EVIDENCE
FINAL EXAM, FALL 2013
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(For the essay questions, provided here are high-scoring sample student answers; I may not agree with everything in them. I have attempted to faithfully reproduce them, typographical & grammatical errors & all.)

Answer Key

1. A-602
2. C-701
3. D-803(2)
4. A-901(a), 104(b), & Lockhart v. McCotter (unique evidence)
5. A-901(a), 104(b), & United States v. Collado (fungible evidence)
6. D-612
7. B-602, 701, 901(a)-(b)(2)
8. C-608(a) (bolstering)
9. C-801(d)(1)(B)
10. B-803(7)
11. D-901(b)(1)
12. A-marital communications privilege (e.g., confidential?)
13. B or D-(610 & Firemen’s Fund Insurance Co. v. Thien & Advisory Committee Notes (1972) @ 905—bias is relevant, distinct from credibility, & not prohibited by 610)
15. D-404(a)(2)(B) (impeachment through pertinent character trait of dishonesty) & 405(a)
16. B-404(b)(2), 405(b)
17. A-704(b) & United States v. Finley
18. Sample Answer A
The court improperly sustained Al's objection to the proof of a common scheme to defraud.
In a trial based on fraud, the prosecution can introduce evidence to prove that
the defendant’s activities established a common scheme to defraud creditors. The issue is whether this type of evidence of Al's character is admissible in a criminal case. Under the Federal Rules of Evidence, the prosecution cannot introduce evidence of a defendant’s character to show conduct in conformity with that character on a specific occasion. An exception to that rule is when the defendant's conduct is used to show a common scheme to commit a crime. Here, Dan's testimony shows just that. Therefore, it should not be considered impermissible character evidence. Accordingly, it should be allowed in under the Rules of Evidence to show a common plan or scheme. Evidence must be relevant to be admitted in court. Here, the evidence is relevant because it has a tendency to prove or disprove a matter in issue in the case. Only relevant evidence will be allowed in by the court in a proceeding and proving a common plan or scheme by a defendant is certainly relevant, even though it is a past act by the defendant. Other exceptions to this rule include evidence establishing motive, opportunity or identity of the defendant. These types of evidence have been deemed relevant and are admissible in a criminal trial under the Federal Rules of Evidence.

Sample Answer B:
The court erred in sustaining Al's objection to the testimony of Dan. The issue is whether Dan, a witness, may testify as to outside circumstances of events that establish a common scheme or plan by the defendant. New York's rule of evidence, as established by the common law of evidence, would allow such relevant testimony to show a common scheme or plan by Al to defraud his customers. Evidence law, in general, allows the admission of any relevant testimony. Evidence is relevant if it tends to prove or disprove a dispositive issue. The testimony of Dan was clearly relevant as an uncharged prior bad act because it met an exception to the rule that unrelated events are not admissible. Under the "MIMIC" rule as adopted in New York, evidence of motive, intent, identification, or a common scheme or plan is admitted as relevant evidence. Dan's testimony shows that Al committed similar acts to the ones at issue and should have been admitted. In this case, there is little chance that the prejudicial value of this testimony will outweigh its beneficial one, since Al is already convicted of six counts of similar larceny. The evidence should have been admitted.
19. **Sample Answer A**

This evidence is relevant under 401 because it has the ability to prove or disprove the fact that the defendant went to the bank and secured improper loans (material fact).

The first issue for the prosecutor to introduce the video surveillance footage is whether the video itself represents an assertion made out of court, that is being introduced for the truth of the matter asserted?

A statement made out of court, that is being introduced for the truth of the matter asserted, is not permitted under hearsay. Such statements made be used for other purposes.

In this present case, it is difficult to determine who the actual declarant is. Most likely, it is the bank surveillance system itself, thus the declarant most likely being the bank. The difficulty in this case is whether there was an actual statement made. The defense will argue that the prosecutor is trying to show the video in order to prove the defendant was in fact in the bank at that time. In this sense, the government would have a difficult time arguing against this point. The video itself is a testament to the fact that Al was present and negotiated some sort of loan.

However, the next step in the analysis seems to be murky because there must be a determination of whether the video constitutes a direct assertion. The defense will argue that this is a direct assertion because it is a video depicting the defendant in the bank and is clearly conveying the message that Al was in fact at the bank on that particular day. However, the government will argue (correctly) that the surveillance video itself is not a direct assertion because the video runs on a loop and is constant. Rather than asserting that the defendant was there on that particular day, the video itself is not assertive conduct by any means. In order for the video to be considered hearsay, it would have to have been recorded for the direct purpose of conveying some sort of message. The video is unstaged and was not taken in lieu of conveying an assertion.

If the defendant’s argument is accepted, the evidence will be excluded as hearsay because it is being offered to prove the truth of the matter asserted. However, this will not be the case because the video itself is not hearsay, not due to an exception, rather because the video is not an assertion at all.

The second issue is whether the Prosecutor can properly authenticate the
surveillance video in order to survive a lack of foundation objection by the defense?

In order to property admit evidence, there must be a sufficient evidentiary basis that the evidence is what it is purported to be. Once authenticated, the court will mark the evidence as an exhibit. This only applies to tangible evidence and testimony is not subject to authentication.

In order for the prosecution to properly authenticate the video to admit it into evidence, it must be established that this video is in fact an accurate depiction of what occurred that day. In order to do this, the prosecution’s strongest option is to get the loan officer, or any bank employee who was present in the bank at that time and saw the defendant while the video was recording and have them testify to personal knowledge. The prosecutor can call to the stand any of the above named witness (those in the bank that day and saw defendant at the particular moment the film was recording) and ask them if the video is a fair and accurate representation of what the witness saw that day. The witness must be testifying from personal knowledge, so the prosecutor must be careful to secure a witness who ACTUALLY saw the defendant in that moment first hand. There is no objection the defense can make if the prosecutor does secure such a witness.

If such witnesses with personal knowledge are unavailable to testify in lieu of authentication, the prosecutor must then look towards the methodology of the camera system in the bank. The prosecutor can then call a witness familiar with the surveillance system within the bank. Such witness can testify to their personal knowledge regarding the manner in which the camera and the film are installed, how the camera was activated, when the film was removed from the camera, and the chain of possession. If these elements are testified to from personal knowledge, the evidence is properly authenticated. The reason for this is because there is sufficient reliability regarding the content of the video and is supported by an individual who knows how, where and when the video was taken and stored. Moreover, the chain of possession would allow the evidence to carry much more weight. Most likely, the prosecutor can call the individual who installed the cameras, who removed the film, and who maintained the cameras. It is highly likely that in the absence of a witness to testify from personal knowledge that the video is an accurate representation of what the bank looked like that day, the prosecution can still properly
authenticate the evidence.

The third issue is, even if properly admitted, will the video surveillance survive a 403 balancing test?

In this instance, it appears that the probative value of the camera is very high. The defendant will argue that this probative value is substantially outweighed by the prejudice it will cause on the defendant because it clearly shows the defendant in the bank, however it does not represent what actually occurred. If the video is showed to a jury, the jury will almost certainly believe the prosecution, however the defendant may have just been at the bank for reasons unrelated to the crime at hand. However, this is a weak argument because it is highly probative and the determination of what the defendant’s purpose of being in the bank that day will be left to the jury to decide.

Therefore, this evidence would almost certainly survive the 403 balancing test because the video’s probative value is not substantially outweighed by the unfair prejudice.

Lastly, whether the evidence is subject to the best evidence rule?

The best evidence rule only applies to tangible evidence and not demonstrative evidence. In this sense, the video is tangible evidence and not demonstrative because the video is not being used to show the physical condition of the bank at the time, rather that the defendant was there. This is debatable however because the evidence itself must be at issue in the trial. The defense may very well deny the video’s contents, thus putting the contents at issue in the case, which subjects the evidence to the best evidence rule. However, it is arguable that this is merely a recordation of events and there is little room to dispute the content.

The prosecution must be aware of this and there are different thresholds permitted under Rules 1001-1004. The requirements are that the original copy should be produced, and if it is not ascertainable, a duplicate will suffice. And if this is impossible, secondary evidence may be admitted as long as it is not within the control of the party trying to bring the evidence and not their fault that the evidence is missing.

Ultimately, there is no indication that the video intended to be introduced by the prosecution is not the original and thus there is no real issue. Mainly, the prosecutor should just be prepared the have the video challenged on the best evidence rule.
Sample Answer B:

Hearsay is an out of court statement, offered in Court to prove the truth of the matter asserted. In this case, I think the prosecutor should anticipate an hearsay objection automatically from the defense, in that they would likely argue that this is classic hearsay. The defense would likely argue that its hearsay because the movie is a statement, in which the assertive conduct by Al in the tape is intended to show the Al made a fraudulent loan application. I would advise the prosecution to argue, that motion pictures are not hearsay. Under Grimes, the DC of Alaska ruled that motion pictures are not hearsay and are admissibly through the witness who verifies the film and uses the film. I would advise that the prosecution, call in the loan officer, and have her ready to testify to the nature of the video and the events depicted in the video. I would further argue that the prosecution, argue, that this surveillance camera, is an automated device, that it continues that it was not created solely for the purpose of Al’s visit to the bank. The camera had no control by a human and that it is reliable.

I would further advise the prosecution to argue additionally, that this is not hearsay, because it is not an assertive conduct. I would advise the prosecution to argue that Al walking in the bank, meeting with the loan officer, shaking her hand, and leaving the bank is not an assertive conduct. The would suggest the prosecution to state that his movements are not interpreted to mean a direct communication of some fact, by him just simply walking into the bank and shaking his hand does not have any direct assertion that he intends to make a fraudulent loan application. These acts of no legal significance to them.

I would further advise the prosecution, to argue that this is not hearsay because it not offered to show the truth of the matter. I would the P to argue that even if this may be consider a direct assertion, I am not introducing this evidence to show that Al met with the loan officer. I am showing it for an alternative motive. I am showing the tape to show that Al did make fraudulent application.

I would advise the P to state that there is no indication of unreliability in the tape recording, and that one of the major policy reason in not allowing, hearsay evidence in, is that we are not able to judge the demeanour of the person. I would say that the P should say you can see the D on the camera.
Even assuming that this is hearsay, I would suggest the 803(6) applies as an exception to hearsay applies. I would argue that the declarant, the video camera does not have to be unavailable to be present. I would have the P argue that this was a regularly conducted business activity of the bank. I would argue that a videotape can be considered a recording and is of an act and event. I would argue that it was made during the time of the event by someone of knowledge. I would suggest again to have the loan officer be ready to testifying about this, or the security officer do so. I would also have the P argue that this is a regular practice of the bank to record everyone who comes in the bank, and this is shown again by the loan officer, security officer, or someone with knowledge of their regularly conducted business practices. I would advise the P to in order to have a tangible evidence admitted it must be first authenticated. In order to field any authentication objections, I would have the P produce sufficient evidence to support a finding that the item is what the P claims it to be. I would tell the P you need a witness who has personal knowledge of this I would again, have the loan officer, testifying to this. I would have them testify, in that by asking her “Do you know what this is?” “Do you know who the persons in the video are?” “Has this film been altered in any way.” I would advise the P that in order to satisfy the best evidence rule, that the P should bring in an original video tape of the surveillance. I would suggest that in order to rebut against any possibly claim that the video was altered in someway. I would tell them that BER applies to videos to as a form of “photograph. This would help resolve any authentication issue. I would suggest that this though may not apply, if you bring in the loan officer to testify, because the loan officer is bring in the substantive evidence, and all that the video that is doing is just illustrative in nature.