

MASSACHUSETTS SCHOOL OF LAW

EVIDENCE

Professor Anthony A. Copani

December 1989
Closed Book Exam
Number of Pages: 5
(Including the
instruction page)

Your success on this examination will depend in large measure on your careful analysis of the questions and on the structure of your answers. There will be no time for extended "treatises" on the areas of the law of Evidence presented by these questions, and you should, therefore, attempt to avoid any rambling discourses.

The questions will be given equal weight in grading, although you may have to spend more time on one or more questions than on others.

Please indicate in each of your answers the jurisdiction, whether Federal or State or both, whose law of Evidence will be applied.

Please budget your time carefully. Credit will be given for good English and clarity of your analysis.

No materials of any type are to be used in this examination.

Best wishes and happy holiday.

EVIDENCE

Professor Anthony A. Copani

December 1989
Closed Book Exam
Number of Pages: 5
(Including the
instruction page)

QUESTION 1

P, a pedestrian, was struck and injured by a negligent hit and run driver. He instituted suit against D claiming he was the driver. D denied he had the accident with P and by way of further defense alleged that P's injury was due to his own negligence in walking on the highway while intoxicated. The license number of D's car was X 3124. The following matters occurred at the trial:

W testified for P, that he was at the scene of the accident with his blind friend J. Without objection, W further testified that he noted the license number of the car that struck P, that he called it off aloud to J, but that he has since forgotten the number. J was then called and, over D's objection, was permitted to testify that the number W called off at the time was X 3124.

Over D's objection, P was permitted to introduce evidence showing that D had been prosecuted for hit and run driving by reason of the accident in question; that although he had pleaded not guilty, he had failed to take the stand or offer any evidence by way of defense; and that he had been found guilty.

F testified for D that at the time of the accident in question she was having dinner with D in a neighboring county. On cross-examination, P's counsel asked F if it was not a fact that she had been having illicit relations with D recently. Objection by D's counsel to the question was sustained.

Over objection by P, Y was permitted to testify that he observed P just prior to the accident and that in his opinion P was intoxicated.

P had testified the accident broke off three of his front teeth. D called attorney X, who, over objection by P, was permitted to testify that P had consulted him after the accident to bring suit against D and that he had said he would claim his three front teeth had been broken by the accident although he had suffered that particular injury the night before in a drunken brawl.

Discuss the propriety of the court's rulings assuming all appropriate reasons for introducing the testimony and for the objections were given.

EVIDENCE

Professor Anthony A. Copani

December 1989
Closed Book Exam
Number of Pages: 5
(Including the
instruction page)

QUESTION 2

P sues D for personal injuries as a result of an accident in which A was driving D's car. D was not present at the accident. P alleges that A was negligent and was driving within the scope of his authority as an agent for D. D's answer denied the agency and denied that A was driving negligently. P has called A as a witness and A testified that he was not D's agent and that the accident was all P's fault.

P's attorney calls D to the witness stand and asks him the following questions, after D testified that A was not his agent:

1. Did A say to Y, in your presence, two weeks after the accident, that he (A) was driving within the scope of his employment by you at the time of the accident?

2. Isn't it true, to your personal knowledge, that A had four serious accidents driving his own car before the accident in question and that, for two of those accidents, he was convicted of operating to endanger?

3. Isn't it true that, in A's community, A has a reputation for not telling the truth?

4. Isn't it true that A is an addicted gambler?

5. (Showing D a certified copy of a criminal sentence imposed upon D for larceny one year before the date of the trial): Are you the same D who was sentenced for larceny in this court record?

6. Did you tell P six months after the accident that it was your belief that the driver of your car must have been going too fast?

7. Did you transfer your \$300,000 house into your wife's name one week after the accident happened?

D'S LAWYER OBJECTS TO EACH QUESTION. HOW SHOULD THE JUDGE RULE AND WHY?

EVIDENCE

Professor Anthony A. Copani

December 1989
Closed Book Exam
Number of Pages: 5
(Including the
instruction page)

QUESTION 3

1. Malloy was rushed to a nearby hospital by ambulance with six bullet wounds in his chest. Also in the ambulance was his five year old daughter, Gail. During the ride Malloy regained consciousness long enough to mumble: "Tricky Tony got me." When the ambulance arrived at the hospital, Gail told Nurse Pringle what she heard her father mumble during the ride. Pringle transcribed what Gail had told her in an official hospital record. Three weeks later Malloy died. Anthony "Tricky" Adverse is now being tried for his murder.

a. The prosecution calls Gail to the stand to testify to her father's statement during the ambulance ride.

b. The prosecution calls Nurse Pringle to testify as to what Gail had said to her.

c. The prosecution calls the medical record librarian to testify as to what Nurse Pringle had transcribed in the hospital record.

A. YOU ARE MALLOY'S DEFENSE COUNSEL. DISCUSS WHAT OBJECTIONS YOU COULD MAKE.

B. IF THE SAME WITNESSES HAD BEEN CALLED FOR THE SAME PURPOSES BY MALLOY'S WIDOW IN A WRONGFUL DEATH ACTION AGAINST ADVERSE, WOULD THERE BE ANY BASIS FOR OBJECTIONS?

2. D is on trial for income tax fraud. By way of defense D seeks to establish that he was merely following a procedure approved by his employer, W, and that he lacked the specific intent to violate the law. At an ex parte investigatory hearing before officials of the taxing authority W testified under oath. W was represented by counsel at the hearing. W is not physically able to testify as a witness at D's trial. D offers in evidence that portion of a properly authenticated stenographic record of the investigatory hearing which contains W's testimony. The prosecution objects on hearsay grounds.

HOW SHOULD THE COURT RULE ON THE OBJECTION: WOULD THE RULING BE DIFFERENT IF THE PROSECUTION SOUGHT TO SO INTRODUCE THE TESTIMONY?

Evidence

Question 4

Dan was tried for theft and burglary of the home of Mr. and Mrs. Charles in Central City. The crimes had been committed during the early morning hours of April 17. Dan's defense was that he had been 200 miles away at the time. Mrs. Charles testified to the losses, described the scene, and identified a half-eaten piece of cheese found in the kitchen following the burglary.

The court admitted the following evidence offered by the prosecution:

The testimony of Mr. Charles that while he and Mrs. Charles were sitting in a park a week following the burglary, Dan walked by and Mrs. Charles screamed, "You stole that jacket from our house," whereupon Dan ran away without saying a word.

The testimony of Yank, a dentist, that, based upon a comparison of legally obtained impressions of Dan's teeth and a cast of the piece of cheese identified by Mrs. Charles, the bite in the cheese was made by Dan's teeth.

The court then admitted the following evidence offered by the defense: The testimony of Bob that on April 16, Dan told Bob that he wanted to use Bob's mountain cabin, which was 200 miles from Central City, for the next two days; that Bob consented and gave Dan the key to the cabin; that on April 18 Dan returned the key and said that the stove had exploded when the stove pipe was struck by lightning during the early morning hours of April 17; and that when he visited the cabin the evening of April 18 the stove was as Dan had described.

The prosecution then offered and the court admitted Able's testimony that Bob had told him that Bob had not seen Dan during the entire month of April.

Assuming that all appropriate objections were timely made, did the court err in admitting the testimony of Mr. Charles, Yank, Bob and Able? Discuss.

**MASSACHUSETTS SCHOOL OF LAW
EVIDENCE
CLOSED BOOK FINAL EXAMINATION
DECEMBER 14, 1992
PROFESSOR ANTHONY A. COPANI**

DO NOT OPEN THE TEST BOOKLET UNTIL TOLD TO DO SO.

WRITE YOUR SOCIAL SECURITY NUMBER: _____

This is a three-hour examination consisting of three questions. Your success on this examination will depend in large measure on your careful analysis of the questions and on the structure of your answers. There will be no credit given for extended "treatises" on the areas of the law presented by those questions, and you should, therefore, attempt to avoid any rambling discourses. However, you should discuss with adequate particularity the issues and the applicable law for each question.

Please indicate jurisdictional differences, if applicable, when analyzing fact patterns.

Please budget your time carefully. Credit will be given for clarity of your analysis.

Questions will be weighed as follows:

MULTISTATE QUESTIONS (20)	20%
ESSAY QUESTION ONE	40%
ESSAY QUESTION TWO	40%

No materials of any type are to be used in this examination. Nor are you to discuss this examination with students from the other section unless all examinations have been completed by all sections. Nor should you discuss this examination with a student who has not taken this exam during its regularly scheduled time because of an excused absence. Infractions of the above will subject any students involved to disciplinary action which shall include expulsion from MSL.

INSTRUCTIONS:

1. MULTIPLE CHOICE
 - A. READ EACH QUESTION THOROUGHLY AND CHOOSE THE BEST ANSWER.
 - B. CIRCLE THE ANSWER ON THE EXAM THAT YOU BELIEVE IS THE BEST ONE.
 - C. USE PENCIL AND REMEMBER TO ERASE COMPLETELY IF YOU WISH TO CHANGE YOUR ANSWER.
 - D. NO CREDIT WILL BE GIVEN FOR MULTIPLE ANSWERS IF YOU FAIL TO ERASE.

2. ESSAY QUESTIONS
 - A. WRITE LEGIBLY.
 - B. USE PEN.

3. WHEN FINISHED, CHECK TO MAKE SURE YOUR SOCIAL SECURITY NUMBER IS ON THIS TEST BOOKLET AND YOUR BLUE BOOK.

PLACE THE EXAM INSIDE YOUR BLUE BOOK AND HAND IT IN.

1. Kramden was involved in an accident with Norton at the intersection of Tremont and Broadway. Kramden sustained a fractured skull and broken neck. Trixie was one of the eyewitnesses to the accident.

At trial, Trixie was called as a witness by Kramden. Trixie testified as a lay witness, without objection, that based on her observations, she thought that Norton was at fault in the accident. On cross-examination, Norton's attorney asked her if she had a conversation with anyone at the accident scene. Trixie replied affirmatively. Norton's counsel asked Trixie the following: "Please tell the court what the other person said was the cause of this accident."

Kramden's counsel objected to the question. The objection should be:

- A. sustained, unless the other party is shown to be unavailable to testify.
 - B. sustained, because the other party's statement is hearsay, and not within any recognized exception.
 - C. overruled, because the other party's statement may contradict the testimony of Trixie.
 - D. overruled, because Kramden has laid the foundation for such rebuttal by eliciting testimony from Trixie.
2. Weld is suing Cellucci for injuries to his back received in an automobile accident. Cellucci calls Dr. Peter Envy who testifies that he saw Weld two months before the accident and Weld stated that his back hurt him so bad, he was forced to quit his job. Weld also stated that his back had been bad since he had injured it in an accident with Bulger four years prior to this occurrence.

Dr. Envy's testimony should be:

- A. excluded, because Bulger is available as a witness.
- B. excluded, because it is hearsay not within any exception.
- C. admitted, because it is a statement of present sense impression.
- D. admitted, because it is a statement given for the purpose of diagnosis and treatment.

3. In a suit by Silber against the Jacobson Insurance Company, notice of a claim is an essential element of Silber's case. Silber has filed a motion for Jacobson to produce the original notice and Jacobson has answered that she is unable to locate same.

At trial, Silber calls his secretary, Maitre. Maitre testifies that he does not remember specifically mailing the notice of the claim, but has in his possession a copy of the letter which was found in the file in Silber's office. Maitre further testifies that it is his custom and practice to place a copy of each piece of correspondence, after he has mailed, it in the appropriate file.

Maitre's testimony should be:

- A. admissible because it falls within the business records exception to the hearsay rule.
 - B. admissible as evidence of business routine tending to show that the letter was actually mailed.
 - C. inadmissible because there is no corroborating evidence of the business routine.
 - D. inadmissible because its prejudicial effect outweighs its probative value.
4. If Maitre properly identifies the copy of the document he had in his possession, it should be:
- A. admissible, because it comes within the business record exception to the hearsay rule.
 - B. admissible, because secondary evidence is admissible in this instance.
 - C. inadmissible, because it is hearsay.
 - D. inadmissible, because its prejudicial effect is outweighed by its probative value.
5. In a medical malpractice suit in Federal District Court, Dr. Ray Dick Ulopathy is called as an expert witness in neurology by the plaintiff. Dr. Ulopathy testified regarding the standard of care in treatment of a spinal cord injury patient, a relevant issue in the case. On cross-examination, Dr. Ulopathy is asked by defense counsel if he recognizes a medical textbook written by Dr. Turner Headankoff, as being one of the medical publications he relied upon in reaching his opinion as to the standard of care. Dr. Ulopathy answered in the negative.

Defense counsel then offers to read relevant passages from the textbook which directly contradict the opinion given by Dr. Ulopathy. Plaintiff's counsel objects. The trial judge should:

- A. sustain the objection, because the prejudicial effect is outweighed by the probative value.
- B. sustain the objection, because the textbook is hearsay and not within any exception.
- C. overrule the objection, because Dr. Ulopathy did not identify the book as one on which he relied in giving his opinion.
- D. overrule the objection, because the author is unavailable to testify.

6. Defense counsel then offers the medical textbook into evidence and Plaintiff's counsel objects. The trial judge should:
- A. sustain the objection, because the prejudicial effect is outweighed by the probative value.
 - B. sustain the objection, because the textbook is hearsay and not within any exception.
 - C. overrule the objection, because Dr. Ulopathy did not identify the book as one on which he relied in giving his opinion.
 - D. overrule the objection, because the author is unavailable to testify.
7. Clinton was charged with the murder of Bush. Clinton claimed that Bush was the aggressor and that he acted in self-defense. The prosecution has called Gore as a witness. Gore has offered to testify that he has known Clinton for many years and that, in his opinion, Clinton has a reputation for being violent and displaying aggressive behavior. The trial judge should:
- A. admit the testimony, if it can be corroborated that Bush knew of Clinton's reputation.
 - B. admit the testimony, because it is more probative than prejudicial.
 - C. deny the testimony, because it attacks Clinton's character when it has not been placed in issue.
 - D. deny the testimony, because Clinton's character may be proven only by reputation after a proper foundation was laid.
8. Quayle was called by Clinton to testify that Bush had a reputation as a brawling hothead and frequently provoked fights. The trial judge should:
- A. deny the testimony because it is more prejudicial than probative
 - B. deny the testimony because Clinton did not lay the proper foundation.
 - C. admit the testimony because it proves that Bush was the aggressor.
 - D. admit the testimony because character may be proven by specific acts of conduct.
9. On cross-examination, Quayle is asked by the prosecutor if he was convicted of shoplifting nine years ago. Clinton's counsel objects. The trial judge should:
- A. sustain the objection, because the prejudicial effect is outweighed by the probative value.
 - B. overrule the objection, because the conviction is within ten years of the time of testimony.
 - C. overrule the objection, because it goes to the ultimate issue in the case.
 - D. sustain the objection, because the offense is not a felony or otherwise admissible for impeachment purposes.

Oscar Madison, a minor, suffered permanent head injuries as a result of being hit by a car driven by defendant Jones. Oscar's father commences this action as a parent in his own right and on behalf of his son.

10. At trial, Plaintiff's attorney called the only witness to the accident, Buddy Brown, aged 7, Oscar's playmate who was four years of age at the time of the accident. The Court should rule that Buddy Brown would be:
 - A. competent to testify, since he had personal knowledge of the accident.
 - B. competent to testify, since a seven year old is presumed to be chronologically mature.
 - C. incompetent, if he lacked the capacity to perceive and relate the accident at the time of its occurrence.
 - D. incompetent, since all children under the age of ten are deemed incompetent to testify.
11. Oscar's mother is then called to testify on her conversation with the Defendant at the hospital where her son was rushed immediately following the accident. Defendant told Mrs. Madison, "Don't worry, my insurance company will offer to settle this case because it was my fault. My agent says the company will offer at least \$100,000." If offered into evidence, the court will most likely rule that Mrs. Madison's statement is:
 - A. admissible, on the issue of Defendant's negligence.
 - B. admissible to show that Defendant is able to pay for the damages to the plaintiff.
 - C. inadmissible, since the testimony was highly prejudicial.
 - D. admissible, only to prove ownership or control of the vehicle.

In an action for malpractice, Boggs sued Dr. Gorman claiming that the latter failed to properly diagnose his emphysema condition. Boggs contends that he went to Dr. Gorman for a medical examination after experiencing chest pains and shortness of breath. However, Dr. Gorman found no evidence of the disease and advised him that he was probably suffering from indigestion. Thereafter, Boggs was examined by Dr. Yawkey who discovered that Boggs in fact was suffering from a chronic case of emphysema.

12. At trial, Boggs calls Dr. Yawkey as his first witness. Dr. Yawkey proposes to testify that the x-rays of Bogg's lungs showed that his respiratory organs were marked by distension which was characteristic of emphysema. Upon objection by Dr. Gorman's attorney, Dr. Yawkey's testimony should be:
 - A. admitted, because a doctor is properly qualified as an expert in medical matters.
 - B. admitted, because Dr. Yawkey followed accepted medical practice in arriving at his opinion.
 - C. excluded, because his opinion is based upon facts not in evidence.
 - D. excluded, because the x-rays are the best evidence to show the distension of Black's lungs.

Popeye brings an action against the administrator of his Uncle Bluto's estate based upon a contract for services rendered in the management of his Uncle's property. In order to rebut the presumption that the services rendered were gratuitous, since Popeye was a relative of Uncle Bluto, Popeye called his sister-in-law, Olive, as a witness. Assume that his jurisdiction has a relevant dead man's statute in effect.

13. Olive testified that she had lived in Popeye's house, knew his Uncle Bluto, and that she was familiar with Bluto's handwriting. Popeye's attorney asked her to look at a letter and to tell the Court whether it was written by Uncle Bluto. Upon objection by the attorney for the administrator of the estate, the trial judge would likely:
 - A. sustain the objection, since Olive is not a handwriting expert.
 - B. sustain the objection, because of the Dead Man's Rule.
 - C. overrule the objection, since the letter qualifies as a past recollection recorded, in exception to the hearsay rule.
 - D. overrule the objection, since an authenticating witness need not be an expert if familiar with the handwriting of the person in question.
14. Olive testified further concerning the contents of the letters and a telegram sent by Bluto to his nephew, in which he stated that he would pay Popeye for his management services. She stated that "she had responded to the Uncle's request for Popeye since he was away at the time." She also said "that she has made copies of the letters and the telegram for Popeye's files." However, the letters, the telegram, and the copies of this correspondence were destroyed inadvertently because of a fire in Popeye's house. The trial judge should rule that Olive's testimony is:
 - A. admissible as secondary evidence under the circumstances.
 - B. admissible as a written admission by the party opponent.
 - C. inadmissible under the Dead Man's Rule.
 - D. inadmissible, because it violated the Best Evidence Rule.

Plaintiff Orr was seriously injured in a collision involving three trucks. A sideswipe occurred between Orr's pick-up truck and a trailer driven by Park as they passed in opposite directions on Route 141. The sideswipe caused Orr's truck to careen down the road and into the path of a third trailer truck operated by Esposito. Orr was immediately killed. Both of the tractor trailer trucks were owned by Sinden Transport Company.

15. At trial, Orr called Cashman, a witness to the collision to testify that he heard an unidentified female witness scream, "Oh my God, that trailer truck sideswiped that little pick-up truck." The trial judge should rule Cashman's testimony:
 - A. admissible as a declaration of existing state of mind.
 - B. inadmissible as hearsay, not within any of the exceptions.
 - C. inadmissible, because it contains inadmissible opinion evidence.
 - D. admissible as excited utterance.

16. Orr further offers that testimony of Hodge, in which he stated that "Park, driver of the trailer truck, ran over to Orr as he was lying on the ground awaiting an ambulance, and said "it is all my fault, I should have been paying more attention to my driving." Assume for this question that Sinden Transport Company is the defendant and that Park is available to testify. The trial judge should rule that the testimony is:
- A. admissible as a declaration against interest.
 - B. admissible as a present sense impression.
 - C. admissible as a vicarious admission.
 - D. inadmissible as hearsay, not within any of the exceptions.
17. Assume that Sinden Transport Company's insurer pays for Plaintiff's hospital bills. Plaintiff's attorney offers the receipts of these bills as evidence to show admission of liability of the company for Park's negligent operation of the trailer truck. On objection to this offer of proof, the court should:
- A. sustain the objection, since the payment of medical expenses is not admissible to prove liability.
 - B. sustain the objection, since the prejudice in admitting the receipts outweighs their probative value.
 - C. overrule the objection, since Park admitted liability.
 - D. overrule the objection, because it violates the Best Evidence Rule.
18. Assume for the purposes of this question only that one week after the accident, Sinden Transport Company hired Smith, a traffic engineer expert to conduct an investigation. He immediately took photographs of the damaged vehicles which were in substantially the same condition as they were following the accident. During the trial, Smith was called to testify. As he was reconstructing the accident scene, the Company's attorney offered the photographs taken by Smith into evidence. On objection by the Plaintiff's attorney to this evidence, the trial judge should:
- A. admit the photographs since Smith was qualified as an expert witness.
 - B. admit the photographs as demonstrative evidence, since they accurately portrayed the damage caused by the collision.
 - C. admit the photographs as secondary evidence.
 - D. admit none of the photographs, since they were taken one week after the accident.

19. Cagle and Copani were involved in an automobile accident in which Cagle was injured and his ostrich boots were ruined. Copani was tried for driving while intoxicated. At the trial of Copani, the prosecutor called Coyne as a witness. Coyne testified that Copani had driven through a red light prior to the accident. On cross-examination by Copani's attorney, Coyne admitted that he told Velvel that he did not know what color the light was when Copani went through it.

The trial judge should:

- A. admit the statement of Coyne to Velvel as substantive evidence.
 - B. admit the statement only if it is corroborated by Velvel.
 - C. instruct the jury, upon proper request, that the prior inconsistent statement of Coyne to Velvel is to be admitted for impeachment purposes only, and not as substantive evidence.
 - D. instruct the jury, upon proper request, that the testimony of Coyne regarding the statement to Velvel, be disregarded.
20. Cagle subsequently sued Copani for the physical injuries to his back which forced him to occasionally use a cane while teaching and for his subsequent manic depression and eventual psychotic breakdown over the loss of his boots. At the civil trial, Coyne was outside the jurisdiction of the court and would not testify.

Cagle's attorney and guardian, Thomas Kiley, offered a transcript of Coyne's testimony at the civil trial. The evidence is:

- A. admissible as past recollection recorded.
- B. admissible as prior recorded hearsay.
- C. inadmissible because it is hearsay, not within any exception.
- D. inadmissible because its prejudicial effect is outweighed by its probative value.