and (D). Whether those apply depends on the way in which the church is set up. (One person assumed that there was no relation between the

plaintiff and the church in which the bishop served, but the rest of you seemed to recognize that there was.) Given the hierarchical nature of a church, there may be an argument that a bishop is authorized to speak for it. And if so, it may well be that a bishop speaks on behalf of all the member churches, and therefore comes within (C). Beyond that, the fact that the pastor wrote to the bishop implies that it was a matter within the duties of the bishop to deal with such matters, and therefore within (D) as well, as in the Sophie the Wolf case.

Several also mentioned FRE 803(3) and 803(6) as available. I thought that neither of them was helpful. First, 803(3) does not seem useful because what the bishop says is not within what the state of mind exception is designed to permit into evidence. (On this, compare II's statement in Question 1.) 803(6) depends upon proof of a lot that we don't have (e.g., that this letter is the sort of memorandum of opinions that the church requires be made), so that it seems unlikely to me that 803(6) could be satisfied. Is there an institutional requirement to make a record of the sorts of things covered in this instance that falls within 803(6)? I think that unlikely.

The reliance on 801(d)(2) may ease the way to solving the FRE 701 objection. As a starting point, one can certainly argue that the 701 limitations should not apply to exclude the statement of a party; just as lack of personal knowledge is not an absolute requirement under 801(d)(2), so might the opinion rule not be a bar. But as many recognized, there are serious problems with allowing in this opinion of the bishop. Is it rationally based on his perceptions? All he knew was what the pastor said about the project; he seems to have made no independent investigation. So that prong might not be satisfied. And the helpfulness idea of 701 is hard to square with what the bishop had to say. His opinion is unlike the usual lay opinion (e.g., "the man seemed drunk"), and more like an expert opinion. The fact that it relates to an ultimate issue somewhat supports that view in the sense that the ultimate issue was a matter of specialized knowledge (e.g., what is a "commercial venture" as distinguished from a "religious function"). Whether this sort of lay opinion would be helpful to the jury is debatable. Maybe the bishop qualifies as an expert by virtue of position alone, but thus far we are not told more about why a 702 opinion should be allowed here.

Moreover, even if the bishop is an expert on what is a "religious function," would that expertise extend also to whether the government has a "compelling interest" in limiting traffic, etc.? It would seem that depends on legal expertise, not religious expertise, so I hoped people would suggest different treatment here.

3. This question was prompted by United States v. Brito, 427 F.3d 53 (1st Cir. 2005).

There were essentially three issues I wanted to see discussed.

First, the district court rejected D's proffer of a stipulation that he had been convicted of one of the covered crimes that is a predicate to a charge of felon in possession. This ruling flies in the face of *Old Chief v. United States*. True, in that case the earlier charge was similar to the current charge, but nonetheless the stipulation seems to have offered the prosecution everything legitimate it could get by proving the prior. And even if that were not wrong, allowing proof of three priors seems beyond the pale. There is no indication that D contested being a felon; he only contested having possessed a gun. [This is background for the later discussion of the rule in *U.S. v. Luce*.]

Second, there is the question of the cross-examination using priors. I note that several of you said that D "lied" on the stand, and that this justified the impeachment. I don't see a reason in the facts for saying that. Of course, the government was trying to persuade the jury not to believe D's story. But the admissibility of the evidence did not depend on some determination by the judge that D had lied.

The only plausible ground for admissibility of these priors is FRE 609(a)(1), and there are a number of arguments against allowing such impeachment. The convictions are not so old as to be subject to FRE 609(b), but they are close. The charges do not particularly indicate lack of trustworthiness, although they may be much stronger on that score than many. Indeed, compared not only to resisting the draft but also to assault, drug trafficking may be a fairly strong blotch on somebody's credibility. And credibility may be central here, as the issue being resolved is whether D possessed the gun. So there's a lot to argue about on this point.

That brings us to the Luce point. As many of you noted, this case is different because D took the stand here. But the argument made by the prosecution here is different also. It is that since D took the stand, it could impeach using 609(a)(1), and that therefore D should not be able to attack the very attackable permission to offer the priors during its case in chief, because that is mooted by his later testimony and impeachment. The counter to that argument is that the prosecution had already put in the priors then, and D might not have taken the stand had it not. In addition, he suffered having the priors brought out twice, adding to his prejudice.

[One thing I saw on several answers that I could not understand was an assertion that there was a collateral matter problem here. In the first place, given the charge, proof of a prior is not collateral. But more significantly, the 609(a) proof came out while D was on the stand and did not depend on calling another witness, so the collateral matter rule would not come into play in any event.]

4. This question was prompted by Chavez v. Carranza, 413 F.Supp.2d 891 (W.D. Tenn. 2005).

I found that answers were often somewhat scattershot, moving from one possible hearsay exception to another. Thus, I found students making arguments for use of FRE 803(5), even though there was no proposals for the declarants interviewed by representatives of the Truth Commission to testify and affirm that they had forgotten what had happened but had known at the time the document was prepared, much less that they had somehow "made or adopted" what was in the ten-volume report after it was issued and when they still knew. Similarly, FRE 803(6) cannot work because of a huge *Johnson v. Lutz* problem -- the declarants interviewed by Truth Commission representatives had no business duty to make accurate reports. And even though the Truth Commission representatives had such a duty, it is hard to imagine that an excited utterance justification can be made justify admission of what these people told those representatives of the Commission. Finally, I even found arguments for the learned treatise exception of FRE 803(18). At first, this bewildered me, and then I concluded that it seemed to result from the length of the report. Something that long reminded people of a learned treatise, I gather. But to use that exception, you must first have on the stand an expert witness, and then call to the attention of the witness a treatise "established as a reliable authority." That's not what we are talking about here, where plaintiff wants to use the report to establish the basic facts of her case.

What remains is FRE 803(18), as most of you eventually realized. Within that rule, the most pertinent provision is (C). This report is not simply about the activities of the Truth Commission, and it is also not about matters observed by the Truth Commission representatives (although some of it -- the forensic examination results -- might seem that way). Rather, this is something like what we saw in *Beech Aircraft Corp. v. Rainey*, an investigation that involves examining such evidence as can be found and interviewing such witnesses as can be found and leads to a report with conclusions.

So the questions I wanted to see discussed were whether this exception could be applied to the report in this case. A central question is whether the Truth Commission is a "public office or agency," and whether the report was "made pursuant to authority granted by law." As most of you concluded, the United Nations is sufficiently a public agency to qualify under FRE 803(8). And there is a good argument that the way in which the Truth Commission was set up meant that it was making its investigation pursuant to authority granted by law. As a starting point, the authority comes from the 1991 agreement between the government of El Salvador and the "liberation" forces, but that must have involved official U.N. involvement to produce the commission. And it called for the commission to investigate disappearances like what happened to

plaintiff's husband and to identify those responsible.

The nature of the report also seems like the sort of thing covered by 803(8)(C). As the Supreme Court recognized in *Beech Aircraft*, the exception allows in "factual findings." That sounds like the portions of the report quoted in the question. Maybe there is an argument against admitting all the statements made to the commission's investigators by witnesses, but at least reports of the forensic examinations performed by the commission's representatives should qualify.

There is an argument, however, that "the sources of information or other circumstances indicate lack of trustworthiness." Perhaps the Commission was something of a prosecuting agency. After all, if the goal was to "identify the responsible parties," was it meant that nothing should be done to them? A reasonable response to this concern was that U.N. and related organizations may sometimes be set up as prosecutorial agencies, but that this one seems not to have been organized that way. To the contrary, we are not told that there were any criminal prosecutions as a result, and in many places (e.g., South Africa) the larger purpose of such truth commissions has been to cause people to confront the past and foster building for a better future rather than ensuring that justice is done by putting the wrongdoers in jail.

That overlay may explain another reaction I encountered in many answers -- arguments that this lawsuit was somehow a criminal proceeding and that 803(8)(C) therefore could not be used. In the first place, as the rule suggests, its prohibition in criminal cases does not apply to use "against the Government." But there is no governmental party in this private lawsuit. That should have alerted people to the reality that this is a civil case between two people based on something that might also be the subject of a criminal case. O.J. was sued as well as being prosecuted, and there is no issue in this problem like the one in *U.S. v. Oates*.

5. This question was prompted by *Brooks v. Tri-Systems, Inc.*, 423 F.3d 1109 (8th Cir. 2005).

Many answers to this question caused me pain as a civil procedure teacher, and if I remember I will even make students recall (or learn about) Fed. R. Civ. P. 56(e) next year. The point is that the way information is brought before the court on a summary judgment motion is often by affidavit, and that an affidavit in essence is a written version of what a person will say if called as a witness. Thus, the evidence rules we have been studying are often, in civil cases, applied at the summary judgment stage. So it is not meaningful to say that the affidavit itself is hearsay, because it is a substitute for the affiant getting on the stand and saying what is in the affidavit. The admissibility issue has to do with whether that is admissible.

(a) The question here, then, is whether the wife would be allowed to testify to what the husband said when he awoke in the intensive care facility. Essentially, we have something that would probably have been admissible under 803(1) or (2) had the statement been made right after the accident. 803(1) covers statements made "immediately after" an event, and 803(2) permits statements made while the declarant was still under the excitement of the event. A problem that is left unclear on the facts is whether the husband had been conscious for part of the time after the accident and before he awoke in the wife's presence. If not, one can make an argument that, from the perspective of the hearsay rules, this might be within even 803(1). For him, one might say, this is "immediately after" because it is the next thing of which he was aware. And surely such an accident was an exciting occurrence and the person would still be under that excitement when he awoke from the effects of the event, particularly in an intensive care unit. But we don't know whether he was conscious during part of that time, and there may be no way to know for sure. He probably does not recall. And the fact that he said what he said only in response to his wife's question somewhat undercuts the spontaneity of the statement, which may weaken it for both 803(1) and (2) purposes.

I saw a lot of other arguments made at this point that seemed to me to be off the point. 803(4) seemed to me a plausible argument in some ways. This was a hospital setting, and statements to a wife might be within that exception. But the particulars supplied seemed hard to connect to any treatment or diagnosis that might justify their admission under this exception. 803(5) was invoked by several, but without seeming (as in question 4) to reflect on the prerequisites. Is the idea that the affidavit was the memorandum adopted by the husband? That seems pretty unlikely. And I even saw some arguments that 801(d)(1)(B) might be applied, but the problem is that husband now cannot remember what happened, so it's not a question of a consistent prior statement, and I don't think any argument of recent fabrication could be made.

(b) This portion of the question prompted some responses I found surprising. Many talked of the similar happenings sort of issue that was seen in *Simon v. Kennebunkport*. Perhaps that makes some sense, but the thrust of the affidavit was to show that there was rubble on the highway on the day of the accident and that defendant was responsible for it. Similarly, I saw no habit evidence basis for this evidence.

The point here was to use not only hearsay but also the 602 and 401 objections. On the former -- MM's statement that there was debris on the highway seems to be based entirely on what others told her; she did not see it. So under 602 she cannot testify in that form about the debris. And I hoped that people would reflect on the timing of things here. The accident happened at midnight on Saturday, and all agree that defendant's work crews stopped working

at 4:30 p.m. on Friday. Yet according to MM, her customers said "Sloppy's done it again" with regard to the debris they (but not MM) claimed to have seen. How could they know that? This comes near to the character/habit area, but the problem presented here might be considered more basically a 401 problem -- even if there were debris on the highway, does that provide a basis for recovery against defendant in this case?

Regarding hearsay, the problem is whether there is an exception to get in the customers' statements about debris on the road on Saturday. (As an aside, I note that this should be customers' statements, not customer's statements -- there were several customers, not just one.) Again, 803(1) or (2) seem the potential exceptions. 803(2) is more forgiving in temporal terms, but hard to fit otherwise. Was this really an exciting event? It sounds like these people didn't regard it as exciting. To the contrary, they said it was a common occurrence. And nothing shows that they were operating under the effect of excitement. So 803(1) seems the more likely exception. But that requires that the statement be made "immediately thereafter" if not during the observation of the event. Since MM did not see the highway from her store, the customers presumably could not either, so they were not making comments while looking at the debris. We are told that the store is "near the curve where the accident occurred." Would that put it near enough to mean that the customers were walking into the store immediately after seeing the debris? These issues make application of 803(1) problematical, but another aspect makes it a good fit. The idea of that exception is that often the person to whom the statement is made is in a position to verify it, which increases trustworthiness. Here, MM herself could easily have checked, and the large number of statements by customers, some probably in the presence of others who just went through the curve, provides that sort of reassurance about use of this evidence.

6. This question was prompted by United States v. Dawson, 425 F.3d 389 (2d Cir. 2005).

(a) I was looking for people to grapple with the problems presented by the missing or unintelligible portions of the tape recordings. I note at the outset, that the problem nowhere says that these recorded telephone conversations, but may of you seemingly assumed that they did. It seems, in any event, that this evidence is to bolster TT's story about D's drug dealing and overcome an attack asserting that TT was making up stories to make money from being a turncoat.

One sort of problem is the authentication problem. Related to this (and credited where linked in) is what might be called a best evidence rule concern. It is not really a best evidence rule problem, because the objective is not to prove the contents of the tapes and, more importantly, it seems that we have the original of whatever TT has retained. Rather, it is to confirm TT's story from

the stand. For that purpose, authentication seems the bigger obstacle. At the outset, there seems no difficulty. TT says this is the tape he made of conversations with D, and seemingly affirmed on the stand that he could understand the intelligible parts and they contained his voice and D's voice. Ordinarily, that would suffice under FRE 901 to authenticate the tape, and D does not seem to dispute that basic authentication. The unintelligible parts, on this analysis, need no authentication since they are not offered in evidence at all, and neither are the blank parts.

That brings us to the question what is being authenticated. D's objection is that other portions of the conversations between TT and D were not on the tape. TT does not seem to deny that the tapes are incomplete, but only says that they are accurate depictions of the parts they depict. Should FRE 106 come into play? It is tempting to think that it should, but difficult to make the argument. All FRE 106 really says is that, when part of a writing or recorded statement is offered the other side can insist that other parts be introduced right then to provide the full picture of what is in the statement. The problem here is that the recorded statement we have does not include all interactions between TT and D, and D asserts in a nonspecific way that other portions "might be exculpatory." In the first place, D is somewhat speculative about what should be there that is not and would be exculpatory. TT says that he erased nothing having to do with drugs and that the other parts are unintelligible for mechanical reasons. Why would those unrelated parts be exculpatory? More basically, FRE 106 simply does not seem to be an exclusionary rule. It doesn't say that the parts of the document offered by the proponent are inadmissible under some circumstances, but only that other parts must be introduced right then rather than later.

(b) The basic thing I was looking for was a discussion of whether the district court had unduly restricted cross-examination of TT. There are strong grounds for D to challenge TT's testimony on grounds of bias. TT has purchased immunity from prosecution and even help (through inaction) in his effort to obtain citizenship. He also gets a payoff for his efforts (although we are not told that he will make money off of this prosecution). Altogether, this is very strong bias evidence. The false statement on his citizenship application, moreover, seems within FRE 608(b). Yet all the district court would allow was one very general question that TT answered "yes." There seems to me a strong argument that this limitation on cross examination wrongly prevented D from putting before the jury details that would bear strongly on whether to accept TT's story, and that were not conveyed by the bland question and answer the court did allow.

It may be that there is a counter to this argument however. Some jurors may be offended by the sort of arrangements the DEA has to make to fight its war on drugs. Some of the specifics of TT's deal -- particularly the DEA's promise to keep TT's false

statements on his citizenship application secret -- would be likely to provoke such a reaction. Yet in FRE 403 terms, that seems to be an inappropriate basis for rejecting TT's testimony. The only legitimate ground for D's inquiry into TT's arrangements is to show that they are a reason to believe that he made up his story about D. It is not legitimate for D to suggest to the jury that it should acquit him because of the sordid sorts of deals DEA makes with other drug dealers. This unfair prejudice might go a long way toward persuading a court of appeals that the district court's limitation was not an abuse of discretion.

This portion of the question prompted some of you to bring up things that I thought were off point. First, several of you raised FRE 410, but there is no offer here of statements made in plea negotiations between TT and a lawyer for the government. To the contrary, so far as we know TT has never been prosecuted. Also, a number of you raised extrinsic evidence concerns. (In general, extrinsic evidence concerns seem to have been a big deal to a lot of people in this class.) All D was trying to do was cross-examine TT about these matters, not to introduce extrinsic evidence of them, so I saw this as off points.

7. This question was prompted by Railroad Management Co. v. CFS Louisiana Midstream Co., 428 F.3d 214 (5th Cir. 2005).

As noted above in regard to question no. 5, I was frustrated to find that a number of you dealt with the affidavits as though they were subject to authentication or to the original writing rule. As Fed. R. Civ. P. 56(e) says, however, they are merely methods for putting before the court the likely testimony of the affiants; the question is whether that testimony would be admissible, not whether the affidavits are, as documents, themselves admissible at trial. Thus, there is not concern under FRE 1002 with whether the affidavits are originals.

The basic thing I was hoping people would explore is whether FRE 1002 applies to this case at all. Is there a legal requirement that there be proof a writing to show that there was an assignment. If not, the affidavits seem to provide sufficient evidence to show that there was an assignment. On one level, this is a sort of statute of frauds problem -- does P have to prove that there was a writing signed by SP in order to win the suit? The issue raised by the motion for summary judgment, after all, is whether P had admissible evidence that SP had assigned. It might well be that the testimony of SP's COO and P's CFO would suffice. So the central problem is an FRE 1002 problem, but many did not focus particularly on that.

If one assumes that P must prove that there was a writing embodying the assignment, the evidence it proffers is quite peculiar. I'm not sure there is a perfect way of dealing with it, but was looking for sensible discussions of the problems. The

affidavits do not, so far as we are told, affirm that either the redacted version of the contract or the excerpts are truly what P claims they are, so there is an authentication shortfall. The statement in P's memorandum opposing the summary judgment motion that the excerpt is from the SP-P agreement does not seem sufficient, because that's just a statement by lawyers who have no personal knowledge of which we are advised to prove that this is the real thing. And the redacted version produced through discovery does not purport to have the assignment provision, so it's simply off point if FRE 1002 requires that such a provision be produced.

Against this background, discussions of substituting a copy for the original -- while given some credit -- seemed somewhat off the mark to me. The point is that nobody claims that either item (1) or item (3) was a copy within the meaning of FRE 1001(4) of the critical passage of the contract. And the fact that other portions of the contract were produced in item (1) by that means does not seem to help.

Although I was thus crediting a number of points about authentication and the original writing rule as I graded this question, I encountered a number that I thought did not warrant credit. Thus, even though item (1) was produced through discovery, that alone does not authenticate it. Often, it may be sufficient to show that the other side produced something (although more often you need something more to show what the something is), here the party challenged on authentication is the one who produced the redacted version. Production through discovery alone, then, is not sufficient.

Others suggested that item (3) could be admitted under FRE 1006 as a summary. But it does not purport to be a summary. Rather, it seems, it is a verbatim presentation of certain parts of the contract. And we are not told that it is voluminous in a way that would justify reliance on FRE 1006.

Further, there is no hearsay problem in this case I can see. If (as seemingly required by the FRE 1002 analysis) it is necessary to put before the court an assignment provision signed by SP, that would seem to be legally operative language that overcomes any hearsay concerns.

Finally, I thought that the fact the court allowed P to produce a redacted version of the contract through discovery did not much affect the ruling on the current motion. P still has the burden to prove what it must prove, and the ruling on what it had to disclose through discovery did not change that. Certainly the court was not then presented with the objections made now.

8. This question was prompted by United States v. Drury, 396 F.3d 1303 (11th Cir. 2005).

(a) This is an FRE 608(a)(2) issue. Many treated it as an FRE 404(a)(1) issue, but that seemed to me off the mark. I don't see why D's reputation for truthfulness is a "pertinent trait" within FRE 404(a)(1) in a prosecution for murder for hire. If it were a prosecution for perjury, maybe that character trait would be pertinent. I tried to signal this by saying that the objection was to improper bolstering of D's testimony.

Under FRE 608(a)(2), the challenge for the party who wants to offer such testimony is that the prosecution has triggered the right to offer such evidence. Certainly the prosecution did not offer opinion or reputation evidence on D's bad character for truthfulness. So the only question is whether it has done so "otherwise." On this score, the cross-examination may suffice. It certainly sounds cutting. (Several suggested that the court should have protected D under FRE 611(a)(3), but I doubt that a criminal accused who tells a story like D's story on direct will get much protection. I don't know if some of you were moving toward a "fighting fire with fire" argument here -- saying that D could not invoke FRE 608(a)(2) because he should instead of prevented the questioning in the first place. If so, that seems to me a weak argument.) The cross-examination did "heap scorn" on D's story and suggest that it was based on a TV show. Yet consider how often the prosecution will suggest that the accused's testimony is false. Is every one of those suggestions the same as attacking the accused's general character for truthfulness? Only by saying that this attack was particularly vehement would D's argument suffice. Compare a case in which defendant has been impeached under FRE 608(b) with repeated instances of false statement in the past. That would much more easily seem to fit what FRE 608(a)(2) is talking about.

(b) This evidence raises issues under FRE 801(d)(2)(B). One is similar to the issues raised in (a) -- whether there has been a charge of recent fabrication. When the accused says "I didn't do it," and the prosecution pokes holes in that story, that does not seem like a charge of recent fabrication. Here, the cross-examination may have gone beyond that, however, by suggesting that D made up his current story based on a TV show (although we are not told when that show aired). Maybe that suffices for recent fabrication.

Even if it does, we have the Tome problem. D made the statements sought to be proved after he was arrested. Was that before the motive to lie arose? There's a strong argument that it was not. By that time, he knew that he had to have a story to deal with what he had been arrested for. True, we are not told that he was informed what the charges were. But if not, why was he telling his son about the murder for hire charade right then?

9. This question was prompted by Willingham v. Crooke, 412 F.3d 553 (4th Cir. 2005).

This should have been a rather straightforward problem; I awarded slightly fewer points for answers to it than the others as a result.

The pertinent hearsay exceptions are FRE 803(4) and (6). Both turn largely on assessments whether the information was pertinent to medical diagnosis or treatment. Much of what the doctor wrote down does not seem immediately relevant, but the key point is that P is suing for emotional distress and there is some indication (the tranquilizer and the advice to avoid excitement) that suggest this was on the doctor's mind. The abrasions on the wrists probably were not the only (and perhaps not the main) concern of the doctor.

So the challenge comes to determine whether various statements in the doctor's notes could be justified as related to emotional distress. The "drawn guns" part seems connected to emotional upset, and in particular the specific about the drawn gun pointed at P's face. Many thought the assertion that P had not nothing to provoke the cops' reaction would not be relevant to treatment, but it seems to me that the emotional impact of being treated this way without having provoked it might be stronger than in a situation in which the patient could understand where the violent response came from. So it seemed to me that valid arguments could be made for getting in most of the things in the doctor's report. Whether watching TV after dinner gets in is unclear to me, although it may be important to set the entire scene for the upset that was about to happen.

That said, there might be a strong argument under FRE 803(6) that the circumstances indicate lack of trustworthiness. P is a lawyer. According to the cops, she shouted at them about the legal requisites for a home incursion. By the time she got to the doctor's office she had been in custody and had plenty of time to think about the legal ramifications of what had happened. Maybe her story was heavily affected by this reflection, and she was telling the doctor a tale for later use in court, not so much to get medical treatment. Probably this sort of thing is best handled with cross-examination of P, not complete exclusion of the evidence, but it is a valid issue.

Several students said that 803(2) might be used to get in P's statements as recorded by the doctor. This seemed to me a stretch. In the first place, it seems to me more likely that P was conniving by the time she got to the doctor than that she was still in such a state of excitement as to warrant treatment under FRE 803(2). And even if so, this argument undermines the argument under FRE 803(6) for admission of the doctor's notes because what matters there is not that P was excited but that the materials written down are pertinent to diagnosis or treatment.

Some said that this situation might be covered by FRE 801(d)(1)(B) as a recent fabrication situation. I did not see any

reason for that view. The cops' version of events is that she was shouting about their breaking the law from the outset; that's not a recent fabrication sort of story.