

EVIDENCE ASSIGNMENTS

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CASEBOOK: EVIDENCE, CASES AND MATERIALS, 9TH EDITION WEINSTEIN, MANSFIELD, ABRAMS & BERGER

Federal Rules of Evidence - 2013 Rules (You may download them)

NOTES:

- 1) **Office Hours:** Half an hour before and after each class. Also, available by appointment.
- 2) **Class Participation:** Class participation is critical to learning. Students are expected to be prepared for class. Preparation requires more than simply reading the assignment. To be prepared students must both have read and spend time trying to understand the cases before class. In this class, hypotheticals will be used extensively. The purpose of a hypothetical is to give students an opportunity to assess their knowledge of the materials. Students who do not try to answer hypotheticals will deprive themselves of critical feedback. If you are not called on, think of what your answer would be and compare it to the students who are responding.

This feedback mechanism is solely designed to assist students in evaluating their knowledge of the materials. Each class is an informal examination. Each class is designed to provide a measure of how much you have learning.

Failure to provide an answer to a class question that shows that you have some familiarity with the assigned reading and are making an effort to answer the question may lead to a reduction in your final grade.

- 3) **Attendance:** Good and regular attendance is mandatory. Attendance will be taken and an excessive number of absences may lead to involuntary withdrawal from the class.

- 4) **Final Examination:** Closed book.

- 5) **Assignments:** The schedule identifies specific Federal Rules of Evidence that are to be read in conjunction with the assignments.

- 1) Students will be expected to have carefully read the assigned Federal rule prior to class and to be able to explain each such rule *during the class session*. If the rule contains elements, students must be able to identify those elements.
- 2) The assignment for the next class is always the reading of approximately 50 pages from the last case discussed in the prior class.
- 3) The major cases that will be discussed in class are specifically noted in the assignment to facilitate class preparation.

ASSIGNMENTS

ASSIGNMENTS FOR THE FIRST TWO CLASSES: Judicial Notice & Witness Examination up to and including Past Recollection Recorded.

Judicial Notice:

FRE 201; 1238-1247; 237-246; 333-339; 316-333

Witness Examination

Direct (Rule 611(c))-- 333-339

Straub v. Reading Co.; 335-339 (important pages)

Preparation of Witnesses -- 316-333; 237- 246

Resolution Trust Corp. v. Bright

Opinion NO. 79, Legal Ethics Committee

Refreshing (Rule 612) -- 340-352

US v. Riccardi

Past Recollection Recorded (Rule 803(5)) -- 539-540

US v. Porter

Cross -- (Rule 607,611(a)(b)(c)) -- 362-381

Finch v. Weiner

People v. Sallis

Redirect — 381-385

Commonwealth v. O'Brien

Real Proof/Relevance

Factual Relevance (Rule 401,901)-- 97-122

McAndrews v. Leonard

Baillet Latour v. Baillet Latour - 94

Almeida v. Corriea

Bruce's Juices v. US

Miller v. Pate - Add the following facts:

The "blood" was Type A

The decedent had Type A blood

40% of the population has Type A blood

The shorts were found 3 days after the crime

Anderson v. Berg

Preliminary Issues of Fact (Rule 104 (a) & (b)) - 169-172

Sliker v. US

Logical Relevance (Rule 401)-- 1-15

People v. Adamson

Prejudice -- (Rule 403) -- 15-35

State v. Poe
US v. Zimeri-Safie
State v. Bray
Robbins v. Whelan
Old Chief v. US

Reproductions/Photographs -- (Rule 901) -- 150-176

Knihal v. State
Loftin v. Howard
Bannister v. Town of Noble
US v. Carbone

Diagrams -- 176-181

Views -- 136-139

People v. Crimmins

Demonstrations -- 139-150

Larramendy v. Myres
Hall v. GM

Writings

Foundation -- (Rule 901-902) -- 181-211

Keegan v. Green Giant Co.
US v. Labovitz
Zenith Radio Corp. v. Matsushita Electric Industries
University of Illinois. v. Spalding

Best Evidence (Rule 1002, 1004, 1006, 1007)-- 211-237

Myers v. US
Davenport v. Ourisman-Mandell Chevrolet, Inc.
Amoco v. US Relevance and Sufficiency

Circumstantial Proof -- 35-51

Regina v. Onufrejczyk

Statistical Proof -- 51-79

People v. Collins
Smith v. Rapid Transit, Inc.
State v. Rolls

Review of Relevance

Collateral Evidence (Rule 607 - U.S. v. Abel, p. 406) -- 402-407

State v. Oswald
Stephens v. People
People v. Pargo
People v. Terczak

People v. Wilson

Competency

Common Law – (Rule 601) – 255-277

Rock v. Arkansas

Zeigler v. Moore

Truthfulness -- 285-291

US v. Ward

Ability to Perceive – (Rule 602) -- 291-297

State v. Ranieri

Infancy -- 297-305; 563;

Mental Disease – 305-316

Opinion Evidence

Lay Opinion -- (Rule 701) --352-362

Wilson v. Pennsylvania RR Co.

US v. Stamps

Expert Opinion -- (Rule 702-5) -- 954-1067

Een v. Consolidated Freightways

People v. Taylor

Meier v. Ross General Hospital

Daubert v. Merrell Dow Pharm.

US v. Chischilly

US v. Scop

US v. West (Rule 704)

Rabata v. Dohner

Pelster v. Ray (Rule 703)

People v. Anderson

Learned Treatises -- (Rule 803(18)) -- 766-771

Lie Detectors -- 467-471

Cross Examination

Anticipating Cross -- 385-390

US v. Cosentino

Impeaching Own Witness –(Rule 607) - 390-401

Impeachment Subject Matter

Bias -- 406-416

Gordon v. US

US v. Campbell

Henning v. Thomas

Grudt v. City of LA

Crimes -- (Rule 609) -- 416-429

People v. Sandoval, 34NY2d 371 (1974)

US v. Valencia
Cree v. Hatcher
Bad Acts -- (Rule 608) -- 429-438
People v. Sorge
People v. Duffy, 36NY2d258 (1975)

Statements

Prior Inconsistent — (Rule 613; 801(d)(1)(A)) -- 453-462; 522-530
Denver City Tramway Co. V. Lomovt
Rowe v. Farmers Insurance Company, Inc
Nucci v. Proper, 95NY2d 597 (201)
Letendre v. Hartford Ins Acc & Indemntiy Co,
21 NY2d 518 (1968)
Prior Consistent -- (Rule 801 (d)(1) (B)) -- 540-549; 552-554
Tome v. US
Beech Aircraft Corp. V. Rainey (Rule 106)

Circumstantial Proof

Character

Other Crimes -- (Rule 404, 405) -- 808-815; 819-853; 861-875
People v. Molineux, 168NY264 (1901)
People v. Zackowitz
State v. Spraggin
State v. Abercrombie
People v. Steele
Gaddis v. State
People v. Cole
US v. Montalvo
People v. Santarelli (Review 703 & 702 with these facts)
State v. Bock
US v. Figueroa
Lyles v. State
Huddleston v. US
Reputation -- (Rule 803(21); 404 (a); 608(a)) -- 875-887; 438-447; 464-467
Michelson v. US
US v. Dotson
Civil Cases -- 914-921
Dallas Railway & Terminal CO. v. Farnsworth
Habit & Custom -- (Rule 406) -- 921-926
Frase v. Henry
Settlement Offers -- (Rule 408) -- 938-947

Hearsay

Rule 801

Definition (Rule 801 (a))-- 475-522

Leake v. Haggert
People v. Eady
Brown v. Coca Cola
Kingdon v. Sybant
Safeway Stores Inc. v. Combs
Hanson v. Johnson
Koury v. Follo
US v. Jackson
Betts v. Betts
Bridges v. State
State v. Galvan
Rex v. Wysochan
Wright v. Doe D. Tatham
Silver v. New York Cent. R.R. Co.
Kinder v. Commonwealth

Admissions (Rule 801(d)(2)(A-E))-- 563-605

Bill v. Farm Bureau Life Insurance Co.
Schrffius v. Orr
East Kentucky Rural Electric Co-op. v. Phelps
US v. McKeon
Mahlandt v. Wild Canid Survival & Research Center, Inc.
Brookover v. Mary Hitchcock Memorial Hospital
Wilkerson v. Carnival Cruise Lines, Inc.
Bourjaily v. US
US v. Urbanik

Rule 804

Unavailability - Rule 804(a)(1-5)

Dying Declaration - Rule 804(b)(2)-- 753-760

People v. Callahan
People v. Nieves

Declaration Against Interest- (Rule 804(b)(3))-- 605-634

Potter v. Finan
Carpenter v. Davis
People v. Brown
Williamson v. US

Former Testimony - Rule 804 (b)(1)-- 723-737; 747-752

Lloyd v. American Export Lines, Inc.
Fleury v. Edwards
State v. Ayers
Commonwealth v. Canon --- US. v. Napoli

Rule 803

Business Records –R.803(6) & 803(8)– 679-723

Palmer v. Hoffman

US v. Jacoby

Johnson v. Lutz

Beech Aircraft Corp. v. Rainey

Baker v. Elcona Homes Corp.

Commonwealth v. DiGiacomo

Physical or Mental Condition -- R.803(4) – 645-654; 718-723

Wadena v. Bush

US v. Tome

State of Mind -- R.803(3) – 654-679

US v. Brown

Mutual Life Ins. v. Hillmon

US v. Annunziato

Smith v. Slifer

In re Anderson's Estate

Spontaneous or Excited Utterances -- R.801-2) --634-645

Commonwealth v. Coleman

US v. Obayagbona

Catchall -- (Rule 807) – 774-796

Robinson v. Shapiro

Constitutional Limitations -- Confrontation

Handout:

Crawford v. Washington, 541 U.S. 36 (2004)

Davis v. Washington, 47 U.S. 813 (2006)

Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011)

HOW TO ANALYZE HYPOTHETICALS

When you hear the facts of a hypothetical the first thing that you must do is identify:

- A) Who is the plaintiff.
- B) Who is the defendant.
- C) What does the plaintiff claim happened.
- D) Does the defendant agree.

Only after you have retrieved this basic information can you proceed to analyze the specific problem that the hypothetical is designed to create. If you don't know these basic facts, the hypothetical will be meaningless.

INTRODUCTORY HYPOTHETICAL

John Smith lives about ½ mile West of the Hanson Street park. The park is on Hanson Street, the major north/south street in the city of Hanson. Hanson Street is the demarcation between the residential and commercial areas of Hanson. The park is on the East side of the street. Immediately to the west of the street is a large industrial area that is filled with heavy industry factories, such as steel mills and the like. Immediately across the street from the park is the Hanson Meat Rendering factory. HMR is a large factory extracting fluids from meats. The byproduct of the extraction is the release of an extremely noxious odor. Although HMR has filtering equipment designed to retain the noxious gases, odors are released.

When the wind blows from west to east these odors can be detected in the park. John Smith is the plaintiff in an action to close the plant for violation of Hanson Ordinance #111,

“It is prohibited to impair, pollute or destroy the air or other natural resource. It is an affirmative defense that an industrial release has been caused despite the use of the best available equipment to abate such release.”

The Hanson Street park was developed at about the same time as HMR was built. The parkland had been a farm. The park covers about 12 acres. Fill from the construction of many of the industries and single family homes in Hanson was used to create a sizeable hill. The entire park was planted with as large a variety of local flora as could be assembled. 40 years later, the park has a towering forest area and fields of native plants. Walking tours describe the flora and the fauna that have been attracted to the fields, forest and pond. A large pond was dug and now is a stopping place for migratory birds. Of course, the park also contains a baseball field, a basketball area and assorted playgrounds.

John Smith claims that the smell from the plant literally sickens him and his children and that they have to leave the park. He has four witnesses who support his testimony about the nature of the smell.

HMR will call four witnesses, none of whom can be in any way connected to the company, who will testify that the smell does not bother them and that the park is constantly filled with children and adults, with or without regard to any smells. HMR also will call an

expert witness to testify that it is using the best abatement equipment available for a plant of their size. She will also testify that “better” equipment would be far too expensive and would necessitate a closing of the plant.

Judicial Notice

- 1 - Will the court take judicial notice that the meat rendering process produces an offensive smell.
- 2 - Will the court take judicial notice of the fact that a climate condition known as a heat inversion causes emissions from factories to stay closer to the ground where they can be detected for longer periods.
- 3 - Will the court take judicial notice of the fact that a climate condition known as a heat inversion only occurs during the warmer summer weather?
- 4 - Will the court take judicial notice that the Hanson Street factory is in an “industrial district.”

Direct Examination

- 1 - Q: Mr Smith, you live at 121 Jones Street with your wife and two children, Amy who is 6 and John who is 10?
A: Yes
- 2 - Q: Mr Smith, the smell in the Hanson Street park has made you sick?
A: Yes
- 3 - Q: Mr Smith, where is the Hanson Street park?
A: Across the street from the Hanson Meat Rendering Factory.
- 4 - Smith calls Mr Hanson, the factory owner.
Q: Your factory emits a God awful smell, doesn't it?
Objection

Witness Preparation

5 - Mr. Jones comes to Smith's attorney's office to talk about his testimony. The attorney knows that Jones told Smith that the park is a horror show. When Jones is asked about the park, he says, “It is really a nice place. My kids play there all the time.”

The attorney then says, “Smith is suing Hanson Meat Processing because the smell from the plant makes him and his kids sick. He told me that you were a witness who would help him prove how bad the smell is by testifying that it makes you feel horrible. He needs your testimony.

Is that what you will say?"

Witness say, "I guess so."

Attorney: Smith and all the others say it stinks. Do you disagree with them?

After several hours of such, witness has told the attorney that the smell is so awful that he rarely is willing to let his kids use the park, when the factory is operating. Further, he will say, if asked, that the park is a nice place in which his kids play at the time when the factory is not operating.

Assuming that the local prosecutor hears this conversation, can you imagine a conversation that led the witness to say above without the attorney violating any ethical or legal mandate?

Further, Direct Examination

6 - On Direct Examination in a personal injury case, Witness doesn't remember which car ran the red light. The attorney has an office memo that he wrote after talking to witness that contains an outline of all of the facts in the case. It is marked as Exhibit 1 for Identification.

:

Q: I show you what has been marked Exhibit 1 for identification. Read it.

A: It says that the red car went through the red light. --- Objection

- What is the attorney trying to do? If this is not the right way to do it, what is?
Could he do it if the witness had not already said that he did not remember?

7 - The witness never remembers. The attorney has an office memo that he wrote after talking to the witness that contains an outline of all of the facts in the case.

A) Is there a viable way for the attorney to introduce the memo into evidence as a substitute for the testimony that is not remembered? If so, what has to be said by the witness for this to happen?

Cross Examination

1 - Jones has testified for the Hanson Meat Processing plant that he uses the park all the time and that the smell does not bother him

What single fact would be the most important to emphasize on cross examination? This fact is one that cannot be denied by Hanson and will help plaintiff prevail.