This is a 3-hour, restricted open book exam that is worth 100 points. You are allowed to consult only the following material:

- the required texts for the course as listed in the syllabus, which includes printouts of any assigned reading material posted on this course’s TWEN website (no other commercially prepared materials are allowed); &,
- any material you personally prepared.

This exam is comprised of 17 multiple-choice questions and 2 essay questions. On the essay questions, I cannot recommend highly enough that you take time to organize your answer; a well-presented answer will necessarily be more cogent and is therefore unavoidably going to be more prone to a better grade than a disorganized one. If you are handwriting your exam, please write on only one side of the page! Your answers should demonstrate knowledge of the issues we have discussed in this course, including how they may relate to each other. Concentrate on any approaches or issues that you think are the most important, but do not hesitate to give a short summary of why you have rejected any other approaches or issues. However, if you are pressed for time, err in favor of discussing the most important issues rather than spending time you do not really have on other items.

You must turn in this exam along with your answers. I will not return your exam answers to you.

Before starting the exam, make sure you have 10 pages (including this page). Good luck!!
In July 2011, Al started a business, Al’s Antiques, which dealt exclusively in very high end, and therefore very expensive, antiques. Al’s Antiques required customers to pay in full prior to delivery.

As of April 30, 2012, Al’s Antiques was effectively out of money, and therefore effectively out of business. As of that day, it never delivered another antique to a customer. Al, however, continued to accept orders, and accompanying payments, on behalf of Al’s Antiques.

Carl placed an order for an antique on May 10, 2012, and paid Al’s Antiques the $5,000 purchase price. On May 25, 2012, Al told Carl there would be a two-week delay in delivery due to “unforeseen problems.” When no delivery had been made by July 1, 2012, Carl telephoned Al’s Antiques on that day but heard an automated telephone company message that the telephone number had been disconnected. Later on the same day, Carl went by the Al’s Antique store and found it closed. As he was about to leave, but while he was still standing in front of the store, another car screeched to a stop in front of the store. The driver jumped out and ran to the Al’s Antiques storefront. Finding it closed, the driver, who was extremely agitated, turned to Carl and yelled, “That Al’s no good! He promised me just a week ago that my antique was on the way! But he’s stolen $3,000 from me!” Carl went immediately to the police station to report what had happened.

At the end of July 2012, police arrested Al. At the time of his arrest, police seized a briefcase that was in Al’s possession. The briefcase was a very ordinary, typical brown leather briefcase, except that it was imprinted with Al’s initials and had a rainbow-colored ribbon tied around one end of its handle. The briefcase contained $50,000.

Law enforcement’s further investigation revealed that in the months of May and June 2012, Al had accepted orders and payments in amounts ranging from $3,000 to $15,000 from numerous other customers. The orders had all provided for delivery within fifteen days of payment. Al had offered his customers various excuses for delays in delivery, but no deliveries occurred on any purchases made on April 30, 2012 or later. Al’s Antiques’s banking records revealed that the remaining balance of $50,000 in its accounts had been withdrawn in cash earlier on the day that Al was arrested.

The investigation also uncovered that Al, on behalf of Al’s Antiques, had applied for a loan at Citibank in April 2012, using a loan application that both Citibank and the prosecutor allege was fraudulent. Specifically, the loan application that Al submitted to Citibank listed an inventory for Al’s Antiques valued at $60,000, which Al identified as collateral for the loan he sought. The prosecutor alleges that, at the time Al submitted this loan application on behalf of Al’s Antiques, it had had no inventory at all.

In September 2012, the prosecutor brought Al’s case before the grand jury, and among other evidence presented Carl’s testimony about his experience with Al’s Antiques. The grand jury indicted Al.

At Al’s criminal trial in a federal district court in February 2013, the prosecutor called Carl as a witness. During the prosecutor’s direct examination, Carl gave substantively the same testimony as he had given before the grand jury. At the end of the prosecutor’s direct examination, the prosecutor asked Carl, “Do you remember testifying before the grand jury in September 2012 about your experience with Al’s Antiques?” Carl answered, “Yes.” The prosecutor then asked Carl, “Was your testimony today substantively the same as, or different from, your testimony before the grand jury?” Al’s lawyer objected, and the court sustained the objection.

While cross-examining Carl, Al’s lawyer suggested that Carl was only testifying against Al because Carl was biased against Al after having discovered in November 2012 that Al was HIV positive, which Carl presumed meant that Al was homosexual, and Carl’s religion considered homosexuality a sin.
On redirect examination, the prosecutor asked Carl, “What did you tell the grand jury when you testified before it?” Al’s lawyer objected, but the court overruled the objection.

Later in the trial, the prosecutor also called Ann as a witness. Ann is a friend of Jane. Jane had been married to Al, and Jane had worked as the financial bookkeeper for Al’s Antiques. When the prosecutor asked Ann whether Jane had ever said that Al had told Jane, in early April 2012 and while they were at work and discussing Al’s Antiques’s finances, that “he was in deep, and getting deeper,” Al’s defense counsel made a hearsay objection. The court sustained the objection.

Before resting its case in chief, the prosecutor called Dan as a witness, making an offer of proof outside the presence of the jury that, to establish Al had had a common plan to defraud customers, Dan would testify that Al took his order and payment for an antique on June 1, 2012, but that he never heard from Al again and never received delivery of the antique. Al’s defense counsel objected to the offer of proof and the court sustained the objection.

All of the following questions pertain to Al’s criminal trial in federal district court, and in which the Federal Rules of Evidence, and their interpretive decisional law, are controlling.

**Question 1** (4 points)

Can Carl properly testify that he telephoned Al’s Antiques’s on July 1, 2012 and discovered that the telephone number had been disconnected?

(A) Yes, because his testimony is based upon personal knowledge.

(B) No, because he has no authority to speak on behalf of the telephone company.

(C) No, because the best evidence rule requires the prosecution to prove this fact through telephone company records.

(D) No, Carl’s testimony is hearsay because he is repeating the telephone company’s automated message announcing that the telephone number was disconnected.

**Question 2** (4 points)

Can Carl properly testify that, when he was standing in front of the Al’s Antiques store on July 1, 2012, a car “screeched” to a stop in front of it?

(A) Yes, so long as a foundation is laid for his expert opinion about screeching.

(B) No, because this testimony is irrelevant.

(C) Yes, because he may properly opine about screeching.

(D) No, unless the probative value outweighs the prejudicial effect.
**Question 3**  (4 points)

Can Carl properly testify that, when he was standing in front of the Al’s Antiques store on July 1, 2012, the driver who had exited the car had yelled, “That Al’s no good! He promised me just a week ago that my antique was on the way! But he’s stolen $3,000 from me!”

(A) No, because Carl’s testimony is hearsay.

(B) Yes, because Carl is repeating the perception of an event immediately after he perceived it.

(C) No, because reliability concerns require that the prosecution produce the driver at trial, and question him directly, in order to admit the driver’s statements.

(D) Yes, because the driver was under stress when he made his statements.

**Question 4**  (4 points)

Does the prosecution need to establish a chain of custody before it can introduce into evidence the briefcase that was in Al’s possession at the time of his arrest?

(A) No, because sufficient evidence exists to allow the court, as a matter of conditional relevancy, to admit the briefcase.

(B) Yes, because chain of custody is always an authentication requirement.

(C) No, because the briefcase's probative value outweighs any unfair prejudice.

(D) Yes, because otherwise insufficient evidence exists to allow the court, as a matter of conditional relevancy, to admit the briefcase.

**Question 5**  (4 points)

Does the prosecution need to establish a chain of custody before it can introduce into evidence the $50,000 that was seized from Al at the time of his arrest?

(A) Yes, because otherwise insufficient evidence exists to allow the court, as a matter of conditional relevancy, to admit the $50,000.

(B) No, because chain of custody is only one of many ways to authenticate evidence.

(C) Yes, because the probative value of the $50,000 substantially outweighs any unfair prejudice.

(D) No, because sufficient evidence exists to allow the court, as a matter of conditional relevancy, to admit the $50,000.
**Question 6** (4 points)

During its case in chief at trial, the prosecutor engages in direct examination of a witness from the bank that held Al's Antiques's accounts, to establish that the accounts had $50,000 on deposit before the entire amount was withdrawn. The witness, however, initially testifies that he cannot remember the amount of the balance before all of it was withdrawn. May the prosecutor show the relevant bank account records, which have not been admitted into evidence, to the witness?

(A) No, because only evidence admitted into the record can be shown to a witness at trial.

(B) Yes, because the best evidence rule requires the prosecutor to use the bank account records to prove this fact.

(C) No, because the bank account records can only be used for impeachment.

(D) Yes, so long as the bank account records are shared with the opposing party, the jury is not exposed to them, they spark the witness's memory, and they are taken away from the witness before the witness answers.

**Question 7** (4 points)

If the prosecutor seeks to introduce into evidence the allegedly fraudulent loan application that Al submitted to Citibank (on Al's Antiques’s behalf), in part by asking Carl during direct examination whether Carl recognizes the signature on the loan application as Al's, which of the following objections would you recommend that Al's defense counsel make?

(A) Incompetency, because the prosecution has not subjected Carl to testing or evaluation to show he has the mental competency to testify.

(B) Lack of foundation, unless the prosecutor can show that Carl had prior personal knowledge of Al's signature.

(C) Incompetency, because Carl is not a handwriting expert.

(D) Relevancy, if Al can show that he had tried to withdraw the allegedly fraudulent loan application, because his attempt constituted a subsequent remedial measure.

**Question 8** (4 points)

Which of the following options would be the best reason for the court having sustained defense counsel’s objection after the prosecutor asked Carl, “Was your testimony today substantively the same as, or different from, your testimony before the grand jury?”

(A) The question called for a hearsay answer because it was about a prior out of court statement.
(B) The question was leading.

(C) Carl had not yet been impeached.

(D) Lack of foundation.

**Question 9** (4 points)

Which of the following options would be the best reason for the court having overruled defense counsel’s objection after the prosecutor asked Carl, “What did you tell the grand jury when you testified before it?”

(A) The question did not call for a hearsay answer because the declarant and witness were the same person.

(B) The question assumed facts not in evidence.

(C) Carl had been impeached.

(D) Lack of foundation.

**Question 10** (4 points)

If defense counsel wants to admit into evidence Al’s Antique’s banking records through a bank employee witness familiar with the bank’s operations and with exposure to how its system produces the bank records, to show that no deposits were made into its accounts after April 30, 2012, and if the prosecution objects on hearsay grounds, how should the court rule?

(A) Sustained, because the banking records are self-serving.

(B) Overruled, so long as the court believes the banking records are trustworthy.

(C) Sustained, because the banking records are hearsay.

(D) Overruled, because the banking records are self-authenticating.

**Question 11** (4 points)

If defense counsel wants to admit into evidence Al’s Antique’s banking records to show that no deposits were made into its accounts after April 30, 2012, and if the prosecution objects for lack of foundation, how should the court rule?

(A) Sustained, if defense counsel cannot provide sufficient chain of custody evidence about the banking records.
(B) Overruled, if defense counsel is introducing the banking records through a bank employee witness, because testimony is not subject to an authentication requirement.

(C) Sustained, because the banking records are being used to prove the truth of their contents.

(D) Overruled, if defense counsel is introducing the banking records through a bank employee witness familiar with its operations and with exposure to how its system produces the bank records.

**Question 12** (4 points)

If the prosecution wants Jane, who married Al in February 2000, to testify that he admitted to her in June 2012 that he’d had “trouble with the business” and “had done something very bad,” can Al prevent her from testifying?

(A) Maybe, even if Jane and Al divorced in December 2012.

(B) No, because Jane and Al divorced in December 2012.

(C) No, because only Jane can invoke a marital privilege.

(D) Yes, because Al holds the marital privilege.

**Question 13** (4 points)

If the prosecution objected when Al’s lawyer suggested that Carl was only testifying against Al because Carl was biased against Al after having discovered during November 2012 that Al was HIV positive, which Carl presumed meant that Al was homosexual, and Carl’s religion considered homosexuality a sin, how should the court have ruled?

(A) Sustained, because evidence based upon a witness’s religious beliefs is not admissible to attack credibility.

(B) Overruled, because the question is relevant.

(C) Sustained, because evidence based upon a witness’s religious beliefs is never admissible.

(D) Overruled, because criminal defendants are entitled to impeach prosecution witnesses.

**Question 14** (4 points)

Was the court correct in sustaining defense counsel’s hearsay objection to the prosecutor’s question to Ann about whether Jane had ever said that Al had told Jane, in early April 2012, that “he was in deep, and getting deeper”?
(A) No, because the meaning of “in deep, and getting deeper” goes to weight rather than admissibility.

(B) Yes, because this multiple hearsay is inadmissible.

(C) No, presuming that the court can correctly treat Al as Jane’s employer.

(D) Yes, because Jane was married to Al and a marital privilege applies.

**Question 15** (4 points)

If, on cross-examination, Al’s defense counsel asks Carl whether, when applying for Carl's current job, Carl had misrepresented on his resume that he had obtained a particular educational degree, and the prosecution objects, how should the court rule?

(A) Sustained, because the question is irrelevant.

(B) Sustained, because Carl can only be impeached through reputation or opinion evidence.

(C) Overruled, because habit evidence is admissible.

(D) Overruled, because Carl is subject to this sort of impeachment.

**Question 16** (4 points)

If the prosecution seeks to offer evidence of Al’s prior conviction for forging checks, and defense counsel objects, how should the court rule?

(A) Sustained, because propensity evidence is inadmissible.

(B) Overruled, if dishonesty is an essential element of a charge Al faces in this criminal trial and the court is persuaded that the prior conviction, while relevant to propensity, is also relevant to showing something other than propensity.

(C) Sustained, if the prosecution failed to provide reasonable notice before trial to Al of such an evidentiary offering, because the prosecution always has such a duty in a criminal trial.

(D) Overruled, if Al has already introduced evidence of his honesty.

**Question 17** (4 points)

Al’s defense counsel seeks to introduce the testimony of a psychologist, who will testify that Al has a certain mental belief system and explain in general terms how Al’s belief system differs from the belief systems most people have. This testimony, if the jury accepts it, makes it unlikely that the prosecution could prove that Al had the requisite
intent to support a criminal conviction. The prosecution objects to the psychologist’s testimony. How should the court rule?

(A) Overruled, if the psychologist is testifying about an ultimate issue, because ultimate issue testimony is admissible, and the jury remained free to make its own determination about whether Al had the mental state or condition that constitutes an element of the crime charged.

(B) Overruled, if the psychologist is testifying about an ultimate issue, because experts are competent to give any opinion testimony they wish.

(C) Sustained, if the psychologist is testifying about an ultimate issue, because ultimate issue testimony is inadmissible because ultimate issues are for the jury to determine.

(D) Sustained, if the psychologist’s methodology is not generally accepted among psychologists.

**Question 18** (10 points)

Explain whether you think the court properly sustained the objection that Al’s defense counsel made to the prosecutor’s offer of proof concerning Dan and his testimony about Al’s allegedly common plan to defraud customers.

**Question 19** (18 points)

If, related to the allegedly fraudulent loan application that Al submitted to Citibank (on Al’s Antiques’s behalf), the prosecutor wants to introduce into evidence video security footage from Citibank, which shows Al walking into Citibank, meeting with a loan officer, shaking hands with her, and then walking out of the bank, explain how the prosecutor should be prepared to respond to hearsay and authentication objections.