

MASSACHUSETTS SCHOOL OF LAW

EVIDENCE

CLOSED BOOK FINAL EXAMINATION

DECEMBER 13, 2011

PROFESSOR ANTHONY A. COPANI

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THIS EXAM CONTAINS TEN PAGES AND CONSISTS OF SIXTEEN QUESTIONS. THE WEIGHT OF EACH QUESTION IS SET FORTH IN THE QUESTION. IT IS YOUR RESPONSIBILITY TO CHECK THAT YOUR EXAM CONTAINS THE CORRECT NUMBER OF QUESTIONS.

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QUESTION ONE (12 PTS)

Francis testifies for the defense in an action involving the sale of real property. Francis was an eyewitness to the alleged contract to sell the property.

1. During cross-examination by the plaintiff, Francis is asked whether he had been convicted of attempted robbery in 2009. Is this question permissible?
2. Francis denied having been convicted of attempted robbery. Can the opposing counsel offer in evidence a certified copy of the attempted robbery conviction?
3. On cross-examination, Francis is asked whether he was wearing his hearing aid at the time of the alleged sale. Francis responded by saying that he was indeed using his hearing aid. Can opposing counsel call a different witness, Tiffany, to testify that Francis was not wearing a hearing aid at the time of the alleged sale?
4. On cross-examination, Francis is asked, "Wasn't it raining on the day in question and not bright and sunny" as he had testified to on direct. Francis answered the question by denying it was raining. Can opposing counsel call a different witness in rebuttal to testify that it was raining on the day of the sale?
5. Francis is also asked whether he had said in a deposition two months before trial, "I was the first one there for the meeting about the sale," when on direct he testified that he "was the third or fourth person there." If Francis claims he made no such prior statement, can a rebuttal witness who was present at the deposition testify that Francis made the statement?
6. If Francis is asked on cross-examination whether he owes the defendant a large sum of money and he denies it, can the Plaintiff call a different witness in rebuttal to confirm this fact?

QUESTION TWO (6 PTS)

Leanne, after moving to Alaska to be closer to her idol, Sally Pailin, decided to take up ice skating. One day, after completing a two hour workout, she put her skates outside the front door of her apartment. When she returned for the skates minutes later, they were gone. Tim standing nearby said, "Oh, Steve just stopped by and took the skates." Leanne sued Steve for conversion. At trial, Leanne called Tim to testify on her behalf. When Leanne's counsel asked Tim who took the skates, he stated, "Why, Danielle took them."

1. Can Leanne impeach Tim on direct examination with his previous out-of-court statement.
2. Is Tim's prior statement admissible for the truth of the matter asserted?
3. If Leanne produces no evidence other than Tim's testimony and stipulation that Leanne's skates were taken without permission, will Leanne win at trial?

QUESTION THREE (5 PTS)

A twin-engine plane flying for US Scare, a small commuter airline, was forced to make an emergency crash landing after the engines failed. The pilot jumped out unscathed and stated to the press as soon as it arrived, "While I did not see the mechanics work on this plane, this landing was due to the incompetence of the mechanics and not pilot error, I'll tell you that!"

1. If several injured passengers brought suit against the pilot, can the passengers offer the pilot's statements in evidence? Why?
2. Will the answer to 1 hinge on whether the pilot's statement was based on personal knowledge?
3. If US Scare is also sued, can the pilot's statements be offered against the company? Explain.

QUESTION FOUR (4 PTS)

During the busy afternoon rush hour, Cathy became very sick. She was quickly transported by ambulance to the Healthwise Hospital, located downtown. On the way, Cathy

managed to tell the emergency medical technician in the ambulance that “I started feeling dizzy and faint, after I had the lobster special at MSL’s Beef and Beer Joint; I’m sure it is food poisoning because MSL’s chefs are careless and do not cook the food as thoroughly as they should.”

Cathy subsequently brings suit against MSL’s. She wishes to introduce her prior statements to the emergency medical technician. Are those statements admissible?

QUESTION FIVE (4 PTS)

Roland, an accountant with SBP Company, a chemical manufacturer, stated at a private dinner party to some friends that “SBP is really pouring those hazardous chemicals into the river, including dangerous PCBs.” In a subsequent lawsuit accusing SBP of improperly dumping chemicals into the river, one of the friends who heard Roland’s statement at the dinner party is called to testify about the statement for the plaintiffs. Is Roland’s statement hearsay? Is it admissible? Explain.

QUESTION SIX (10 PTS)

Bonnie is charged with stealing and then selling neighborhood dogs for considerable profit. Dionne Sullivan owned a dog named Acceptance, who was one of the animals allegedly sold by defendant Bonnie. At Bonnie’s trial, which of the following testimony meets the technical definition of hearsay?

1. Dionne testified that, when she saw Acceptance in Bonnie’s yard eating a steak, Acceptance wagged his tail upon seeing her.
2. Dionne testified that she said to her friend, Michelle while observing Acceptance in Bonnie’s yard, “That’s my dog!”
3. Dionne told the police that the dog she saw in Bonnie’s yard was Acceptance.
4. When Officer Roland asked Dionne if she was sure it was Acceptance, Dionne scratched her head, looked quizzical, and then nodded her head, yes.

5. Dionne testified that the dog she saw in Bonnie's backyard was her very own Acceptance.

QUESTIONS SEVEN (4 PTS)

In a robbery trial, an eyewitness, Jetzenia, testifies that she saw the defendant snatch the victim's purse and quickly exit the mall through the A-Mart located on the mall's south side. Jetzenia added, "I ran up to Officer Dick. I was out of breath and couldn't speak. Later, he showed me several photographs. I pointed to the photograph of the defendant, indicating that he was the guy who snatched the purse and ran out of the A-Mart.

1. Is Jetzenia's testimony hearsay? Why?
2. Jetzenia wishes to testify that "my best friend, Karl, was standing right next to me when the defendant ran out of the store. Karl also told the police officer after looking at the pictures that the defendant was the fellow who snatched the purse." Is this testimony admissible?

QUESTION EIGHT (4 PTS)

Georgie, at his weekly card game, was being teased by the other card players. "Hey, hey Georgie, I heard you were the person responsible for sticking up the First National Bank last week and escaping with \$83,000.00 in new \$50.00 bills. Is it true Georgie? Georgie did not respond, but merely smiled weakly and dealt the cards. Is evidence of Georgie's silence admissible?

QUESTION NINE (10 PTS)

Fiorentino is charged with attempted murder after allegedly shooting and seriously injuring Stephen. At trial, a government witness, Daniel, testified about the events on the evening of April 26, 2010, when Stephen was shot.

PROSECUTOR: What happened at approximately 7 p.m. on April 26, 2010?

1. Stephen told me he was going to William's house that night to drink some beers;
2. Stephen told me he had been having drinks with William on a regular basis for the last three weeks.
3. Stephen said he's feeling kind of depressed that that his head hurts;
4. Stephen said he had twisted his knee the week before in a touch football game, and wanted to know if I had any aspirin or pain reliever to give to him.

DEFENSE COUNSEL: Objection to the each answer. Motion to strike.

What ruling and why? Answer each question separately.

QUESTION TEN (5 PTS)

Compare and contrast the differences between Admissions and Declaration Against Interest.

QUESTION ELEVEN (4 PTS)

During her lunch hour, Jill witnessed a horrific car crash in which several people were seriously injured. Because Jill was shaken up after observing the carnage at close range, she left her investment banking job much earlier than usual. After an hour-long commute home, she still felt agitated. When she walked into the house, her sister, Celine, asked her about her day. Scarcely able to contain herself, Jill said, "I saw a woman and two youngsters practically killed by a guy who ran a red light! He went through the intersection long after the light had turned red. It made me sick."

The people injured in the crash subsequently brought suit and Celine is asked to testify about Jill's statement. Jill is available to testify, but prefers not to recall the incident. Is Celine permitted to testify to Jill's statement? Explain.

QUESTION TWELVE (4 PTS)

Veronica, a billionaire, discovers Buddhism. She denounces her worldly possessions and boards a flight to Tibet, where she plans to spend the rest of her natural life in a monastery. As the plane takes off, she exclaims, "I must set the record straight before I begin my new life; I did pay Steven to kill my poor departed husband and his lover."

Is this statement admissible, if offered by the prosecution in Steven's subsequent trial for murdering Veronica's husband?

QUESTION THIRTEEN (8 PTS)

Jason sues NBS Television for distributing a videotape in which NBS made allegedly libelous statements about him. At trial, Jason testifies about the tape, but does not bring it with him.

1. Is Jason's testimony admissible?
2. If Jason brings a copy of the videotape, does this satisfy the best evidence rule?
3. The president of NBS was overheard two weeks prior to trial at a cocktail party saying, "Our employees said in that videotape that Jason was a slippery snake-so what?" Is this testimony admissible?

4. If Jason has accidentally destroyed the videotape, what recourse does he have, if any, at trial?

QUESTION FOURTEEN (4 PTS)

The government charged William and Tim with first degree murder of Fiorentino. At the joint trial of William and Tim, Dick testified that he saw the two defendants shortly after the alleged homicide. According to Dick, Tim told William that he “love(d) how cold hearted William cut, stabbed and beat Fiorentino while Tim pulled Fiorentino’s hair and shot him in the head.” Dick also testified that, although William said nothing in response to Tim, he nodded his head, grinned, and slapped Tim’s hands in a “high five.” Tim and William both objected to this testimony. Is it admissible?

QUESTION FIFTEEN (4 PTS)

Leah, the wife calls 911, “please help, my husband, Karl, is trying to kill me.”

In a trial against Karl for domestic violence, Leah testifies she was just kidding when she made the call. The prosecutor wants to play the tape of the call. The Defendant, Karl, objects. Is the tape admissible?

QUESTION SIXTEEN (12 PTS)

Renee who is twenty (20) years of age, was in her bedroom with her boyfriend, Tim, the defendant.

Renee's mother was two rooms away in her own bedroom. The mother heard an argument between Renee and the defendant. The mother went to Renee's room to see what was wrong. The defendant had already left and Renee was lying on her bed crying.

The mother asked Renee what happened and she replied that, "Tim grabbed the front of her shirt and then he began to choke me and then hit my head on the floor."

The next door neighbor, hearing the commotion, called the police who arrived at the scene within fifteen minutes. The police spoke with the mother and Renee.

Officer Dan asked Renee what happened and she related the same statement she told her mother. She further gave the police a physical description of the defendant, that he was six feet two inches and weighed 230 pounds.

An ambulance shortly arrived at the scene and Renee was taken to the Lawrence Hospital. While being admitted she gave the same account that she told the police to Marissa, the admitting nurse. Despite the doctor's best effort to save Renee, she died as a result of massive brain damage.

Tim is now on trial for murder. Assume the Commonwealth intends to call Renee's mother, Officer Dan, and Marissa to the stand, what evidence is admissible? Explain in detail the reasons for your answer.

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QUESTIONS WILL BE WEIGHED AT 5 POINTS EACH. THERE ARE A TOTAL OF TWENTY QUESTIONS ON THIS EXAM.

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ESSAY QUESTIONS

ANSWER EACH QUESTION IN DETAIL APPLYING THE FEDERAL RULES OF EVIDENCE. BE SURE TO NUMBER YOUR ANSWERS IN YOUR BLUE BOOK TO CORRESPOND TO THE QUESTIONS AS SET FORTH IN THE EXAM

QUESTION ONE:

This is a civil action on a life insurance policy. The principal issue at trial is whether policy exclusion applies to prevent payment on the policy. The insurance company cannot find the original policy, which should have been in the policyholder's file. At a bench trial, the insurance company calls as a witness the manager of the claims department. The following then happens:

Q. (By defendant's lawyer) Ms. Walker, did you look for the executed original of the plaintiff's policy with your company?

A. I did, and the people in my department did. The executed original should be in the policyholder's file. We looked in all the places it might have been misfiled, but weren't able to locate it. I have no idea what happened to it.

[Defendant's lawyer has exhibit marked and shows it to opposing counsel.]

Q. I'm showing you Defendant's Exhibit No. 2. Please examine it for a moment. What kind of document is that?

A. It's one of our standard life insurance contracts.

Q. Was that the standard policy your company used at the time you insured the plaintiff?

A. Yes, that's our standard life insurance policy, which we've used for several years, including the year we insured the plaintiff.

Defendant: We offer Defendant's Exhibit No. 2.

Plaintiff: We object, Your Honor.

How should the Court rule? Explain your answer.

QUESTION TWO:

This is a robbery prosecution. The victim testifies on direct as follows:

Q. (By prosecutor) Ms. Adams, do you see the man who robbed you in court today?

A. Yes, I do.

Q. Please point to him and describe what he's wearing.

A. He's the man right over there (pointing to the defendant) wearing the brown pants and white shirt.

Prosecutor: May the record show that the witness has pointed to the defendant?

Judge: Yes.

Q. Ms. Adams, you also attended a lineup?

A. Yes.

Q. Did you identify anyone?

A. Yes.

Q. What did you tell the detective at the lineup?

Defendant: Objection, Your Honor. It's hearsay.

Judge: Overruled. The witness may answer.

A. I told the detective that the defendant, who was one of the people in the lineup, was the one who robbed me.

Was the Court's ruling correct? Explain your answer.

QUESTION THREE:

Same case as QUESTION TWO. The victim has no memory of the lineup and has been unable to identify anyone in court. The prosecution calls a detective as its next witness:

Q. (By prosecutor) Detective Peterson, you ran the lineup?

A. I did.

Q. The victim, Ms. Adams, was present?

A. She was.

Q. What did Ms. Adams tell you at the lineup?

Defendant: Objection, it's hearsay.

Judge: Sustained. Move on to another topic.

Was the Court's ruling correct? Explain your answer.

QUESTION FOUR:

This is a child molestation prosecution against the victim's stepfather. At trial, the prosecution calls the victim's treating physician. During the doctor's direct examination, the following happens:

Q. (By prosecutor) Dr. Williams, did you talk to Mary when you examined her?

A. Yes.

Q. Tell us what Mary said.

Defendant: Objection, Your Honor.

Judge: Overruled.

A. That her stepfather had fondled her.

Was the Court's ruling correct? Is this hearsay, non-hearsay, or an exception? Explain your answer.

QUESTION FIVE:

John was found murdered in the parking lot at WalMart. The police suspected his girlfriend, Stacey, as a suspect. When the police arrived at Stacey's apartment, they observed her lying on the family room floor, dead from a bullet wound to her head in an apparent suicide. Next to the body was Stacey's computer, which was still on at the time. The police observed a message on the screen, which read as follows:

"I cannot live with myself anymore because I killed my boyfriend John in WalMart's parking lot."

John's estate has brought a wrongful death claim against Stacey's estate. Is the above statement admissible at trial? EXPLAIN

QUESTION SIX:

This is an automobile negligence case. A witness, who observed the accident, testified on direct examination that the defendant's car ran the red light. The witness is now being cross-examined as follows:

- Q. (By defendant's lawyer) Mr. Wilbur, you say you saw the big black car run through that red light?
- A. Yes.
- Q. The day after the collision an investigator came to your home?
- A. That's right.
- Q. You talked to him about the accident?
- A. Right.
- Q. And you signed a one-page statement stating what you saw?
- A. Right.
- Q. Let me show you that statement, which has been marked Defendant's Exhibit No. 3. That's your signature on the bottom, isn't it?
- A. Yes.
- Q. Didn't you say in your signed statement: "I didn't really see the traffic light until afterwards, but I assumed the big black car must have run the red light."?
- A. That's what I said.

When the plaintiff rests, the defendant moves for a judgment as a matter of law.

Defendant: There is no evidence my client went through the red light. The only eyewitness to the accident, Mr. Wilbur, told the investigator he did not see the light until after the collision.

Should the Judge grant Defendant's motion for a judgment as a matter of law? Explain your answer.

QUESTION SEVEN:

After Paul and Angie are involved in an automobile accident, Angie approaches Paul and says, "You ran that red light." Paul remains silent.

At trial, Angie wants to introduce evidence of Paul's silence to prove he ran the red light.

Is this hearsay? Explain your answer.

QUESTION EIGHT:

In a Paternity action, the mother, Jennifer, seeks to introduce a letter from the defendant's attorney in which the attorney stated that his client, Pablo, had admitted that he was the child's father. This letter is offered to prove that the defendant is the father of the child.

Is this hearsay? Explain your answer.

QUESTION NINE:

Mark was driving his car and had stopped at a traffic light. After waiting for a period of time, the driver in the car behind him honked his horn. Immediately after this occurred, cars going in opposite directions collided in the intersection. Jessie, a passenger in the car with Mark, who did not see the color of the light, is asked to testify about what the driver behind Mark had done, for the purpose of proving that the light had turned green in the direction that Mark was traveling.

Is this hearsay? Explain your answer.

QUESTION TEN:

This is a rape case. Martha has alleged that her estranged husband forced her to have sexual intercourse against her wishes. Martha filed a complaint with the District Attorney's Office and her husband, Rob Blake, was arraigned in the Superior Court. One month later, Blake was so enraged that he drove to Martha's house and shot her in the chest. A next-door neighbor rushed to her house after hearing gunshots. The neighbor heard Martha say as she was dying, "Get me a priest. I know I am dying. I should have been a more understanding wife, but my husband didn't have to shoot me."

Is the above statement admissible by the defendant? Is it hearsay? Explain your answer.

QUESTION ELEVEN:

Mandy called 911 complaining that her ex-boyfriend just broke into her house and was beating her. The 911 operator asked Mandy a series of questions which led Mandy to identify her attacker as Mario Jones. Mario was later arrested and charged with violating a domestic no contact order.

At trial, Mandy did not appear as a witness. The prosecution sought to introduce that portion of the 911 tape in which Mandy identified Mario as her attacker.

The Court, over the Defendant's objection, and allowed the tapes into evidence.

Was the Court's ruling correct? Explain your answer in detail.

QUESTION TWELVE:

COMPARE AND CONTRAST "Admissions" with "Declarations Against Interest" setting forth the elements of each.

QUESTION THIRTEEN:

The police raid Katie's residence on a tip that it is a betting establishment. The local minister observes the raid and calls the telephone number listed for Katie. When an unfamiliar voice answers, the minister assumes it is the police and states, "I'm glad you people finally realized that Katie's place is a betting establishment. Good work!" The prosecution subsequently offers the minister's statement at Katie's trial to prove the residence is being used as a betting establishment.

Is the statement hearsay? Explain your answer.

QUESTION FOURTEEN:

Defendant is charged with theft of the owner's car. Defendant's defense is that he had the owner's consent. At trial, defendant calls a witness who testifies as follows:

Q. (By defendant's lawyer) Mr. Avery, were you at the party?

A. Yes.

Q. Did you see my client, Chris Johnson, and the owner, Bobby Franklin, talking that evening?

A. Yes.

Q. Where and when was that?

A. It was around 11:00 p.m. in the kitchen. There was just me and the two of them.

Q. What did Bobby Franklin say at the time?

Prosecutor: Objection, Your Honor.

Judge: What's the basis for your objection?

Prosecutor: It's hearsay, Your Honor.

Judge: Overruled. The witness may answer.

A. Bobby said to Chris, "You can take my car to pick up the beer."

Was the Judge's ruling correct? Is this hearsay? Explain your answer.

QUESTION FIFTEEN:

James Kelly, a state senator, was indicted for extortion induced under color of authority. To establish that the victims of Kelly's alleged extortion scheme feared official retribution should they have failed to comply with Kelly's requests, an essential element of the crime charged, the Government seeks to introduce a letter that one of the victims had written to his business associate in which the victim explained: "Kelly seems to have us over a barrel on this one. If we don't give his nephew a job, we may have several of our contracts with the state canceled, or worse. You know these politicians, they don't get mad, they just get even."

Is the above statement admissible at trial. Explain your answer.

QUESTION SIXTEEN:

Shawn is prosecuted for allegedly battering Bobbi on a Colorado ski slope. The only eyewitness is Shawn's sister, Sandy. The prosecutor calls Sandy as a witness. On direct examination, the prosecutor questions Sandy.

Q. (By prosecutor) Sandy, you are the sister of the defendant, Shawn, correct?

Defense counsel: Objection. The question is misleading and therefore improper.

a. **How should the Court rule? Explain.**

Q. Sandy, are you currently facing a criminal charge of attempted murder?

Defense counsel: Objection.

b. **How should the Court rule? Explain.**

Prosecutor: Have any deals been made in return for your testimony?

Defense Counsel: Objection!

c. **How should the Court rule? Explain.**

QUESTION SEVENTEEN:

A University School of Law student was recently raped while studying late at night in the library. The University hired an outside consulting firm to prepare a report on what steps, if any, the school could take to avoid future such incidents. The consultant recommended that the library be locked during night hours; that only students, faculty and staff have keys; that locks be changed each semester; and that video cameras and emergency alarm buttons be installed on every floor. However, none of these changes have been implemented. The rape victim sues the University for damages and seeks to offer the report into evidence.

Ignoring hearsay issues, should the University's objection be sustained or overruled?

QUESTION EIGHTEEN:

Dan is charged with murdering Anna. Consider the following two potential items of evidence:

1. The prosecution calls Anna's friend, Ellen, to testify that "I talked to Anna on the morning of the day that she was killed. During that conversation, Anna told me that Dan had visited her the day before and said that he was going to kill her."

Is Ellen's testimony admissible? Explain.

2. The prosecution calls Anna's friend Ellen to testify that "I talked to Anna on the morning of the day that she was killed. During that conversation, Anna told me that after I left she was going to pay a visit to Dan."

Is Ellen's testimony hearsay? Explain.

QUESTION NINETEEN:

Oriana attends a dinner party and sees an old friend, Dr. Hurley. Oriana has never been a patient of Dr. Hurley, an internist. However, from time to time when they have been together on social occasions, Oriana has talked to Dr. Hurley about personal medical concerns. At the dinner party, Oriana tells Dr. Hurley that "I've been getting really bad headaches for a few weeks now, they started when that auto paint shop opened up next to where I live. Do you think I should wait to see if they go away, or should I make an appointment with my doctor?" Sometime later, Oriana files suit against the auto paint shop.

Is Oriana's statement to Dr. Hurley admissible?

QUESTION TWENTY:

In a complex commercial litigation case, the plaintiff offers various items in evidence. **What would the plaintiff have to do, if anything, to authenticate the following evidence? Explain.**

- a. A telephone conversation.
- b. A business associate's handwriting.
- c. A *Newsweek* magazine.
- d. A Diet Coke label.
- e. A photograph of the defendant.

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Q. Was that the standard policy your company used at the time you insured the plaintiff?

A. Yes, that's our standard life insurance policy, which we've used for several years, including the year we insured the plaintiff.

Defendant: We offer Defendant's Exhibit No. 2.

Plaintiff: We object, Your Honor.

How should the Court rule? Explain your answer.

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This is a robbery prosecution. The victim testifies on direct as follows:

Q. (By prosecutor) Ms. Adams, do you see the man who robbed you in court today?

A. Yes, I do.

Q. Please point to him and describe what he's wearing.

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Judge: Yes.

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Q. Did you identify anyone?

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Was the Court's ruling correct? Explain your answer.

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Q. (By prosecutor) Detective Peterson, you ran the lineup?

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A. She was.

Q. What did Ms. Adams tell you at the lineup?

Defendant: Objection, it's hearsay.

Judge: Sustained. Move on to another topic.

Was the Court's ruling correct? Explain your answer.

QUESTION FOUR:

This is a child molestation prosecution against the victim's stepfather. At trial, the prosecution calls the victim's treating physician. During the doctor's direct examination, the following happens:

Q. (By prosecutor) Dr. Williams, did you talk to Mary when you examined her?

A. Yes.

Q. Tell us what Mary said.

Defendant: Objection, Your Honor.

Judge: Overruled.

A. That her stepfather had fondled her.

Was the Court's ruling correct? Is this hearsay, non-hearsay, or an exception? Explain your answer.

QUESTION FIVE:

Jane was found murdered in the parking lot at WalMart. The police suspected her boyfriend, Ken Mitchell, as a suspect. When the police arrived at Mitchell's apartment, they observed him lying on the family room floor, dead from a bullet wound to his head in an apparent suicide. Next to the body was Ken's computer, which was still on at the time. The police observed a message on the screen, which read as follows:

"I cannot live with myself anymore because I killed my girlfriend Jane in WalMart's parking lot."

Jane's estate has brought a wrongful death claim against Ken's estate. Is the above statement admissible at trial?

QUESTION SIX:

This is an automobile negligence case. A witness, who observed the accident, testified on direct examination that the defendant's car ran the red light. The witness is now being cross-examined as follows:

- Q. (By defendant's lawyer) Mr. Wilbur, you say you saw the big black car run through that red light?
- A. Yes.
- Q. The day after the collision an investigator came to your home?
- A. That's right.
- Q. You talked to him about the accident?
- A. Right.
- Q. And you signed a one-page statement stating what you saw?
- A. Right.
- Q. Let me show you that statement, which has been marked Defendant's Exhibit No. 3. That's your signature on the bottom, isn't it?
- A. Yes.
- Q. Didn't you say in your signed statement: "I didn't really see the traffic light until afterwards, but I assumed the big black car must have run the red light."
- A. That's what I said.

When the plaintiff rests, the defendant moves for a judgment as a matter of law.

Defendant: There is no evidence my client went through the red light. The only eyewitness to the accident, Mr. Wilbur, told the investigator he did not see the light until after the collision.

Should the Judge grant Defendant's motion for a judgment as a matter of law? Explain your answer.

QUESTION SEVEN:

After Danilo and Anya are involved in an automobile accident, Anya approaches Danilo and says, "You ran that red light." Danilo remains silent.

At trial, Anya wants to introduce evidence of Danilo's silence to prove he ran the red light.

Is this hearsay? Explain your answer.

QUESTION EIGHT:

Lee was involved in an automobile accident on Route 495. At the scene, Lee's body was placed in a hearse and then driven away to the morgue. Can this be used as evidence of his death?

Is this hearsay? Explain your answer.

QUESTION NINE:

This is a medical malpractice case brought against a doctor as a result of a surgical procedure. The defendant claims the plaintiff's injuries were caused by a nurse's negligence. At trial, the defendant intends to call a witness who will testify that the nurse, immediately after the surgery, stated, "I made a big mistake in there."

Is the above statement admissible by the defendant? Is it hearsay? Explain your answer.

QUESTION TEN:

This is a rape case. Margaret has alleged that her estranged husband forced her to have sexual intercourse against her wishes. Margaret filed a complaint with the District Attorney's Office and her husband, Dale Blake, was arraigned in the Superior Court. One month later, Blake was so enraged that he drove to Margaret's house and shot her in the chest. A next-door neighbor rushed to her house after hearing gunshots. The neighbor heard Margaret say as she was dying, "Get me a priest. I know I am dying. I should have been a more understanding wife, but my husband didn't have to shoot me."

Is the above statement admissible by the defendant? Is it hearsay? Explain your answer.

QUESTION ELEVEN:

Stacey called 911 complaining that her ex-boyfriend has just broke into her house and was beating her. The 911 operator asked Stacy a series of questions which led Stacey to identify her attacker as Patrick Smith. Patrick was later arrested and charged with violating a domestic no contact order.

At trial, Stacey did not appear as a witness. The prosecution sought to introduce that portion of the 911 tape in which Stacy identified Patrick as her attacker.

The Court, over the Defendant's objection, allowed the tapes into evidence.

Was the Court's ruling correct? Explain your answer in detail.

QUESTION TWELVE:

Glen is charged with murdering Kim, a prostitute. The defense seeks to show that Kim had been blackmailing a number of her clients, to show that others had a motive to kill her. As evidence that Kim had been blackmailing clients, the defense seeks to offer into evidence a portion of her diary detailing clients' names, the amounts of money she had demanded that the clients pay her, the dates of the demands and any payments made by the clients. The prosecutor objects that the diary is inadmissible hearsay. The defense argues that Rule 803(6) business records applies.

How should the judge rule and why?

QUESTION THIRTEEN:

Billy Bob tells Tattle Tale, "You remember when I wrote my will, the witnesses weren't really there when I signed it." Billy Bob dies. Tattle Tale takes the stand in a probate contest.

Is the statement hearsay? Explain your answer.

QUESTION FOURTEEN:

Defendant is charged with theft of the owner's car. Defendant's defense is that he had the owner's consent. At trial, defendant calls a witness who testifies as follows:

- Q. (By defendant's lawyer) Mr. Avery, were you at the party?
A. Yes.
Q. Did you see my client, Chris Johnson, and the owner, Bobby Franklin, talking that evening?
A. Yes.
Q. Where and when was that?
A. It was around 11:00 p.m. in the kitchen. There was just me and the two of them.
Q. What did Bobby Franklin say at the time?
Prosecutor: Objection, Your Honor.
Judge: What's the basis for your objection?
Prosecutor: It's hearsay, Your Honor.
Judge: Overruled. The witness may answer.
A. Bobby said to Chris, "You can take my car to pick up the beer."

Was the Judge's ruling correct? Is this hearsay? Explain your answer.

QUESTION FIFTEEN:

Carolyn testified in a commercial litigation action.

Which of the following questions are permissible during the cross-examination of Carolyn? Explain.

- a. "You used your personal computer to make notes of the meeting with the opposing party two days after the meeting occurred, not immediately thereafter, as you testified on direct examination, isn't that right?"
- b. "You have a Macintosh computer, not a Dell as you just testified on direct, isn't that correct?"
- c. "You left your office last Wednesday at 5:30 p.m., not 7:30 p.m. as you testified on direct examination, right?"
- d. "Your boss, Ms. Sanders, was wrong when she testified that she deposited the March proceeds on March 4th, wasn't she?"
- e. "Isn't it true that you are one big liar?"

QUESTION SIXTEEN:

Shawn is prosecuted for allegedly battering Bobbi on a Colorado ski slope. The only eyewitness is Shawn's sister, Sandy. The prosecutor calls Sandy as a witness. On direct examination, the prosecutor questions Sandy.

Q. (By prosecutor) Sandy, you are the sister of the defendant, Shawn, correct?

Defense counsel: Objection. The question is misleading and therefore improper.

a. **How should the Court rule? Explain.**

Q. Sandy, are you currently facing a criminal charge of attempted murder?

Defense counsel: Objection.

b. **How should the Court rule? Explain.**

Prosecutor: Have any deals been made in return for your testimony?

Defense Counsel: Objection!

c. **How should the Court rule? Explain.**

QUESTION SEVENTEEN:

A University School of Law student was recently raped while studying late at night in the library. The University hired an outside consulting firm to prepare a report on what steps, if any, the school could take to avoid future such incidents. The consultant recommended that the library be locked during night hours; that only students, faculty and staff have keys; that locks be changed each semester; and that video cameras and emergency alarm buttons be installed on every floor. However, none of these changes have been implemented. The rape victim sues the University for damages and seeks to offer the report into evidence.

Ignoring hearsay issues, should the University's objection be sustained or overruled?

QUESTION EIGHTEEN:

Dale is charged with murdering Jennifer. Consider the following two potential items of evidence:

1. The prosecution calls Jennifer's friend, Marjie, to testify that "I talked to Jennifer on the morning of the day that she was killed. During that conversation, Jennifer told me that Dale had visited her the day before and said that he was going to kill her.

Is Marjie's testimony admissible? Explain.

2. The prosecution calls Jennifer's friend Marjie to testify that "I talked to Jennifer on the morning of the day that she was killed. During that conversation, Jennifer told me that after I left she was going to pay a visit to Dale."

Is Marjie's testimony hearsay? Explain.

QUESTION NINETEEN:

Ashley attends a dinner party and sees an old friend, Dr. Marie. Ashley has never been a patient of Dr. Marie, an internist. However, from time to time when they have been together on social occasions, Ashley has talked to Dr. Marie about personal medical concerns. At the dinner party, Ashley tells Dr. Marie that "I've been getting really bad headaches for a few weeks now. They started when that auto paint shop opened up next to where I live. Do you think I should wait to see if they go away, or should I make an appointment with my doctor?" Sometime later, Ashley files suit against the auto paint shop.

Is Ashley's statement to Dr. Marie admissible?

QUESTION TWENTY:

In a complex commercial litigation case, the plaintiff offers various items in evidence. **What would the plaintiff have to do, if anything, to authenticate the following evidence? Explain.**

- a. A telephone conversation.
- b. A business associate's handwriting.
- c. A *Newsweek* magazine.
- d. A Diet Coke.
- e. A photograph of the defendant.

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.

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.

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.

ESSAY QUESTION ONE:

Brady Cardia consulted Dr. Izzy Skemia, a cardiologist, because of fainting spells. Dr. Skemia diagnosed Brady's condition as right bundle branch block, a cardiac condition that caused the heart to stop beating intermittently and made Brady faint.

Dr. Skemia recommended the implementation of a permanent cardiac pacemaker for treatment of the condition. Because the implementation of a pacemaker was a surgical procedure, Dr. Skemia arranged for the surgery to be performed on Brady by Dr. Claude E. Cator, a thoracic (chest) surgeon. Brady consulted Dr. Cator and the surgery was scheduled at St. Timothy the Benevolent Hospital.

On November 10, 1991, Dr. Cator implanted a pacemaker manufactured by Creve Coeur, Inc., a company with corporate headquarters located in another jurisdiction. Brady was scheduled to receive Creve Coeur's model, the "Lazarus", which was a dual chambered, atrial tracking, telemetry equipped device considered to be the state-of-the-art in the pacemaker industry. Instead, due to a mislabeling problem, he had a model implanted known by the generic name "Nova" that had been manufactured by four different manufacturers and had also been obsolete for several years. "Nova" models had not been regularly distributed in the stream of commerce since 1988, when a particular lot of product had been recalled by the Food and Drug Administration for premature battery failure. Creve Coeur and the other companies had been ordered to destroy all remaining supplies but Creve Coeur had not done so.

After the surgery, Brady was taken to recovery. While recording notations in his chart, the nurse reviewed the literature that had accompanied the pacemaker and discovered the mistake. He immediately called Dr. Skemia, who screamed into the telephone.

"That Goddam Cator should be suspended from practice for not checking the label!"

Skemia then left for the hospital to see Brady. Before he arrived, Brady awoke in recovery. The defective pacer began to skip beats and Brady fainted. Just before he lost consciousness, he whispered to the nurse,

"I think it's all over for me. I wish I wouldn't have taken that money that Tachy is accused of stealing from Copani Enterprises. When I wake up, I'm going to call the DA and clear his name."

Tachy Cardia was Brady's brother and scheduled to go to trial the following week for embezzlement of company funds from his employer, Copani Enterprises.

When Dr. Skemia arrived at the hospital, Brady's body was being taken to the morgue. Enraged, Skemia confronted Cator in front of a technician and screamed,

"Cator, it looks like you're still on the take from Creve Coeur for implanting those outdated pacers!"

Cator replied, "Don't act so high and mighty, you hypocritical sonofabitch! I gave you half of the money I got!"

Dr. Skemia remained silent. Dr. Cator died one week before trial. The attorney for his estate, Lou Pole, called Will I.

Stuffum, vice president of Creve Coeur, as a witness. Pole showed Stuffum the pacemaker that had been explanted from Brady and asked if it was manufactured by Creve Coeur. Stuffum replied in the negative. On the bottom of the can was a heart with a lightning bolt, the corporate symbol of Creve Coeur. Pole then introduced the can into evidence.

Pole then asked Stuffum if Creve Coeur had received a notice from the government requiring destruction of all remaining "Nova" pacemakers. Stuffum replied in the negative. Pole then introduced into evidence a copy of an official government record referencing the notice.

Pole then asked Stuffum if he had even been employed by the Heart Break Corporation, another pacemaker company. Stuffum replied in the affirmative. Pole then asked Stuffum if he was fired from Heart Break for sending pacemakers with defective circuits to hospitals after Heart Break discovered the problem. Stuffum answered in the negative. Pole then introduced a carbon copy of a memo from the payroll department of Heart Break, together with a check stub entitled "severance pay." The memo was unsigned and entitled, "Termination of Will I. Stuffum."

The body of the memo read:

"You are hereby terminated, effective immediately, for violating company policy by shipping defective products."

DISCUSS THE EVIDENTIARY ISSUES, THE APPROPRIATE OBJECTIONS, HOW THE COURT SHOULD RULE ON THE OBJECTIONS AND WHAT EVIDENCE SHOULD BE ADMITTED.

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

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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.

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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?

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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.