

Presented by Frank R. Acuña, Attorney at Law

Passing the Evidence Essay Section

*Stay Focused, Stay Mechanical
And Pass!*

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Presented by Frank R. Acuña, Attorney at Law

Course Plan – 8 Hours

1. Overview: The Master Mnemonics
2. Relevance & Foundation
- 3-4. Hearsay & Exceptions
5. Hearsay Review
6. Exclusions & Limitations
7. FRE 403, Procedural Matters, Form of the Question
8. Review

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Evidence Study Aids (p.1)

Method:

- One Hour Practice Test
- Check Answers
- Go Back to Your Outline/FRE

Materials:

- Siegel's Evidence: Questions & Answers
- Kaplan PMBR Finals: Evidence
- BAR/BRI: Evidence
- Crunch Time: Evidence (Emanuel)

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Thinking Like a Lawyer - IRAC

- History:
 - Developed by the U.S. Army
 - Pounded into first year law students
 - Is the basis of all legal analysis
- Issue
- Rule
- Application
- Conclusion

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Thinking Like a Lawyer - IRAC

- Military Example: Your M-1 has jammed
- Legal Example: Hearsay
 - Tony, a limousine company owner, is on trial for tax fraud. Evidence is introduced that Tom heard Tony at a bar, bragging that he reported only his credit card payments and cash payments if a customer asked for a receipt. Anything else, he pocketed.
 - Issue: Is Tony's statement hearsay?
 - Issue: Is there an exception to the hearsay rule that applies?

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Thinking Like a Lawyer - IRAC

- Issue: Is Tony's statement hearsay?
 - Rule:
 - Application:
 - Conclusion:
- Issue: Is there an exception to the hearsay rule that applies?
 - Rule:
 - Application:
 - Conclusion:

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Answering Exam Questions (p.2)

- Scan the question
- What is the "Call of the Question"
 - Objections?
 - Admissibility?
 - Rules of Evidence?
 - Others?
- Re-read the question
- Apply the strategy (spot the issues)

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Best Answers (p.3)

Real Friends Have Evidence Lectures at 403 PM Frequently

- Relevance
- Foundation
- Hearsay
- Exclusions & Limitations
- FRE 403
- Procedural Matters
- Form of the Question

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Hearsay Mnemonic (p.3)

ADDEM P. BOPP, SEE ICI!

- Admission
- Declaration Against Interest
- Dying Declaration
- Excited Utterance
- Mental State ("State of Mind")
- Physical State
- Business Records
- Official Written Statement
- Past Recollection Recorded
- Prior Testimony

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Hearsay Mnemonic (p.3)

ADDEM P. BOPP, SEE ICI!

- Sense Impression
- Equivalency
- Expert Cross Examination
- Inconsistent Prior Statements
- Consistent Prior Statements
- Identification of Person

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Example (p.3)

- Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the matter asserted.
 - Statement
 - Other than made by the declarant while testifying at the trial or hearing
 - Offered to prove the matter asserted
- Alternate way of saying it: "Hearsay is an out-of-court statement, made by a declarant, offered to prove the matter asserted"

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Example (p.4)

- IRS wants to establish George was at work at a certain time and day. Sally, another employee, testifies about a conversation she and George had that day about natural grass vs. Astroturf for football.

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Example (p.4)

- IRS wants to establish George overstated the value of the car he gave to charity. Sally, another employee, testifies that she overheard George telling someone that he valued his 1975 Pacer as if it was a 1992 BMW.

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Example (p.4)

- At trial, on the issue of whether Joe was a resident of New York or California for income tax purposes, Joe offers a written declaration by Jane under penalty of perjury that Joe had lived in San Francisco for the past 10 years. Is Jane's declaration admissible in evidence?

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Rules of Evidence – Generally (p.7)

- FRE 101: FRE governs all proceedings in tax court!
- Remember, Overriding Purpose (FRE 102)
 - Fairness in administration
 - Eliminate unjustifiable expense and delay
 - Promote truth and justice
- Burden at Trial
 - Representative must make timely objections and preserve the record!
 - Issue on appeal: Did admission/exclusion affect a substantial right of a party (vs. harmless error)

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Reversible Error, Defined (p.7)

- Did the ruling to admit or exclude the evidence unjustly decide the case?
 - If excluded, was other evidence admitted that, if believed, could have established the same fact? ("Harmless Error Doctrine")
 - If admitted, did the prejudicial effect of the evidence outweigh its evidentiary value?
- Remember the "Plain Error Doctrine".
 - Most commonly found in criminal cases
 - Did the error affect the fairness, integrity, or public reputation of the judicial proceedings?

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Note: Standards of Proof

- Preponderance of the evidence (a hair more than 50%)
- Clear and convincing (a firm belief concerning the truth of the facts)
- Beyond a reasonable doubt and to a moral certainty (criminal cases)
- Example: Auto collision case. P has proved damages; liability and identity of driver at issue.

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Evidence Attack Plan (p.8)

- Is the evidence **R**elevant?
- Can a proper **F**oundation be laid?
- Is it **H**earsay?
- Are there policy reasons to **E**xclude or **L**imit the evidence?
- Does FRE **403** apply?
- Have all **P**rocedural **M**atters been met?
- Is the **F**orm of the question proper?

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Master Mnemonic: Real Friends Have Evidence Lectures at 403 PM Frequently (p.8)

Relevance (FRE 401-402)

- All relevant evidence is admissible. Evidence that is not relevant is not admissible.
- Test: Does the evidence have a reasonable tendency to prove or disprove an issue?
- Are there exclusions?
 - Character
 - Habit
 - Policy Issues

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Foundation

- Authenticating evidence and identifying witnesses (FRE 901 et seq.)
 - Is the evidence what it says it is?
 - Is there the possibility of manufacturing or corruption? (chain of custody)
 - Are the witnesses competent and qualified?
- Foundation will differ depending upon the type of evidence it is
- Example: QuickBooks records of deposits and expenditures

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Foundation

- Witness Testimony (factual) (FRE 601)
 - Competent to testify
 - From their own personal knowledge
- Expert Opinion (FRE 702)
 - Subject beyond common experience
 - Expert is qualified
- Lay Opinion (FRE 701)
 - Subject not beyond the common experience
 - Based on witness perception
 - Discretionary admission

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Master Mnemonic: Real Friends Have Evidence Lectures at 403 PM Frequently (p.8)

Foundation

- Judicial Notice (FRE 201)
 - Can be verified by sources whose accuracy is beyond reasonable dispute
 - Generally known within the territorial limits of the court
- Writings, Recordings, Photographs (FRE 1001)
 - Extremely broad. Basically, any tangible (discernible by the senses) evidence
 - Is it an accurate depiction/recording?
 - Is an object real, or fake?
 - If an example/demonstration, is it a fair representation under “substantially similar conditions?”

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A Note on Depositions (p.9)

- Deposition Uses:
 - To discover the other side's facts
 - To preserve testimony of unavailable witnesses
- Limits:
 - Proffering party may not use depositions in lieu of testimony unless the witness is unavailable and the opposing party had the opportunity to depose
 - Adverse party may use depositions for any reason
 - Either party may use depositions to impeach a witness, even their own!
 - Example: Sleazy Sam testifies in deposition that the QuickBooks account is the only one that existed. At trial, Company puts him on the stand, expecting the same testimony. However, Sam starts testifying as to a second set of books.

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Master Mnemonic: Real Friends Have Evidence Lectures at 403 PM Frequently (p.9)

Hearsay

- General Rule: Hearsay is
 - A statement
 - Other than made by the declarant in the trial or proceedings
 - Offered to prove the matter asserted
- Example: W testifies that D (a limo driver) stated he did not report his cash receipts as income on his tax return. IRS is trying to prove that D under-reported income.
- What if roles were reversed and D testified that W stated W did not report income on Form 1040 at the trial of D's under-reporting?

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Hearsay Attack:

- Is there an assertion?
- Was it made out of court?
- Who is the declarant?
- What was asserted?
- Is the assertion relevant for a non-hearsay use (something other than the matter asserted?)
- Is there an exemption or exception to the hearsay rule that applies (Addem P. Bopp, See Ici!)

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- Watch Out for Multiple Hearsay (FRE 805)
 - A statement may contain testimony of another statement
 - All statements must be analyzed separately before any statement may be admitted
- Example: On an invoice, a customer writes, "Return due to defective Widget L-5". Shipping clerk testifies to having seen the invoice and what was written on the invoice.
 - What are the hearsay levels?
 - Who are the declarants?
 - Do you think it should come in? Why? Why not?

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Master Mnemonic: Real Friends **H**ave Evidence Lectures at 403 PM Frequently (p.10)

- The Master Mnemonic
 - Addem P. Bopp, See Ici!
- Stay Mechanical!
 - Analyze each level of hearsay separately to determine if an exception or non-hearsay use applies!

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Master Mnemonic: Real Friends Have **E**vidence
Lectures at 403 PM Frequently (p.11)

- Exclusions & Limitations
 - Some evidence is automatically excluded or limited, as a matter of public policy, because of the danger of being more prejudicial than probative.
- Generally:
 - Character Evidence
 - Privileges

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Master Mnemonic: Real Friends Have **E**vidence
Lectures at **403 PM** Frequently (p.11)

Clean-Up Objections:

- FRE 403 – Judge's discretion to exclude if:
 - More prejudicial than probative
 - Confusing
 - Cumulative
 - Waste of time (judge is getting bored)
- Procedural Matters
- Form of the Question

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Questions?



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Evidence Attack Plan

- Is the evidence **Relevant**?
- Can a proper **Foundation** be laid?
- Is it **Hearsay**?
- Are there policy reasons to **Exclude** or **Limit** the evidence?
- Does FRE **403** apply?
- Have all **Procedural Matters** been met?
- Is the **Form** of the question proper?

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Relevance (p.11)

- General Rule: All relevant evidence is admissible. Evidence which is not relevant is not admissible. FRE 402
- Two types of relevance:
 - Logical Relevance
 - Does the help to prove a fact necessary to establish a cause or defense?
 - Legal Relevance
 - Is the evidence substantially more prejudicial than probative?

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Logical Relevance (p.11)

- What are the elements of the cause of action or defense?
- What facts are necessary to prove each element?
- Does the evidence help to prove a single fact?
- Example: Murder is the killing of a human being with malice aforethought.
 - Elements:
 - Was there a killing?
 - Was the victim a human being?
 - Did the accused have the appropriate mental state (premeditation)
 - Proffered Evidence:
 - "I heard Bill tell Joe, 'I'm gonna kill Harry'"
 - Does this statement help to prove any fact that is relevant to the elements of murder?

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Logical Relevance (p.11)

- What are the elements of the cause of action or defense?
- What facts are necessary to prove each element?
- Does the evidence help to prove a single fact?
- Tax Example: Tax Evasion
 - Elements:
 - An attempt to evade or defeat a tax or the payment of a tax;
 - An additional tax due and owing; and,
 - Willfulness.
 - "I heard Bill tell Joe, 'I'm not going to report the \$10,000 gift my Aunt Maisie gave me'"

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Relevance: Pop Quiz

- 2016/E-6 (6 minutes) Assume the following facts for Questions E1-E10. Taxpayer ("TP") has filed a petition with the Tax Court contesting an alleged income tax deficiency and a §6662(b)(1) penalty. The IRS contends that TP improperly reported \$250,000 as a charitable contributions deduction on TP's 2012 individual tax return, and that a §6662(b)(1) penalty applies. TP challenges these contentions, arguing that the \$250,000 charitable contributions deduction was proper, and that no §6662(b)(1) penalty is warranted.
- Assume that TP is on the witness stand . . . TP's attorney asks TP "What did you do after you talked with your brother on the telephone?" TP responded, "Well, before I answer your question, I must say this. I think the IRS should be abolished because it is crooked agency." The IRS objects to TP's testimony arguing that the statement is not pertinent to the case at bar. TP contests this claim. How should the court rule?

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Relevance: Pop Quiz

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- Assume that TP is on the witness stand . . . TP's attorney asks TP "What did you do after you talked with your brother on the telephone?" TP responded, "Well, before I answer your question, I must say this. I think the IRS should be abolished because it is crooked agency." The IRS objects to TP's testimony arguing that the statement is not pertinent to the case at bar. TP contests this claim. How should the court rule?
- SUGGESTED ANSWER: Sustained. The statement should be stricken as irrelevant. It does not tend to prove or disprove any fact that is relevant to a tax deficiency or §6662(b)(1) case and should not be admitted under FRE 401.

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Legal Relevance (p.12)

- Test: Evidence may be excluded if its probative value is substantially outweighed by the dangers of
 - Unfair prejudice
 - Confusion of the issues
 - Misleading the trier of fact
- Example: Testimony which may help prove/disprove guilt in a criminal case, but contains racist statements, as well

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Rehabilitating Evidence (p.12)

- Courts will consider:
 - Limiting instructions (for juries) or limited purposes to admit
 - Alternative evidence
 - Materiality
 - Nature of Risk
- Example: "You are instructed not to consider the witness's racist language contained in his/her statement"

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Legal Relevance Exclusions (p.13)

- Subsequent Remedial Measures. FRE 407
 - Cannot be used to prove liability or negligence causing injury
 - But can it be admitted to prove something else?
 - Example
- Liability Insurance. FRE 411
 - Cannot be used to prove liability
 - But can it be admitted to prove something else?
 - Example

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Legal Relevance Exclusions (p.14)

- Payment of medical or similar expenses. FRE 409
 - Humanitarian concern does not establish liability for an injury
 - Example
- Compromise and offers to compromise. FRE 408
 - May not be used to prove liability.
 - May be used to prove bias, prejudice, obstruction.
 - May be used to negate a claim of undue delay in prosecution or obstruction.
 - Example

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Relevance: Pop Quiz

- 2016/E-7 (6 minutes) Assume that TP is on the witness stand. On cross-examination, the IRS asks TP "Isn't it true that just last year in a letter you sent to the IRS you offered to concede that you underpaid your federal income tax and were subject to a §6662(b)(1) penalty in exchange for a negotiated resolution to this matter?" TP objects to this question arguing that his tax liability cannot be proved with such evidence. The IRS submits that TP's objection is without merit. How should the court rule?

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Relevance: Pop Quiz

- 2016/E-7 (6 minutes) Assume that TP is on the witness stand. On cross-examination, the IRS asks TP "Isn't it true that just last year in a letter you sent to the IRS you offered to concede that you underpaid your federal income tax and were subject to a §6662(b)(1) penalty in exchange for a negotiated resolution to this matter?" TP objects to this question arguing that his tax liability cannot be proved with such evidence. The IRS submits that TP's objection is without merit. How should the court rule?
- ANSWER: Sustained. Prior settlement attempts are not admissible to prove liability under FRE 408, which encourages settlements. (12/12)

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Legal Relevance Exclusions (p.14)

- Pleas, discussions, and related statements.
 - Guilty pleas that are withdrawn cannot be used.
 - Nolo contendere not dispositive in civil cases.
 - Any statements regarding those pleas.
 - However: May be used to show perjury or falseness if under oath, on record, and in the presence of counsel.
- Bottom Line: High public policy in favor of settling cases and expediting criminal dispositions.
- Examples: Offers in Compromise?

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Relevance: Pop Quiz

- Three good old boys, are duck hunting when Boater runs into them and injures all three. At trial, can the first GOB introduce testimony by the other two that Boater settled with them?

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Relevance: Pop Quiz

- Worker cuts off his hand on the drill with which he works. He brings a negligence action against his employer. He offers, as evidence of negligence, testimony that the day after the accident, Company placed safety devices on the machines.
 - Objection?
 - Ruling?

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Relevance: Pop Quiz

- Engineer dozes off at the controls and doesn't realize Pedestrian has fallen in front of the train. The train runs over Pedestrian, severing his legs. Pedestrian lives and testifies that Engineer called him and said: "Gee, I'm sorry. I fell asleep at the wheel. It was all my fault. I'll pay your medical bills." Can (1) this statement (or any part) or (2) Naya's payment of Anna's medical bills, be admitted as evidence of liability at a subsequent trial?

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Relevance: Pop Quiz

- 2002/E-12 (4 minutes) Assume that IRS Agent Alan is permitted to review a report he made of a meeting with taxpayer Juan. He will review his report and testify that, during the meeting, Juan said to him: "I know that I should have included it. Can't we settle this for half of what I owe?" Is Alan's testimony regarding this statement admissible against Juan? Explain briefly.

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Relevance: Pop Quiz

- 2002/E-12 (4 minutes) Assume that IRS Agent Alan is permitted to review a report he made of a meeting with taxpayer Juan. He will review his report and testify that, during the meeting, Juan said to him: "I know that I should have included it. Can't we settle this for half of what I owe?" Is Alan's testimony regarding this statement admissible against Juan? Explain briefly.
- SUGGESTED ANSWER: No. Statements made in an attempt to settle a case prior to trial are not admissible under FRE 408.

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Relevance: Pop Quiz

- 2010/E-4 (6 minutes) T asked her accountant, A, to prepare a report in which A summarized and categorized the expenses claimed by T associated with the meeting. T submitted the report during settlement negotiations with the IRS. When no settlement could be reached, T stated that she would use the report during trial of the case. C indicated that he would object to the introduction of the report on the grounds that the report was submitted to C during settlement negotiations and, accordingly, was evidence of conduct or statements made in compromise of negotiations and barred under federal Rule of Evidence 408. T filed a motion in limine, requesting a ruling on the admissibility of the report. What would be the proper ruling of the Tax Court, and why? (Assume that, if necessary, the requirements of Tax Court Rule 143(g) have been satisfied.)

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Relevance: Pop Quiz

- 2010/E-4 (6 minutes) T asked her accountant, A, to prepare a report in which A summarized and categorized the expenses claimed by T associated with the meeting. T submitted the report during settlement negotiations with the IRS. When no settlement could be reached, T stated that she would use the report during trial of the case. C indicated that he would object to the introduction of the report on the grounds that the report was submitted to C during settlement negotiations and, accordingly, was evidence of conduct or statements made in compromise of negotiations and barred under federal Rule of Evidence 408. T filed a motion in limine, requesting a ruling on the admissibility of the report. What would be the proper ruling of the Tax Court, and why? (Assume that, if necessary, the requirements of Tax Court Rule 143(g) have been satisfied.)
- SUGGESTED ANSWER: The Court should rule in favor of T's motion in limine, permitting the report to be introduced at trial. The purpose of FRE 408 is to encourage settlement, so it prohibits one party from using statements or writings made during settlement negotiations against the party who submitted it. However, FRE 408 does not prohibit a party who prepared and submitted a writing during negotiations from using the same material at trial. The report was prepared by T's accountant and is admissible if T proffers it at trial. (6/6)

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Relevance: Pop Quiz

- 2000/E-5 (3 minutes) The IRS asserts that Sam Taxpayer underreported his gross income and overstated his expenses on his Federal income tax return for 1999. Sam operates a small business, "Sam's Speedy Pizza Service," as a proprietorship. He employs 20 people. A trial in the United States Tax Court raised several evidence issues.
- Counsel for Sam called Sam to the witness stand. He testified regarding his income and deductions during the year in issue, 1999. The IRS cross-examined him by asking: "Earlier this year didn't the IRS assert a claim against you for unpaid Federal income tax for 1999, which you attempted to settle by offering partial payment?" Sam's counsel objected. Is this a permissible cross-examination question? Answer "yes" or "no," then explain briefly.

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- Counsel for Sam called Sam to the witness stand. He testified regarding his income and deductions during the year in issue, 1999. The IRS cross-examined him by asking: "Earlier this year didn't the IRS assert a claim against you for unpaid Federal income tax for 1999, which you attempted to settle by offering partial payment?" Sam's counsel objected. Is this a permissible cross-examination question? Answer "yes" or "no," then explain briefly.
- SUGGESTED ANSWER: No. Any statement made during an actual or attempted compromise or settlement of a disputed claim is not admissible to prove the validity or value of a claim. FRE 408 is stated this way to encourage out-of-court settlements without fear of negotiations being used later as evidence.

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Foundation (p.15)

- Has a proper foundation been laid to establish that the evidence meets a minimal level of trustworthiness?
- Each type of evidence has its own foundational facts.

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Foundation: Witness Testimony (p.15)

- Legally competent?
 - Minors?
 - Mentally incompetent?
- Tests:
 - Able to accurately recount facts, give meaningful testimony, understand the oath and obligation to tell the truth
 - Must have personal knowledge!

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Foundation: Opinion Testimony (p.15)

- Lay Opinion
 - Rationally based on witness's perception
 - Adequate opportunity to perceive
 - Special need to understand witness's testimony or determine a fact at issue.
 - Not the subject of expert testimony!
 - Must be a matter of common experience.

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Pop Quiz: Lay Opinion

- Victim is found dead in his study by his maid. Badguy is arrested and tried for murdering Bart by filtering sodium cyanide into the study. Maid testifies for the prosecution: "When I found him, there was a faint smell of almonds in the room." (The distinctive smell of sodium cyanide is often likened to the smell of almonds.) Defense counsel objects, claiming that Maid isn't competent to offer her opinion on the presence of sodium cyanide and that expert testimony is needed.
 - How do you rule?

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Pop Quiz: Lay Opinion

- 2018/E-9 (6 minutes) After TP rests his case, the court asks the IRS whether it wished to present any evidence. The IRS responded, "Yes. My first witness is Jane (J)." After J is called to the witness stand and sworn, J testifies on direct examination that from 2010 to 2016 she was employed at "E's Barbershop," and that twice—once in 2012 and again in 2013—she observed Ed (E), the owner of the business, and TP "in a backroom of the business, and I saw E hand TP a large sum of cash." When asked by the IRS whether she ever confronted TP about what she observed, J responded, "Yes. On two occasions—once in 2012 and again in 2013—I approached TP and inquired of him about my observations. Each time TP was evasive, very nervous, acted really strange and hurriedly left my presence after a few seconds." TP objects to J's answer, arguing that J's testimony contained improper opinions. How should the court rule and why?

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Pop Quiz: Lay Opinion

- 2018/E-9 (6 minutes) After TP rests his case, the court asks the IRS whether it wished to present any evidence. The IRS responded, "Yes. My first witness is Jane (J)." After J is called to the witness stand and sworn, J testifies on direct examination that from 2010 to 2016 she was employed at "E's Barbershop," and that twice—once in 2012 and again in 2013—she observed Ed (E), the owner of the business, and TP "in a backroom of the business, and I saw E hand TP a large sum of cash." When asked by the IRS whether she ever confronted TP about what she observed, J responded, "Yes. On two occasions—once in 2012 and again in 2013—I approached TP and inquired of him about my observations. Each time TP was evasive, very nervous, acted really strange and hurriedly left my presence after a few seconds." TP objects to J's answer, arguing that J's testimony contained improper opinions. How should the court rule and why?
- SUGGESTED ANSWER: Overruled. A lay witness with personal knowledge, who isn't testifying as an expert, can testify on their opinion based on perception or observation under FRE 701. This testimony is about J's observations of TP's demeanor, may be helpful to the trier of fact, and is not based on scientific, technical or other specialized knowledge. (12/12)

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Foundation: Expert Opinion & Scientific Testimony (p.16)

- Beyond common experience.
 - Remember: Special knowledge, skill, experience, training, or education.
 - Remember: Foundation is everything!
 - Testimony based on proper facts or data
 - Witness has reliably applied accepted principals and methods

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Expert Foundation (Voir Dire or Cross)

- As foundation, expert may be "voir dired" or cross examined as to:
 - Qualifications
- On cross examination, challenges to
 - Subject to which opinion relates
 - Matter and reasons upon which opinion is based
 - Compensation or other facts bearing on bias.
- FRE 803(18) (hearsay exception): May be examined on treatises, etc., if shown to be reliable by the witness, other experts, or judicial notice.

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Pop Quiz: Expert Testimony

- Expert is a recognized expert on ghosts. She testifies at a real estate trial for fraud against the seller on the issue of whether Buyer's house is haunted. Must Expert have personally examined the house in order to be able to testify as an expert?

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Pop Quiz: Expert Testimony

- Nephew challenges Uncle's will on the grounds of lack of testamentary capacity. Psychiatrist is called as a witness. He has been shown Uncle's psychiatric reports for the last five years of his life (the will was written two years before Uncle died), and he has interviewed Uncle's relatives and doctors. Uncle's executor asks him: "Did Uncle have the capacity to make a will?" Nephew objects.
 - Objection?
 - Result?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Expert Testimony

- 2000/E-11 (3 minutes) The IRS asserts that Sam Taxpayer underreported his gross income and overstated his expenses on his Federal income tax return for 1999. Sam operates a small business, "Sam's Speedy Pizza Service," as a proprietorship. He employs 20 people. A trial in the United States Tax Court raised several evidence issues. When the direct ended, the IRS attorney asked this question on cross-examination: "Have you testified at the request of Sam Taxpayer's attorney in other tax cases involving other taxpayers?" The expert answered yes, on two occasions. He was then asked: "What were your fees in those two cases?" An objection was lodged on the ground of improper cross-examination. Is this a permissible cross-examination question? Answer "yes" or "no," then explain briefly.

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Expert Testimony

- 2000/E-11 (3 minutes) The IRS asserts that Sam Taxpayer underreported his gross income and overstated his expenses on his Federal income tax return for 1999. Sam operates a small business, "Sam's Speedy Pizza Service," as a proprietorship. He employs 20 people. A trial in the United States Tax Court raised several evidence issues. When the direct ended, the IRS attorney asked this question on cross-examination: "Have you testified at the request of Sam Taxpayer's attorney in other tax cases involving other taxpayers?" The expert answered yes, on two occasions. He was then asked: "What were your fees in those two cases?" An objection was lodged on the ground of improper cross-examination. Is this a permissible cross-examination question? Answer "yes" or "no," then explain briefly.
- SUGGESTED ANSWER: Yes. Cross-examination of an expert directed as establishing bias through financial interest is proper.

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Expert Testimony

- 2000/E-9 (4 minutes) The IRS asserts that Sam Taxpayer underreported his gross income and overstated his expenses on his Federal income tax return for 1999. Sam operates a small business, "Sam's Speedy Pizza Service," as a proprietorship. He employs 20 people. A trial in the United States Tax Court raised several evidence issues. Sam stepped down. As the next witness for Sam, Sam's lawyer called an experienced small business consultant to testify as an expert witness on the propriety and reasonableness of several expense items claimed by Sam. After establishing that the expert looked at Sam's records and that the expenses appeared customary and reasonable, Sam's lawyer asked if the expert had talked about the case with other pizza business owners. The expert replied: "Yes. Their comments provided part of the basis for my opinion here." When Sam's attorney asked: "Will you tell us what they said?" there was a hearsay objection. Is this a permissible question? Answer "yes" or "no," then explain briefly.

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Expert Testimony

- 2000/E-9 (4 minutes) The IRS asserts that Sam Taxpayer underreported his gross income and overstated his expenses on his Federal income tax return for 1999. Sam operates a small business, "Sam's Speedy Pizza Service," as a proprietorship. He employs 20 people. A trial in the United States Tax Court raised several evidence issues. Sam stepped down. As the next witness for Sam, Sam's lawyer called an experienced small business consultant to testify as an expert witness on the propriety and reasonableness of several expense items claimed by Sam. After establishing that the expert looked at Sam's records and that the expenses appeared customary and reasonable, Sam's lawyer asked if the expert had talked about the case with other pizza business owners. The expert replied: "Yes. Their comments provided part of the basis for my opinion here." When Sam's attorney asked: "Will you tell us what they said?" there was a hearsay objection. Is this a permissible question? Answer "yes" or "no," then explain briefly.
- SUGGESTED ANSWER: Yes, if the witness is qualified to testify as an expert under FRE 702. Experts may rely on hearsay evidence (comments from others in the industry) as part of the basis for the expert's decision. However, the expert is not permitted to testify as to the statements as substantive evidence unless there is an exception to the hearsay rule. FRE 703.

Presented by Frank R. Acuña, Attorney at Law

Foundation: Scientific Testimony (p.16)

- If Scientific Devices:
 - Recognized in the relevant scientific community.
 - Device was in proper working order
 - Device was operated by a qualified person and results were interpreted by an expert.

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Expert Testimony

- 2008/E-6 (5 minutes) At the trial before the Tax Court, the value of certain real property is in controversy T calls A, a real estate appraiser with excellent credentials and extensive experience appraising property in the area of the real property the value of which is in controversy. T offers into evidence A's written report, dated January 15, 2008, which contains A's opinion as to the value of the property. T offers A's report as evidence of the value of the property. The report was submitted to the Tax Court 60 days prior to the call of the trial calendar on which T's case appears. C objects to the admission of A's report on the grounds that (1) the appraisal is hearsay and (2) A did not furnish C with a copy of the report until 29 days prior to the call of the trial calendar on which T's case appears. What would be the proper ruling of the Tax Court, and why?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Expert Testimony

- 2008/E-6 (5 minutes) At the trial before the Tax Court, the value of certain real property is in controversy T calls A, a real estate appraiser with excellent credentials and extensive experience appraising property in the area of the real property the value of which is in controversy. T offers into evidence A's written report, dated January 15, 2008, which contains A's opinion as to the value of the property. T offers A's report as evidence of the value of the property. The report was submitted to the Tax Court 60 days prior to the call of the trial calendar on which T's case appears. C objects to the admission of A's report on the grounds that (1) the appraisal is hearsay and (2) A did not furnish C with a copy of the report until 29 days prior to the call of the trial calendar on which T's case appears. What would be the proper ruling of the Tax Court, and why?
- SUGGESTED ANSWER:
 - Overruled as to hearsay. Experts are permitted to rely on reports in forming their opinion and the report itself may be admissible to prove the value of the property if a proper foundation is laid. Further, FRE 803(18) provides a hearsay exception which permits experts to be examined on treatises and other matter which was used by the expert to form their opinion (e.g., comparable sales reports incorporated in an appraisal).
 - However, sustained as to the expert's report not being furnished at least 30 days prior to trial under Tax Court Rule 143(g), unless T can provide a good faith excuse or explanation why the report was not timely furnished to counsel.

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Expert Testimony

- 2002/E-15 (6 minutes) Petitioner offered into evidence a written appraisal of the painting by Art Appraisers Inc (AAI) that valued the painting at \$50,000. Respondent objects as hearsay to a sentence in the document which states: "I consulted with three reputable art gallery owners all of whom reported that they believed the painting was not authentic." For purposes of the question, assume that Tax Court Rule 143(f) regarding expert witness reports has been satisfied. How should the court rule on respondent's hearsay objection? Explain briefly.

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Expert Testimony

- 2002/E-15 (6 minutes) Petitioner offered into evidence a written appraisal of the painting by Art Appraisers Inc (AAI) that valued the painting at \$50,000. Respondent objects as hearsay to a sentence in the document which states: "I consulted with three reputable art gallery owners all of whom reported that they believed the painting was not authentic." For purposes of the question, assume that Tax Court Rule 143(f) regarding expert witness reports has been satisfied. How should the court rule on respondent's hearsay objection? Explain briefly.
- SUGGESTED ANSWER: Objection sustained. Expert witnesses can use technically inadmissible hearsay in forming their opinion, provided they are of a type reasonable relied upon by experts in the particular field in forming opinions under FRE 703, but there is a problem with hearsay incorporated into an expert's report to circumvent FRE 803.
- QUERY: What if the statement was "their criteria included examining the edges of a painting, and on that basis I concluded the painting was not authentic."?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Scientific Testimony

- Defendant is on trial for murder. Prosecution wants Expert to testify that the tires of Defendant's vehicle are identical to those of tire prints found at the scene. Expert will base his conclusions on tests performed with an HP gas chromatograph spectrometer.
 - What foundation is necessary to admit Expert's testimony?

Presented by Frank R. Acuña, Attorney at Law

Final Foundation Note: Excluded Witnesses
(p. 17)

- Persons who may never testify:
 - Judge (FRE 605), Jury Member (FRE 606), Interpreter (FRE 604)
 - Question: What is the difference between judge testifying, and judicial notice?
- Judge has inherent power to exclude witnesses.
 - Exceptions: May not exclude parties, officers or employees of non-natural parties, or “essential persons” (FRE 615)
 - Note: This is also a Procedural Matter!

Presented by Frank R. Acuña, Attorney at Law

Final Foundation Note: Excluded Witnesses
(p. 16)

- 2002/E-10 (3 minutes) The trial before the Tax Court concerns whether certain payments received by Juan should have been included for federal income tax purposes as gross income for 2001. At the outset of the trial, petitioner’s counsel moved the court to “prohibit all persons who will later testify as witnesses from being present in the courtroom.” Should the judge grant the motion and exclude from the courtroom the IRS agent who investigated the case prior to the agents’ testimony? Explain briefly.

Presented by Frank R. Acuña, Attorney at Law

Final Foundation Note: Excluded Witnesses
(p. 16)

- 2002/E-10 (3 minutes) The trial before the Tax Court concerns whether certain payments received by Juan should have been included for federal income tax purposes as gross income for 2001. At the outset of the trial, petitioner’s counsel moved the court to “prohibit all persons who will later testify as witnesses from being present in the courtroom.” Should the judge grant the motion and exclude from the courtroom the IRS agent who investigated the case prior to the agents’ testimony? Explain briefly.
- SUGGESTED ANSWER: No, the IRS employee cannot be excluded under FRE 615(b). Either party or the judge may order that witnesses be excluded, but this cannot include (1) a person who is a party, (2) an officer or employee of a non-natural person party, designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation.

Presented by Frank R. Acuña, Attorney at Law

Foundation: Writings, Recordings & Photos (p.18)

- Best Evidence Rule
 - In proving the contents of a writing
 - The original writing itself must be produced
 - Or shown to be unavailable
 - By the proponent of the secondary evidence
 - Unless the writing refers to a collateral issue.
- However, there is broad latitude under FRE 1001 (p.20, later)
- Let's look at the text!

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Best Evidence Rule

- In his case-in-chief, TP calls his employer Ed (E) to the witness stand. E testifies that he (E) is the owner of "E's Barbershop," that the business originated in 2009, that E has employed five individuals since the birth of the business, that TP was hired in 2010 as a barber and is a current employee of the barbershop, that TP is a salaried employee, that E personally hires and pays his employees, and that E prepares and retains all records relevant to his company's payroll. When asked by TP, "How much money did TP earn between 2011 and 2013?" E testified, "TP earned a total of \$90,000.00. Thirty Thousand dollars in 2011, and the same amount in 2012 and 2013." The IRS objects to E's testimony regarding TP's earnings, arguing that it is barred by the best evidence rule. How should the court rule and why?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Best Evidence Rule

- In his case-in-chief, TP calls his employer Ed (E) to the witness stand. E testifies that he (E) is the owner of "E's Barbershop," that the business originated in 2009, that E has employed five individuals since the birth of the business, that TP was hired in 2010 as a barber and is a current employee of the barbershop, that TP is a salaried employee, that E personally hires and pays his employees, and that E prepares and retains all records relevant to his company's payroll. When asked by TP, "How much money did TP earn between 2011 and 2013?" E testified, "TP earned a total of \$90,000.00. Thirty Thousand dollars in 2011, and the same amount in 2012 and 2013." The IRS objects to E's testimony regarding TP's earnings, arguing that it is barred by the best evidence rule. How should the court rule and why?
- The Court would overrule the objection because the Best Evidence Rule (FRE 1002) is a rule of admissibility that pertains to a writing, recording, and originals. A witness may testify from his personal knowledge, even if a document exists that contains the same information. The best evidence rule is inapplicable here because testimony is at issue, not the contents of any particular writing.

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Best Evidence Rule

- 2004/E-1 T offers into evidence a document (marked "T's Exhibit 1") that purports to be a credit card statement (MasterCard) from the bank that issued T's credit card, Union National Bank, to prove that T was billed \$450.00 for a room at the Ritz Carlton Hotel on a particular date, as shown on the statement. T attempts to testify that T paid the credit card statement (T's Exhibit 1). C objects that T's testimony would violate the so-called "best evidence" (original writing) rule, because the best evidence of the payment would be T's canceled check. How should the Tax Court rule and why?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Best Evidence Rule

- 2004/E-1 T offers into evidence a document (marked "T's Exhibit 1") that purports to be a credit card statement (MasterCard) from the bank that issued T's credit card, Union National Bank, to prove that T was billed \$450.00 for a room at the Ritz Carlton Hotel on a particular date, as shown on the statement. T attempts to testify that T paid the credit card statement (T's Exhibit 1). C objects that T's testimony would violate the so-called "best evidence" (original writing) rule, because the best evidence of the payment would be T's canceled check. How should the Tax Court rule and why?
- SUGGESTED ANSWER: Objection overruled. Under FRE 1002 the best evidence rule is one of admissibility that pertains to a writing where contents of a writing are contested. Here T is providing testimony that he paid the bill; not the contents of any writing. Therefore, the Best Evidence Rule does not apply and T is not required to produce a cancelled check (although a cancelled check may be more persuasive evidence than T's disputed testimony alone).

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Best Evidence Rule

- Exterminator sues Homeowner for breach of contract. Exterminator claims he was never paid for his services. Homeowner testifies, "I paid the guy \$1,000 on April 1." On cross of Homeowner, Exterminator shows that before testifying, Homeowner consulted his check register to see whether it contained a record of such a payment (though Homeowner did not mention the register in his direct testimony). Must the register be produced, under the Best Evidence Rule?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Best Evidence Rule

- Taxpayer takes a huge deduction for art donated to the U.C. Berkeley art gallery. At the trial over the value of the piece, Taxpayer calls an expert witness to determine the value of the statue. Expert is a licensed art appraiser, and says so during his testimony. Will the Best Evidence Rule require that Expert produce his license to prove his status?

Presented by Frank R. Acuña, Attorney at Law

Foundation: Contracts (Parol Evidence Rule) (p.20)

- If an agreement is reduced to writing, that writing is the only admissible evidence of the agreement.
 - All prior or contemporaneous negotiations or agreements are merged into it.
- Exceptions:
 - Incomplete or ambiguous
 - Contract is the product of mistake or illegality
 - Contract procured by fraud, duress, undue influence, illegality, etc.
 - Subsequent modifications or discharge

Presented by Frank R. Acuña, Attorney at Law

Foundation: Documents FRE 1001 (p.21)

- Covers almost every kind of tangible, visual evidence:
 - Letters, words, numbers, in any media
 - Depictions in any media
 - Includes originals, copies, negative, and printouts
- General Rule: A duplicate is admissible unless a question is raised as to authenticity or it would be unfair to admit the duplicate (FRE 1003)
- If any question as to authenticity, either the original or testimony to authenticate may be necessary (see, Authentication, p.23)

Presented by Frank R. Acuña, Attorney at Law

Foundation: Documents FRE 1001 (p.21)

- Impeachment Evidence
 - This is both a foundation issue and a hearsay issue
 - FRE 1007 permits writings, recordings, or photographs to be used to impeach a witness
- Note: The topic of "Impeachment" is huge, and will come up again in a variety of contexts!

Presented by Frank R. Acuña, Attorney at Law

Foundation: Demonstrative Evidence (p.22)

- Examples:
 - Pictures, charts, diagrams, models, etc.
- Test: Is the evidence a "fair representation" of the evidence illustrated
 - Is it substantially similar?
 - Think "true and accurate copy" of a document
 - Think "fair representation and to proper scale" for a diagram or model

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Foundation

2002/E-7 (5 minutes) The Tax Court proceeding concerns whether Paula, the petitioner, is allowed for federal income tax purposes to deduct certain travel and entertainment expenses. Rather than introducing the receipts, Paula called Carl, a CPA, who will testify that he had reviewed all of Paula's records and had prepared a chart with all of the travel and entertainment expenses listed by month on the chart. Respondent's counsel objected on the basis that the chart was not admissible as an exhibit unless the underlying documents were also admitted as exhibits. Should the chart be admitted? Explain briefly.

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Foundation

2002/E-7 (5 minutes) The Tax Court proceeding concerns whether Paula, the petitioner, is allowed for federal income tax purposes to deduct certain travel and entertainment expenses. Rather than introducing the receipts, Paula called Carl, a CPA, who will testify that he had reviewed all of Paula's records and had prepared a chart with all of the travel and entertainment expenses listed by month on the chart. Respondent's counsel objected on the basis that the chart was not admissible as an exhibit unless the underlying documents were also admitted as exhibits. Should the chart be admitted? Explain briefly.

SUGGESTED ANSWER: Not without further foundational facts. The chart lacks foundation for charts or summaries of voluminous writings under FRE 1006, which requires that: the original source documents exist; that they would be admissible in evidence at trial except there were too voluminous and inconvenient to bring to court; and, that opposing parties were given a reasonable opportunity to inspect and to copy the original source documents before trial. The original source documents need not be introduced into evidence, although the court may so require. Absent such facts, the chart should not be admitted.

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Foundation

2000/E-10 (3 minutes) The IRS asserts that Sam Taxpayer underreported his gross income and overstated his expenses on his Federal income tax return for 1999. Sam operates a small business, "Sam's Speedy Pizza Service," as a proprietorship. He employs 20 people. A trial in the United States Tax Court raised several evidence issues. The expert was then asked on direct if he prepared a summary of comparative expenses, comparing Sam's claimed expenses to those of other, similar companies. He replied, "Yes, based upon their business records. First, I secured the regularly prepared business records from four other pizza business companies. Then I prepared a chart which shows that Sam's expenses compare favorably to the expenses incurred by the other similar businesses." The chart was offered in evidence as defense exhibit number one. There was an objection to the exhibit on the following ground: "Objection, the underlying records have not been made available to us." When the judge inquired about this, Sam's lawyer said that they had not disclosed the records of other businesses to the IRS because "we have no legal obligation to do so." Will the exhibit (the chart) be received as part of Sam's trial proof?

Answer "yes" or "no," then explain briefly.

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Foundation

2000/E-10 (3 minutes) The IRS asserts that Sam Taxpayer underreported his gross income and overstated his expenses on his Federal income tax return for 1999. Sam operates a small business, "Sam's Speedy Pizza Service," as a proprietorship. He employs 20 people. A trial in the United States Tax Court raised several evidence issues. The expert was then asked on direct if he prepared a summary of comparative expenses, comparing Sam's claimed expenses to those of other, similar companies. He replied, "Yes, based upon their business records. First, I secured the regularly prepared business records from four other pizza business companies. Then I prepared a chart which shows that Sam's expenses compare favorably to the expenses incurred by the other similar businesses." The chart was offered in evidence as defense exhibit number one. There was an objection to the exhibit on the following ground: "Objection, the underlying records have not been made available to us." When the judge inquired about this, Sam's lawyer said that they had not disclosed the records of other businesses to the IRS because "we have no legal obligation to do so." Will the exhibit (the chart) be received as part of Sam's trial proof?

Answer "yes" or "no," then explain briefly.

SUGGESTED ANSWER: No, because the underlying records were not produced to the IRS before seeking to introduce the chart. Charts and summaries can be used to present information that cannot be conveniently examined in court. Originals or duplicates must be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that the business records be produced in court under FRE 1006.

Presented by Frank R. Acuña, Attorney at Law

Foundation: Recordings & Photographs (p.23)

- Similar Test as Demonstrative Evidence:
 - Is the evidence a “true and accurate recording”
 - Is this an original recording?
 - Foundation questions regarding the facts and circumstances of the recording
 - If a copy, is there any evidence of edits or enhancements?
 - May need expert testimony to authenticate

Presented by Frank R. Acuña, Attorney at Law

Foundation: Deposition Transcripts (p.22)

- General Rule: Hearsay
- Exceptions:
 - May be used to impeach testimony
 - Unavailable witness
- A practical note on video depositions:
 - If at all possible, don't use them.
 - Why?

Presented by Frank R. Acuña, Attorney at Law

Foundation: Authenticating Writings (p.23)

- Four Ways:
- Personal knowledge that writing was by person claimed to be the author
 - Identification of Handwriting
 - Non-expert testimony by someone who was personally familiar with the author's handwriting (e.g., a child)
 - Comparison with authenticated exemplar by a handwriting expert
 - Public Records and Reports (see p.23)
 - Ancient Writings (FRE 901(8))
 - This is a favorite exam topic!
 - In such condition as to create no suspicion
 - Was in a place where, if authentic, it would likely be, and
 - At least 20 years old

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Foundation

2000/E-19 (5 minutes) The IRS asserts that Sam Taxpayer underreported his gross income and overstated his expenses on his Federal income tax return for 1999. Sam operates a small business, "Sam's Speedy Pizza Service," as a proprietorship. He employs 20 people. A trial in the United States Tax Court raised several evidence issues. Sam's lawyer recalled Sam as a witness and asked him whether he ever received a note from Billy Driver. Sam said yes, that he got a note wherein the writer said that if he could keep his job with the company, the writer would not cooperate with the IRS, which was investigating Sam. The note was unsigned, but Sam asserted that he felt it came from Billy. Sam's lawyer offered it into evidence "to impeach the credibility of witness Driver." The IRS objected. Is the note admissible in evidence? Answer "yes" or "no" then explain briefly.

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Foundation

2000/E-19 (5 minutes) The IRS asserts that Sam Taxpayer underreported his gross income and overstated his expenses on his Federal income tax return for 1999. Sam operates a small business, "Sam's Speedy Pizza Service," as a proprietorship. He employs 20 people. A trial in the United States Tax Court raised several evidence issues. Sam's lawyer recalled Sam as a witness and asked him whether he ever received a note from Billy Driver. Sam said yes, that he got a note wherein the writer said that if he could keep his job with the company, the writer would not cooperate with the IRS, which was investigating Sam. The note was unsigned, but Sam asserted that he felt it came from Billy. Sam's lawyer offered it into evidence "to impeach the credibility of witness Driver." The IRS objected. Is the note admissible in evidence? Answer "yes" or "no" then explain briefly.

SUGGESTED ANSWER: No. Before evidence can be admitted the proper foundation must be laid and the evidence must be authenticated and identified. Here Sam only "felt" it came from Billy without testimony that he is personally familiar with Billy's handwriting and can identify the note as such. If an objection is also raised on the basis of hearsay, it would fail because the note is being offered as impeachment evidence; a non-hearsay use.

Presented by Frank R. Acuña, Attorney at Law

Foundation: Authenticating Writings (p.23)

2004/E-1 (4 minutes) T offers into evidence a document (marked "T's Exhibit 1") that purports to be a credit card statement (MasterCard) from the bank that issued T's credit card, Union National Bank, to prove that T was billed \$450.00 for a room at the Ritz Carlton Hotel on a particular date, as shown on the statement. As the entire foundation for the admission of the statement, T testifies that T received the statement in the mail; that it contains T's correct name, address, and account number; and that T paid it. C objects to its admission on the ground that the statement has not been properly authenticated. How should the Tax Court rule and why?

Presented by Frank R. Acuña, Attorney at Law

Foundation: Authenticating Writings (p.23)

2004/E-1 (4 minutes) T offers into evidence a document (marked "T's Exhibit 1") that purports to be a credit card statement (MasterCard) from the bank that issued T's credit card, Union National Bank, to prove that T was billed \$450.00 for a room at the Ritz Carlton Hotel on a particular date, as shown on the statement. As the entire foundation for the admission of the statement, T testifies that T received the statement in the mail; that it contains T's correct name, address, and account number; and that T paid it. C objects to its admission on the ground that the statement has not been properly authenticated. How should the Tax Court rule and why?

SUGGESTED ANSWER: Objection overruled. FRE 901(a) provides a common-sense definition of authenticity; T can authenticate his own exhibit with testimony as to his name, proper address, and account number.

Presented by Frank R. Acuña, Attorney at Law

Foundation: "Notarization" (p.25)

- Witness authentication or "notarization" is not required.
- "Authentication" is a signature by a person who witnessed the signing
- An acknowledgment is the signature and seal of a notary to whom the author:
 - Presented self
 - Proved self to be self
 - Acknowledged that the signature on the document was self's
- Compare: "Jurat"
 - Statement made to the notary public under oath

Presented by Frank R. Acuña, Attorney at Law

Foundation: Voices (p.25)

- Four Ways to Authenticate
 - Personal knowledge, in which the witness heard, saw the speaker, and had personal knowledge of speaker's identity
 - Expert opinion comparing a recording or what was heard first hand to an authenticated exemplar
 - Distinctive voice characteristics
 - Telephone rules
 - Individuals (made to assigned telephone number and the person answering identifies self)
 - Business (made to assigned telephone number and the conversation reasonably related to that business's transactions)

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Foundation

2002/E-6 (3 minutes) The Tax Court proceeding concerns whether Paula, the petitioner, is allowed for federal income tax purposes to deduct certain travel and entertainment expenses. Paula's counsel, before calling any witnesses, addressed the court and stated, "Your honor, before we call our first witness we would like to introduce as Exhibits, all of the receipts for the expenditures in controversy." How should the court rule on respondent's objection to the exhibits as being not authenticated? Briefly explain.

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Foundation

2002/E-6 (3 minutes) The Tax Court proceeding concerns whether Paula, the petitioner, is allowed for federal income tax purposes to deduct certain travel and entertainment expenses. Paula's counsel, before calling any witnesses, addressed the court and stated, "Your honor, before we call our first witness we would like to introduce as Exhibits, all of the receipts for the expenditures in controversy." How should the court rule on respondent's objection to the exhibits as being not authenticated? Briefly explain.

SUGGESTED ANSWER: Objection sustained. Before evidence can be introduced into a trial it must be authenticated with the proper foundation laid. The receipts can be introduced by a person who has personal knowledge that the receipt is what it purports to be, or can be authenticated by circumstantial evidence under FRE 901.

NOTE: There is no requirement under the FRE that evidence be authenticated before trial. Certainly the respondent would question why the receipts were not made available during discovery or exchanged in advance as required by standing pretrial orders that are now standardized and used by all judges (different than what was the case in this exam year).

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Foundation

2008/E-1(a) (6 minutes) T offers into evidence a letter purporting to be from X, dated June 15, 2008, asking to meet with her in Chicago on July 25, 2008, to discuss employing T to design X's web site. Can T authenticate this letter by testifying that she recognizes X's signature from prior business correspondence she had with X? Discuss.

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Foundation

2008/E-1(a) (6 minutes) T offers into evidence a letter purporting to be from X, dated June 15, 2008, asking to meet with her in Chicago on July 25, 2008, to discuss employing T to design X's web site. Can T authenticate this letter by testifying that she recognizes X's signature from prior business correspondence she had with X? Discuss.

SUGGESTED ANSWER: Yes, under FRE 901(b)(2) a lay witness can authenticate a signature they are familiar with due to seeing the signature other times, as long as that familiarity is not done solely for the purpose of preparing for trial.

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Foundation

Taxpayer is on trial for under-reporting fraudulently obtained income (everyone wants to be another Capone!). It is claimed that, not wanting to run afoul of mail fraud laws, he sends emails with his letterhead and monogram to his victims. If the emails are written on electronic letterhead with Taxpayer's imprinted monogram, will the letterhead and monogram alone authenticate the letter?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Foundation

2008/E-3(b) (6 minutes) Assume the court overrules C's hearsay objection and the proffered text is admitted and read to the court. C then requests that T be required to read the next five paragraphs in the text. What additional showing, if any, does C have to make to cause the Tax Court to order T to admit and read the additional the paragraphs?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Foundation

2008/E-3(b) (6 minutes) Assume the court overrules C's hearsay objection and the proffered text is admitted and read to the court. C then requests that T be required to read the next five paragraphs in the text. What additional showing, if any, does C have to make to cause the Tax Court to order T to admit and read the additional the paragraphs?

SUGGESTED ANSWER: C must request that the next 5 paragraphs be read in fairness under the FRE 106 rule of completeness, which prevents a misleading impression by taking something out of context that may not fully convey the meaning.

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Foundation

Custodian, Golden Nugget janitor, is cleaning the men's room one night when he finds, scrawled on the wall of one stall: "I, Howard Hughes, being of sound mind and body" followed by a disposition of Hughes' property, and a signature purporting to be Hughes'. At a trial determining the bathroom will's authenticity, Custodian is called to the stand. He is given a paper containing a signature known to be Hughes' and asked if it matches the one he saw. He says it does. Assuming a non-witnessed will can be valid, has the bathroom will been authenticated?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Foundation

Wheezy has an annoying habit of wheezing is Ws. In a trial, Plaintiff seeks to introduce into evidence his recollections of what he says was a telephone conversation between himself and Wheezy, in which Wheezy called him. The conversation allegedly included this snippet: Plaintiff: Where were you yesterday? What was it like? Caller: I whas in Whalla Whalla; It was windy in the wheatfields. Can Plaintiff's recollection and description of the caller's speech patterns be enough to authenticate the conversation as one involving Nosmo?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Foundation

Mama's prize roses are destroyed by Motorist. When Mama sues the Motorist for damages, Mom offers a photograph taken after the accident to show the extent of the damages. In order for the photograph to be admissible, lay the foundation.

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Foundation

Motorist is on trial for a multiple collision which struck three people, four cars, and destroyed a fruit stand. To aid his testimony, Fruit Stand Owner uses a cardboard plaster model of the city block, smashing into various objects with a scale model Matchbox car to recreate the rampage. Motorist's lawyer objects, claiming that the model requires authentication by the person who built it. Is he correct? If so, what is the foundation?

Presented by Frank R. Acuña, Attorney at Law

Foundation: Judicial Notice (p.26)

- Subjects for Judicial Notice (FRE 201):
 - State and federal laws and regulations
 - Universally known facts:
 - Generally known within court's territorial jurisdiction
 - "Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"
- Forbidden Subjects:
 - Judge's personal knowledge of witness character or relevant facts

Presented by Frank R. Acuña, Attorney at Law

Foundation: Judicial Notice (p.27)

- Mandatory Judicial Notice:
 - Party requests and supplies the necessary information
- Discretionary Judicial Notice:
 - The judge decides to notice facts (the flip side of Rule 403)

Presented by Frank R. Acuña, Attorney at Law

Foundation: Judicial Notice (p.26)

- 2018/E-8 (6 minutes) It has been established through other evidence that the deadline for the filing of federal income taxes in 2011 was April 19. TP then requests that the court take judicial notice "that April 15, 2011, fell on a Friday." If the IRS attorney objects, arguing that there has been no proof offered that April 15, 2011, fell on a Friday, how should the court rule and why?

Presented by Frank R. Acuña, Attorney at Law

Foundation: Judicial Notice (p.26)

- 2018/E-8 (6 minutes) It has been established through other evidence that the deadline for the filing of federal income taxes in 2011 was April 19. TP then requests that the court take judicial notice "that April 15, 2011, fell on a Friday." If the IRS attorney objects, arguing that there has been no proof offered that April 15, 2011, fell on a Friday, how should the court rule and why?
- SUGGESTED ANSWER: Sustained. Although the Court may take judicial notice of legislative, adjudicative facts and law as a short-cut to save time, it must be given the necessary information to do so under FRE 201 (e.g., a calendar). (12/12)
- NOTE: What often makes or breaks an objection is whether the proffering attorney has laid a complete foundation!

Presented by Frank R. Acuña, Attorney at Law

Foundation: Judicial Notice (p.26)

- 2010/E-3 (5 minutes) To prove the dates, location, and program of the Chicago meeting, T asks the Tax Court to take judicial notice of certain web pages available on the sponsoring organization's web site. The web site archives this information for meetings going back five years. C objects. What would be the proper ruling of the Tax Court, and why?

Presented by Frank R. Acuña, Attorney at Law

Foundation: Judicial Notice (p.26)

- 2010/E-3 (5 minutes) To prove the dates, location, and program of the Chicago meeting, T asks the Tax Court to take judicial notice of certain web pages available on the sponsoring organization's web site. The web site archives this information for meetings going back five years. C objects. What would be the proper ruling of the Tax Court, and why?
- SUGGESTED ANSWER: Sustained. Judicial notice under FRE 201 may only be taken of legislative or adjudicated facts or law. It may be taken at the discretion of the court or by request of the parties when provided with the information. Judicial notice applies to facts that cannot be reasonably disputed and are commonly known; this website information would not qualify because it is not generally known within the jurisdiction of the court and was not verifiable through sources that could not be reasonably questioned and are subject to dispute. (5/5)
- ALTERNATE ANSWER FOR DISCUSSION: Overruled. Judicial notice may be taken under FRE 201 of facts that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned". Further, great deference is given to the court's sense of judicial economy. Therefore, if the court deems the organization's website to be accurate, the court could take judicial notice of the organization's reported information.

Presented by Frank R. Acuña, Attorney at Law

Foundation: Judicial Notice

2014/E-3. Assume the same facts as in 2014/E-2. Assume further that the Tax Court overruled the objection, and that W denied having such a conversation with S.

In the midst of W's response to TP's question, W added the following: "Moreover, it was impossible for me to have had such a conversation with S as your question suggested, because in 2009 the City Local Library was open Mondays through Saturdays, but it was closed on Sundays. And December 9th fell on a Sunday. I know that because December 9th was my birthday." December 9, 2009, actually was a Monday, and TP then asks the Court to take judicial notice that December 9, 2009, fell on a Monday. The IRS objects, arguing that TP is required to prove this fact. How should the Tax Court rule?

Presented by Frank R. Acuña, Attorney at Law

Foundation: Judicial Notice

SUGGESTED ANSWER: Overruled.

The court can take judicial notice of "universally known facts" which are generally known within the territorial jurisdiction of the trial court and capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. FRE 201. The day of the week upon which a date fell is subject to undisputed verification and the court must judicially notice it upon request and may judicially notice it upon its own motion, thus saving time at trial.

Presented by Frank R. Acuña, Attorney at Law

Foundation: Presumptions (p.27)

- Often considered as a substitute for foundational facts
- Imposed by law and requires the opposing party to introduce facts to rebut.
 - Example p. 27
 - "It should be up to my sister to prove that my father's trust amendment is valid"

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Judicial Notice

OctoMom files a paternity suit against Dad for child support. Is the fact that the normal human gestation period is approximately 280 days a fact suitable for judicial notice?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Judicial Notice

Driver and Passenger are involved in an automobile collision on Main Street on June 21. Passenger sues Driver for negligence in crossing the double yellow line. Driver claims he was swerving to avoid a large tree which had fallen across his lane, which he couldn't see in time to stop. Passenger asks the judge to take judicial notice of the fallen tree. In fact, the judge knows about the fallen tree because he lives on Main Street. May the judge properly take judicial notice of the fallen tree?


Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Judicial Notice

Tax Professional is on trial for bludgeoning Client, who arrived at Tax Professional's office after dark on April 15 with a shopping bag full of receipts and a demand not to go on extension. Tax Professional's alibi is that she deadbolted her door at 5:00 p.m. and was dead drunk in the back room of her office by 5:15. Is the time at which the sun set on April 15 a fact suitable for judicial notice, assuming it is relevant?

Presented by Frank R. Acuña, Attorney at Law

Questions?



Presented by Frank R. Acuña, Attorney at Law

Hearsay: Defined (p.28)

- Evidence of
 - A statement
 - Made out of court
 - Offered to prove the matter asserted
- Hearsay Attack:
 - Check each of the elements above
 - If hearsay, is there a non-hearsay use?
 - Proving something other than what is in the statement
 - Impeaching the witness
 - Others?
 - Is there an applicable hearsay exception or exemption?

Presented by Frank R. Acuña, Attorney at Law

Hearsay Test Whammies

- Multiple Hearsay (p.29)
 - Each statement must be analyzed separately
 - If either of the multiple hearsay levels is inadmissible, the entire testimony is inadmissible
- Make Sure You Know the Elements of Each Exception!
 - Is "unavailability" required?
 - Is "impeachment" required?
- Stay Mechanical!

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay, Generally

Passenger on Flight 514 is tried for negligence in lighting a cigarette in the lavatory that ignited the plane. Passenger's defense is that the "No Smoking, Fasten Seat Belts" sign was off when he lit up. The prosecution offers testimony by Rescuer, who will testify that when the fiery blimp touched down, Survivor (who survived the accident but later died of an unrelated illness) said to Rescuer, "The No Smoking light was on when Passenger lit up."

Is Rescuer's testimony hearsay? Is it admissible?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay, Generally

2016/E-4 (6 minutes) Assume that C, the President of Charity, Inc., is still on the witness stand. Assume further that the document referenced in question 3 was admitted into evidence. During direct examination, TP asks C the following question: "After you received the document in the mail from the IRS, which recognized your entity as a tax-exempt organization, what did you do next?" C responded, "I asked my secretary, 'Can you tell me where in our office we file our important correspondence?'" The IRS objects, arguing that C's question to the secretary is hearsay. TP responds that the IRS's objection is without merit. How should the court rule?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay, Generally

2016/E-4 (6 minutes) Assume that C, the President of Charity, Inc., is still on the witness stand. Assume further that the document referenced in question 3 was admitted into evidence. During direct examination, TP asks C the following question: "After you received the document in the mail from the IRS, which recognized your entity as a tax-exempt organization, what did you do next?" C responded, "I asked my secretary, 'Can you tell me where in our office we file our important correspondence?'" The IRS objects, arguing that C's question to the secretary is hearsay. TP responds that the IRS's objection is without merit. How should the court rule?

SUGGESTED ANSWER: Overruled. This is a question, not a statement, and asserts no facts. As such, it is not hearsay, which is an out of court statement offered to prove the truth of the matter asserted. (12/12)

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay, Generally

2016/E-5 (6 minutes) Assume that TP takes the witness stand. On direct examination, TP's attorney asks TP the following: "You testified that you filed your return in early April 2013. And you further testified that, after you submitted your return, you called your brother. What did you say to him during that conversation?" TP responded, "I told him, 'I just filed my tax return, which included a \$250,000 charitable gift to that wonderful charitable organization, Charity, Inc.'" The IRS objects to TP's response arguing that it is hearsay. TP's counsel responds that the IRS's objection is without merit and that TP's response should be admissible for the truth of the matters asserted therein. How should the Court rule?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay, Generally

2016/E-5 (6 minutes) Assume that TP takes the witness stand. On direct examination, TP's attorney asks TP the following: "You testified that you filed your return in early April 2013. And you further testified that, after you submitted your return, you called your brother. What did you say to him during that conversation?" TP responded, "I told him, 'I just filed my tax return, which included a \$250,000 charitable gift to that wonderful charitable organization, Charity, Inc.'"

The IRS objects to TP's response arguing that it is hearsay. TP's counsel responds that the IRS's objection is without merit and that TP's response should be admissible for the truth of the matters asserted therein. How should the Court rule?

SUGGESTED ANSWER: Sustained. TP's own statement is still hearsay and does not fall within any non-hearsay use, exemption, or exception. The statement was made out of court and is being offered to prove the matter asserted, that TP made a \$250,000 charitable gift to Charity, Inc. (12/12)

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay, Generally

- 2008/E-5 Assume that T has testified. C offers into evidence the original of T's DayTimer diary for the month of July 2008, which contains entries made by T that are in some respects apparently inconsistent with her testimony as to her activities when she was in Chicago that month. Assume that the parties have stipulated that the diary is authentic and the entries are in T's handwriting.
- (a)(5 minutes) T objects that the entries are hearsay and improper impeachment. C responds that C is only offering it to impeach T. What would be the proper ruling of the Tax Court, and why?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay, Generally

- 2008/E-5 Assume that T has testified. C offers into evidence the original of T's DayTimer diary for the month of July 2008, which contains entries made by T that are in some respects apparently inconsistent with her testimony as to her activities when she was in Chicago that month. Assume that the parties have stipulated that the diary is authentic and the entries are in T's handwriting.
- (a)(5 minutes) T objects that the entries are hearsay and improper impeachment. C responds that C is only offering it to impeach T. What would be the proper ruling of the Tax Court, and why?

- SUGGESTED ANSWER: Overruled. The diary can be brought in as impeachment under FRE 607 by the opposing party; a non hearsay use under FRE 801(d)(2).

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay, Generally

- (b)(8 minutes) Assume the court overrules T's objections and admits the diary. T then offers into evidence a memo she claims she placed in her desk in which she amplified and explained these diary entries. The memo does in fact corroborate her testimony as to her activities in Chicago on July 24-26, 2008. T offers to testify that she wrote the memo on the date stated on its face (July 31, 2008), and that it is true and accurate. C objects. What would be the proper ruling of the Tax Court, and why?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay, Generally

- (b)(8 minutes) Assume the court overrules T's objections and admits the diary. T then offers into evidence a memo she claims she placed in her desk in which she amplified and explained these diary entries. The memo does in fact corroborate her testimony as to her activities in Chicago on July 24-26, 2008. T offers to testify that she wrote the memo on the date stated on its face (July 31, 2008), and that it is true and accurate. C objects. What would be the proper ruling of the Tax Court, and why?
- SUGGESTED ANSWER: Overruled. The Court should allow T to authenticate and lay proper foundation for the July 31 letter to show it is a record of a regularly conducted activity and admissible under FRE 803(6). That requires determining if the memo was made at or near the time of the event and that it is the regular business activity to make the memo. As the maker of the memo T can testify as to these questions. The Court can decide as to the weight of the evidence.
- ALTERNATE ANSWER FOR DISCUSSION: Sustained. The memo is an out of court statement offered to prove her activities on July 24-26, 2008. There is no foundation laid that the memo is a business record; which is a written statement prepared in the regular course of business, made at or near the time of an act, condition, or event, which identifies the mode of its preparation, and which bears the indicia of trustworthiness.

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay, Generally

2012/E-1(a)(6 minutes) As part of TP's case-in-chief, TP (through TP's attorney) calls F to the witness stand. After establishing that TP and F had a telephone conversation on April 8, 2007 (less than a week before TP filed TP's 2006 federal tax return), TP asks F whether F recalled TP's last words before their conversation ended. F responded "Yes, I do. TP said 'I'm glad I made several thousand dollars in charitable contributions. They are legitimate deductions.'" The I.R.S. objects on hearsay grounds. Explain how the Tax Court should rule.

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay, Generally

2012/E-1 (a) (6 minutes) As part of TP's case-in-chief, TP (through TP's attorney) calls F to the witness stand. After establishing that TP and F had a telephone conversation on April 8, 2007 (less than a week before TP filed TP's 2006 federal tax return), TP asks F whether F recalled TP's last words before their conversation ended. F responded "Yes, I do. TP said 'I'm glad I made several thousand dollars in charitable contributions. They are legitimate deductions.'" The I.R.S. objects on hearsay grounds. Explain how the Tax Court should rule.

SUGGESTED ANSWER: Sustained. TP's statement is an out of court statement offered for to prove the matter asserted; that TP made several thousand dollars in legitimate charitable contributions. There is no non-hearsay use, exemption, or exception available. (12/12)

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay, Generally

- 2004/E-1 (12 minutes) T offers into evidence a document (marked "T's Exhibit 1") that purports to be a credit card statement (MasterCard) from the bank that issued T's credit card, Union National Bank, to prove that T was billed \$450.00 for a room at the Ritz Carlton Hotel on a particular date, as shown on the statement.
- (b) (5 minutes/s) Assume that there is a pre-trial stipulation between T and C that T's Exhibit 1 is authentic. T now offers T's Exhibit 1 into evidence to prove that T stayed at the Ritz Carlton Hotel on the date shown on the statement. C objects to its admission on the ground of hearsay. How should the Tax Court rule and why?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay, Generally

- 2004/E-1 (12 minutes) T offers into evidence a document (marked "T's Exhibit 1") that purports to be a credit card statement (MasterCard) from the bank that issued T's credit card, Union National Bank, to prove that T was **billed** \$450.00 for a room at the Ritz Carlton Hotel on a particular date, as shown on the statement.
- (b) (5 minutes/s) Assume that there is a pre-trial stipulation between T and C that T's Exhibit 1 is authentic. T now offers T's Exhibit 1 into evidence to prove that T **stayed** at the Ritz Carlton Hotel on the date shown on the statement. C objects to its admission on the ground of hearsay. How should the Tax Court rule and why?
- SUGGESTED ANSWER: Objection sustained. While pretrial stipulations are binding on all parties, this document is hearsay, unless it falls under a hearsay exception (such as the business records exception). All it establishes is that someone was billed by the Ritz, without further testimony it does not prove the taxpayer stayed at the hotel.
- ALTERNATE ANSWER FOR DISCUSSION: Overruled. Although a credit card bill is hearsay, the parties stipulated that the bill is authentic, which presumably falls under the Business Records Exception to the hearsay rule. However, further evidence will be needed to establish that T was not just billed for the stay, but in fact stayed at the Ritz Carlton (e.g., T's testimony, T's authenticated handwriting on the invoice the day of T's stay, or the testimony of others to corroborate that T was there).

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay, Generally

2014/E-2. TP called W to the witness stand with the expectation that W would help establish

TP's presence at the City Local Library and (2) TP's good faith attempts to ascertain the Internal Revenue Code requirements regarding gross income. During W's direct examination, however, W testified that W never encountered TP prior to this trial, that W never observed TP in the City Local Library (where W is employed), and that W never assisted TP in any respect in regards to a search within the library for books and materials relevant to Internal Revenue Code gross income reporting requirements. Surprised by W's response, TP then asked W, "Isn't it true that on Monday December 9, 2009 you told your supervisor S that earlier that same day you had just spent several hours with TP helping TP locate books and other materials pertinent to Internal Revenue Code gross income reporting requirements?" IRS objects, arguing that a response to this question calls for hearsay. Explain how the Tax Court should rule.

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay, Generally

SUGGESTED ANSWER: Overruled.

The statement is an out of court assertion and would appear to be hearsay. However, the statement is not being offered to prove the matter asserted (that TP was at the library researching reporting requirements), but instead to impeach W's testimony at trial (a non-hearsay use). Therefore, the question does not call for hearsay.

Overtime Question: Why not Inconsistent Prior Statement?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay, Generally

Rakish enters Husband's study and tells him, "I am having an affair with your wife." Husband pulls a revolver and shoots him. At Husband's trial for murder, Rakish's statement is offered by the Husband to prove that the killing was provoked.

Is the statement hearsay? Is it admissible?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay, Generally

Geezer dies. In his will, he leaves his entire estate to one of his sons, Snotty, and nothing to his daughter, Snarky. Snarky contests the will, claiming undue influence. Snotty wants to rebut by proving that he had always been his father's favorite. He offers the testimony of his father's lifelong friend, Bob, who will testify: "Geezer told me fifteen years ago that 'Snotty is the finest child in my family.'"

Is the statement hearsay? Is it admissible?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay, Generally

Defendant is on trial for the attempted murder of Victim. Defendant pleads insanity. Witness, offered by the prosecution, testifies that Defendant is perfectly normal. To impeach Witness, Defendant has Neighbor testify that, the day after the incident, Witness told Neighbor: "Defendant is out of his mind."

Is the statement hearsay? Is it admissible?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay, Generally

Rover is a bomb-sniffing dog at Las Vegas International Airport. While patrolling luggage, Rover indicates to his handler, Cop, that there are drugs in a suitcase. When the suitcase's owner, Druggie, is tried on drug charges, Cop testifies for the prosecution: "Rover indicated there were drugs in the suitcase."

Is Rover's conduct hearsay? Is it admissible?

Presented by Frank R. Acuña, Attorney at Law

Hearsay Exceptions: The Mnemonic

ADDEM P. BOPP, SEE ICI!

- Admission
- Declaration Against Interest
- Dying Declaration
- Excited Utterance
- Mental State
- Physical State
- Business Records
- Official Written Statement
- Past Recollection Recorded
- Prior Testimony

Presented by Frank R. Acuña, Attorney at Law

A Note on Unavailability (FRE 1004)

Certain exceptions to the Hearsay Rule require that the Hearsay Declarant is unavailable. Memorize them!

Threshold Question: Is the Hearsay Declarant Unavailable?

- Claim of privilege by the Declarant;
- Refusal to testify, despite judicial pressure to do so;
- Claimed lack of memory established by the witness himself on direct or cross;
- Death or infirmity of the Declarant;
- Absence from the hearing coupled with the inability to compel attendance by process or other reasonable means.

Presented by Frank R. Acuña, Attorney at Law

A Note on Unavailability (FRE 1004)

Rule 804 Exceptions require unavailability

- Declaration Against Interest. FRE 804(b)(3).
- Dying Declaration. FRE 804(b)(2).
- Prior Recorded Testimony. FRE 804(b)(1).
- Statement of Personal or Family History. FRE 804(b)(4).

Rule 804/807 also allows a Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.

Hearsay exceptions under Rule 803 do not require unavailability.

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

Admissions (p.31):

- Five Different Types:
 - Direct Admission
 - Adoptive Admission
 - Authorized Admission
 - Agent/Employee Admission
 - Co-Conspirator Admission

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

2012/E-2(a) (6 minutes) As part of the I.R.S. case, the government calls to the witness stand A. Earlier in the trial, the I.R.S. established that, on January 4, 2007, TP personally contacted A and requested that A contact B. On direct examination, the I.R.S. attorney asks A to describe a telephone conversation between A and B that occurred on January 5, 2007. A testified that A had called B that morning and said to B, "B, there is some big money awaiting us after TP files TP's taxes this year if you can help us out. TP wants to cheat the I.R.S. by claiming some phony charitable deductions. I reviewed TP's charitable deductions and I don't think the I.R.S. will notice the improprieties. But we need your help." TP objects to A's testimony on hearsay grounds. If the I.R.S. seeks to admit the entirety of the statement for its truth, what is the government's best response, and explain how the Tax Court should rule.

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

2012/E-2(a) (6 minutes) As part of the I.R.S. case, the government calls to the witness stand A. Earlier in the trial, the I.R.S. established that, on January 4, 2007, TP personally contacted A and requested that A contact B. On direct examination, the I.R.S. attorney asks A to describe a telephone conversation between A and B that occurred on January 5, 2007. A testified that A had called B that morning and said to B, "B, there is some big money awaiting us after TP files TP's taxes this year if you can help us out. TP wants to cheat the I.R.S. by claiming some phony charitable deductions. I reviewed TP's charitable deductions and I don't think the I.R.S. will notice the improprieties. But we need your help." TP objects to A's testimony on hearsay grounds. If the I.R.S. seeks to admit the entirety of the statement for its truth, what is the government's best response, and explain how the Tax Court should rule.

SUGGESTED ANSWER: The government's best response is that the statement is a co-conspirator statement ("we need your help") made during and in furtherance of the conspiracy to defraud the IRS under FRE 801(d)(2)(E). The Tax Court should overrule the objection. (12/12)

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

- 2000/E-12 (3 minutes) The following facts apply to questions E-5 through E-19. The IRS asserts that Sam Taxpayer underreported his gross income and overstated his expenses on his Federal income tax return for 1999. Sam operates a small business, "Sam's Speedy Pizza Service," as a proprietorship. He employs 20 people. A trial in the United States Tax Court raised several evidence issues. During the case presented by the IRS, Billy Driver testified. Up until a month ago, Billy delivered pizzas for Sam, and ran other errands for the pizza company as well. Before trial Billy stated that he was present at a conversation in the summer of 2000 between Sam and Walt Supplier wherein Sam said: "I know my bill with you is \$10,000, that's what I owe you and that's what you will get. But make out your statement to me like you are charging me \$20,000, that way I can claim more for expenses." Walt declined to inflate the bill. Billy took the stand, seeking to tell about Sam's request to Walt. Before Billy got much of this testimony out, there was a hearsay objection by counsel for Sam. On the issue of whether the statement by Sam is inadmissible hearsay, should the objection be sustained? Answer "yes" or "no," then explain briefly.

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

- 2000/E-12 (3 minutes) The following facts apply to questions E-5 through E-19. The IRS asserts that Sam Taxpayer underreported his gross income and overstated his expenses on his Federal income tax return for 1999. Sam operates a small business, "Sam's Speedy Pizza Service," as a proprietorship. He employs 20 people. A trial in the United States Tax Court raised several evidence issues. During the case presented by the IRS, Billy Driver testified. Up until a month ago, Billy delivered pizzas for Sam, and ran other errands for the pizza company as well. Before trial Billy stated that he was present at a conversation in the summer of 2000 between Sam and Walt Supplier wherein Sam said: "I know my bill with you is \$10,000, that's what I owe you and that's what you will get. But make out your statement to me like you are charging me \$20,000, that way I can claim more for expenses." Walt declined to inflate the bill. Billy took the stand, seeking to tell about Sam's request to Walt. Before Billy got much of this testimony out, there was a hearsay objection by counsel for Sam. On the issue of whether the statement by Sam is inadmissible hearsay, should the objection be sustained? Answer "yes" or "no," then explain briefly.
- SUGGESTED ANSWER: No. Admissions (a statement made by a party to the litigation offered against that party) are technically non-hearsay under FRE 801(d)(2). The declarant's availability is immaterial. A party's words or acts may be offered as evidence against him.

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

2002/E-1 (6 minutes) John was Chief Executive Officer and majority shareholder of Small Bank, Inc. ("SBI"). A deficiency notice was issued to SBI alleging that part of John's salary was unreasonable and was a dividend, which was not deductible by SBI. Karin, who was then a vice-resident of SBI, was called as a witness by the respondent and testified that she was present with two other bank officers during a conversation with John when John said, "Let's not pay out our income as dividends. Let's raise all of our salaries." The petitioner objected that Karin's testimony concerning John's statement was hearsay. How should the court rule? Briefly explain.

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

2002/E-1 (6 minutes) John was Chief Executive Officer and majority shareholder of Small Bank, Inc. ("SBI"). A deficiency notice was issued to SBI alleging that part of John's salary was unreasonable and was a dividend, which was not deductible by SBI. Karin, who was then a vice-president of SBI, was called as a witness by the respondent and testified that she was present with two other bank officers during a conversation with John when John said, "Let's not pay out our income as dividends. Let's raise all of our salaries." The petitioner objected that Karin's testimony concerning John's statement was hearsay. How should the court rule? Briefly explain.

SUGGESTED ANSWER: Objection overruled. Although this appears to be hearsay (an out of court statement made by a declarant, offered to prove the truth of the matter asserted), admission by party-opponent is technically defined as non-hearsay by the FRE under FRE 801(a)(2)(D). John is the CEO and majority shareholder of SBI, an agent of the party (SBI) and he held this role when speaking in the conversation Karin heard. The testimony is offered by the respondent, a required element of party opponent.

NOTE: Admissions do not have to be against the party's interests when they are made. ALTERNATE ANSWER FOR DISCUSSION: Objection overruled. The statement is an out of court assertion made by John to prove the matter asserted; that John would increase salaries to avoid dividend income. However, it can be viewed either as a direct admission by a party or a statement intent within the state of mind exception to the hearsay rule.

Bonus Question: Why not "Declaration Against Interest"?

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

Declarations Against Interest (p.32):

- **Unavailable declarant**
- A reasonable person in the declarant's position would have made the statement only if believed to be true BECAUSE
 - Statement is sufficiently against interest to subject declarant due to
 - Pecuniary loss
 - Civil or criminal penalties
 - And was against the declarant's interest when made

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

Dying Declarations (p.32):

- Probably won't get many of these on a tax test!
- **Unavailable witness**
- Made a statement
 - About the circumstances of death
 - Under a sense of imminent death
 - From the declarant's personal knowledge
 - Not opinion or speculation
- Offered in a criminal homicide case or any civil case

Presented by Frank R. Acuña, Attorney at Law

ADDEEM P. BOPP, SEE ICI!

Excited Utterance (p.33):

- Startling event must occur
- Statement made while under stress or excitement of the event
- Relating to the event
- Declarant need not be known or identified

Presented by Frank R. Acuña, Attorney at Law

ADDEEM P. BOPP, SEE ICI!

2016/E-2 (6 minutes) Assume that C, the President of Charity, Inc., is still on the witness stand. During direct examination, TP asks C the following question: "After you requested a donation from TP, what, if anything, did TP say?" C then responded, "TP then started to cry hysterically and then rather loudly exclaimed, 'Yes! I would love to help out! I have so many close family members who are destitute and in desperate situations. This is such a great cause, and I am beyond thrilled to have been asked to be a part of such a fantastic charitable effort!'" The IRS objects to C's testimony on hearsay grounds. How should the Tax Court rule?

Presented by Frank R. Acuña, Attorney at Law

ADDEEM P. BOPP, SEE ICI!

2016/E-2 (6 minutes) Assume that C, the President of Charity, Inc., is still on the witness stand. During direct examination, TP asks C the following question: "After you requested a donation from TP, what, if anything, did TP say?" C then responded, "TP then started to cry hysterically and then rather loudly exclaimed, 'Yes! I would love to help out! I have so many close family members who are destitute and in desperate situations. This is such a great cause, and I am beyond thrilled to have been asked to be a part of such a fantastic charitable effort!'" The IRS objects to C's testimony on hearsay grounds. How should the Tax Court rule?

SUGGESTED ANSWER: Overruled. It is hearsay under FRE 801 as the statement is being offered to prove truth of the matter asserted, that TP was excited to make the donation to Charity, Inc. Part of the statement falls under the state of mind exception under FRE 803(3), as TP's statements about "I would love to help out ..." and "I am beyond thrilled" to make the contribution admissible. The excited utterance exception under FRE 803(2) is needed to get the rest of the statement in, about close family members and what a great cause it is. (12/12).

DISCUSSION: Do these circumstances qualify as an "excited utterance"?

Presented by Frank R. Acuña, Attorney at Law

ADDEP. BOPP, SEE ICI!

Mental State (p.33):

- Present Mental State
 - Offered to prove
 - Declarant's presently held state of mind, emotion, or physical sensation
 - Including intent, plan, motive, design, mental feeling, or bodily health
 - That existed when the statement was made
- Former Mental State
 - Statement of memory or former belief
 - Offered to prove facts re declarant's testamentary intent

Presented by Frank R. Acuña, Attorney at Law

ADDEP. BOPP, SEE ICI!

2018/E-4 (6 minutes) In his case-in-chief, TP calls Fred (F) to the witness stand. F testifies that he (F) owns a lawn care business that has been in existence since 2009. F further testifies that "on occasion from 2011-2013 TP assisted me in various aspects of my business, including mowing lawns and bill collection." When asked by TP whether F ever compensated TP for his assistance during 2011-2013, F testified, "Absolutely not. I remember TP telling me, 'I want my work for you to be on a volunteer basis. I just don't want any issues with the IRS.'" The IRS objects only to that portion of F's testimony regarding what TP told him ("I want my work for you to be on a volunteer basis. I just don't want any issues with the IRS"), arguing that it is hearsay. TP insists that the statement should be admissible for its truth. How should the court rule and why?

Presented by Frank R. Acuña, Attorney at Law

ADDEP. BOPP, SEE ICI!

2018/E-4 (6 minutes) In his case-in-chief, TP calls Fred (F) to the witness stand. F testifies that he (F) owns a lawn care business that has been in existence since 2009. F further testifies that "on occasion from 2011-2013 TP assisted me in various aspects of my business, including mowing lawns and bill collection." When asked by TP whether F ever compensated TP for his assistance during 2011-2013, F testified, "Absolutely not. I remember TP telling me, 'I want my work for you to be on a volunteer basis. I just don't want any issues with the IRS.'" The IRS objects only to that portion of F's testimony regarding what TP told him ("I want my work for you to be on a volunteer basis. I just don't want any issues with the IRS"), arguing that it is hearsay. TP insists that the statement should be admissible for its truth. How should the court rule and why?

SUGGESTED ANSWER: Overruled. The statement falls under the state of mind exception to hearsay under FRE 803(3) because it is a statement of the TP's intent "to work on a voluntary basis." (12/12)

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

- 2004/E-8 (4 minutes) To prove that T was in Miami, Florida, during the month of July 2004, C calls Barbara Brown, a friend of T and T's spouse S. Barbara will testify that in a conversation with W on June 15, 2004, S said, "T and I are going to spend the month of July at our condo in Miami. I'll call you when I get back." T objects on the ground of hearsay. How should the Tax Court rule and why?

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

- 2004/E-8 (4 minutes) To prove that T was in Miami, Florida, during the month of July 2004, C calls Barbara Brown, a friend of T and T's spouse S. Barbara will testify that in a conversation with W on June 15, 2004, S said, "T and I are going to spend the month of July at our condo in Miami. I'll call you when I get back." T objects on the ground of hearsay. How should the Tax Court rule and why?
- SUGGESTED ANSWER: Objection overruled. S's statement expressing S's motive, plan or intent to go to Miami for July is admissible under FRE 803(3). It was made contemporaneously (2 weeks before the travel), the state of mind is relevant to the issue of whether T & S took a business trip as claimed, and there are no suspicious circumstances suggesting that S was fabricating these thoughts.

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

Physical State (p.33):

- Description of declarant's
 - Medical history
 - Physical sensation
 - Pain
 - Bodily health
- If made for diagnosis or treatment
- If pertinent to the diagnosis or treatment

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

Business Records (p.34):

- This is a biggie in civil and tax cases!
- Two types
 - To prove the occurrence of an act, condition, or event
 - To prove the non-occurrence of an act, condition, or event
- These types of questions almost always include "Foundation" issues

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

Business Records (p.34):

- Proving the occurrence of an act, condition, or event. **Here is the foundation:**
 - A written statement, including electronic data
 - Prepared in the regular course of business
 - Made at or near the time of an act, condition, or event
 - Specific identity of the document and mode of preparation; and,
 - The sources of the information and the method and time of preparation were such to indicate trustworthiness

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

Business Records (p.34):

- May also prove the absence of occurrence of an act, condition, or event:
 - Records of such acts, conditions, or events were regularly made in the course of business; and,
 - Absence of the records is a trustworthy indication it did not occur

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

2002/E-3 (3 minutes) The petitioner obtained copies of SBI's records that include John's salary for the years in question. In order to have these records admitted during the Tax Court's proceeding as SBI's business records, what foundation testimony must be introduced.

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

2002/E-3 (3 minutes) The petitioner obtained copies of SBI's records that include John's salary for the years in question. In order to have these records admitted during the Tax Court's proceeding as SBI's business records, what foundation testimony must be introduced.

SUGGESTED ANSWER: Business records are admissible as an exception to hearsay under 803(6), as long as they are kept as regular course of the business, by a person of authority or custodian of records, at or near the time of the event as testified to through a qualified witness. There must be no indication of a lack of trustworthiness in the source of info or method of preparation.

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

2018/E-3 (6 minutes) Assume that Ed (E) is still on the witness stand. TP's attorney approaches E and shows him a document titled "Exhibit 2." When asked by TP if he recognizes the document, E responds, "Yes I do. It is a document—a yearly earnings statement—that I routinely and contemporaneously prepare and maintain in our company's files. It is a document that reflects the annual earnings in a particular year for our employees. This particular document, Exhibit 2, reflects TP's yearly earnings for the June 2011 (sic)." Based upon this testimony TP seeks to admit the yearly earnings document into evidence. If the IRS objects how should the court rule and why?

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

2018/E-3 (6 minutes) Assume that Ed (E) is still on the witness stand. TP's attorney approaches E and shows him a document titled "Exhibit 2." When asked by TP if he recognizes the document, E responds, "Yes I do. It is a document—a yearly earnings statement—that I routinely and contemporaneously prepare and maintain in our company's files. It is a document that reflects the annual earnings in a particular year for our employees. This particular document, Exhibit 2, reflects TP's yearly earnings for the June 2011 [sic]." Based upon this testimony TP seeks to admit the yearly earnings document into evidence. If the IRS objects how should the court rule and why?

SUGGESTED ANSWER: Overruled. The business record exception under FRE 803(6) allows the earnings document into evidence because it was made by a person with knowledge, at or near the time, it was the employer's regular practice to prepare and maintain that record in the company files, the record was kept in the course of a regularly conducted activity, and it is testified to by the person with knowledge. (12/12)

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

- 2010/Exam: Taxpayer (T), a self-employed web-site designer, has filed a petition with the Tax Court to redetermine a deficiency as set forth in a notice of deficiency. The alleged deficiency arises from the disallowance of certain claimed business expense deductions. T works out of her home office. The Commissioner has answered, both parties have followed all proper pre-trial procedures, and the case is now at trial. Unless otherwise stated, assume that each question calls for relevant evidence, that is, evidence that is material and probative as to some issue in the case.
- 2010/E-1 T keeps her business travel records in a computer database program called TravelHelper. The program is an off-the-shelf software program available in computer stores. The TravelHelper database has fields to record all pertinent details of her travel, including dates, locations, persons, itemized expenses, and all other information that would be necessary to justify a travel expense deduction. To substantiate her deductions for a business trip to Chicago on January 13-17, 2010, T offers into evidence a printout of data from TravelHelper for the relevant time period.
- (a)(2 minutes) You represent T. What objection or objections would you anticipate C might make to this printout if you fail to lay an adequate foundation for its admission? In other words, what rules of evidence are implicated by the offer of this evidence?

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

- 2010/Exam: Taxpayer (T), a self-employed web-site designer, has filed a petition with the Tax Court to redetermine a deficiency as set forth in a notice of deficiency. The alleged deficiency arises from the disallowance of certain claimed business expense deductions. T works out of her home office. The Commissioner has answered, both parties have followed all proper pre-trial procedures, and the case is now at trial. Unless otherwise stated, assume that each question calls for relevant evidence, that is, evidence that is material and probative as to some issue in the case.
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- (a)(2 minutes) You represent T. What objection or objections would you anticipate C might make to this printout if you fail to lay an adequate foundation for its admission? In other words, what rules of evidence are implicated by the offer of this evidence?
- SUGGESTED ANSWER: Objection, hearsay and lack of foundation. It's an out of court statement offered to prove the truth of the matter asserted so hearsay under FRE 803. The records have not been authenticated under FRE 901 either by T's own testimony or by a witness with personal knowledge or who can show the evidence is what T says it is. (2/2)

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

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- (b)(10 minutes) What foundation(s) do you have to lay to meet any possible objection or objections to this evidence? Include the elements of each foundation and describe, in general, how T would lay that foundation.

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

- 2010/Exam: Taxpayer (T), a self-employed web-site designer, has filed a petition with the Tax Court to redetermine a deficiency as set forth in a notice of deficiency. The alleged deficiency arises from the disallowance of certain claimed business expense deductions. T works out of her home office. The Commissioner has answered, both parties have followed all proper pre-trial procedures, and the case is now at trial. Unless otherwise stated, assume that each question calls for relevant evidence, that is, evidence that is material and probative as to some issue in the case.
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- (b)(10 minutes) What foundation(s) do you have to lay to meet any possible objection or objections to this evidence? Include the elements of each foundation and describe, in general, how T would lay that foundation.
- SUGGESTED ANSWER: To meet the FRE 803(6) business records exception and to offer the travel records into evidence, T must establish by testimony of the custodian of the record or a person of knowledge: It was made at or near the time of the expenses, during the course of a regularly conducted business activity, and it was the regular practice of that business to make such records.
- Note: Authentication can be made through certification of a custodian or other qualified person under FRE 902(11). (10/10)

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

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- (c)(10 minutes) Suppose the evidence shows that although the trip was in January, the data was not entered into the database until March 15, when it was entered as part of the process of preparing her tax returns. T's secretary, S, entered the data into the computer based on notes that T made in her pocket diary during the trip, and receipts T kept in her files. How does this affect the admissibility of the printout? Discuss.

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

- 2010/Exam: Taxpayer (T), a self-employed web-site designer, has filed a petition with the Tax Court to redetermine a deficiency as set forth in a notice of deficiency. The alleged deficiency arises from the disallowance of certain claimed business expense deductions. T works out of her home office. The Commissioner has answered, both parties have followed all proper pre-trial procedures, and the case is now at trial. Unless otherwise stated, assume that each question calls for relevant evidence, that is, evidence that is material and probative as to some issue in the case.
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- (c)(10 minutes) Suppose the evidence shows that although the trip was in January, the data was not entered into the database until March 15, when it was entered as part of the process of preparing her tax returns. T's secretary, S, entered the data into the computer based on notes that T made in her pocket diary during the trip, and receipts T kept in her files. How does this affect the admissibility of the printout? Discuss.
- SUGGESTED ANSWER: To overcome an objection that the documents were not contemporaneously entered under FRE 803(6), T should establish that the database entry was made from records T made at or near the time of the events, and prepared by S as part of her employment duties as an employee of the business from information transmitted by a person with knowledge. The underlying documents (hotel, airplane and car rental bills) should support the contemporaneously entered items. Showing that it was T's regular practice to prepare contemporaneous notes in the pocket diary, and S's regular and timely maintenance of the entries and expenses reports helps overcome objections. (10/10)

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

- 2010/Exam: Taxpayer (T), a self-employed web-site designer, has filed a petition with the Tax Court to redetermine a deficiency as set forth in a notice of deficiency. The alleged deficiency arises from the disallowance of certain claimed business expense deductions. T works out of her home office. The Commissioner has answered, both parties have followed all proper pre-trial procedures, and the case is now at trial. Unless otherwise stated, assume that each question calls for relevant evidence, that is, evidence that is material and probative as to some issue in the case.
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- (d)(6 minutes) As part of the foundation for this printout, does T need to call any witness other than herself to testify? Could any part of the foundation be done by affidavit? Explain.

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

- SUGGESTED ANSWER: Authentication testimony to be made by "the custodian or any other qualified witness or by certification that complies" with the FRE. S or another qualified witness could verify authenticity of the printout and T could testify as to the original diary entries and her record keeping practices. FRE 902(1) allows original or duplicate domestic records of a regularly conducted activity that would be admissible under FRE 803(6) if accompanied by a written declaration signed by the custodian that the record :
 1. Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of the matters;
 2. Was kept in the course of the regularly conducted activity; and
 3. Was made by the regularly conducted activity as a regular practice.
 However, a party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them. (6/6)

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

- 2004/E-10 (8 minutes) T is seeking to prove the date on which T received a telephone call from a person named Rodriguez. Direct examination of T proceeds with the following questions and answers:
 - Q. "What was the date on which you received the call from Mr. Rodriguez?" A. "I don't recall."
 - Q. "I show you what has been marked as T's Exhibit 2. Do you recognize it?" A. "Yes, it's the telephone log from my office."
 - Q. "Does that refresh your memory?" A. "It says here August 2, 2004." (b)(4 minutes) The examination continues as follows:
 - Q. "Did you record the date of the call in your log?" A. "No, it was recorded by my secretary, MJ, who keeps all the records."
 - Q. "How do you know if MJ recorded the date correctly?" A. "We follow a standard procedure for recording dates in the log, and MJ always follows that procedure. MJ never makes a mistake."

T then offers the telephone log, T's Exhibit 2, into evidence. C objects.
- How should the Tax Court rule, and why?

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

- 2004/E-10 (8 minutes) T is seeking to prove the date on which T received a telephone call from a person named Rodriguez. Direct examination of T proceeds with the following questions and answers:
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 - Q. "I show you what has been marked as T's Exhibit 2. Do you recognize it?" A. "Yes, it's the telephone log from my office."
 - Q. "Does that refresh your memory?" A. "It says here August 2, 2004." (b)(4 minutes) The examination continues as follows:
 - Q. "Did you record the date of the call in your log?" A. "No, it was recorded by my secretary, MJ, who keeps all the records."
 - Q. "How do you know if MJ recorded the date correctly?" A. "We follow a standard procedure for recording dates in the log, and MJ always follows that procedure. MJ never makes a mistake."

T then offers the telephone log, T's Exhibit 2, into evidence. C objects.
- How should the Tax Court rule, and why?
- SUGGESTED ANSWER: Objection sustained. Although this appears to be under the business records hearsay exception, T did not make the record. Contemporaneous, regularly kept business records may be admitted by the record maker or someone with personal knowledge or duty to record as a hearsay exception under FRE 803(6) (if kept by person of responsibility and there is no reason to doubt their veracity). MJ, the record maker, is not available to testify.
- FOR DISCUSSION: Could T qualify as a person with knowledge about the company's records? Also, note the difference between refreshing the witness's recollection with a writing, and trying to introduce the writing itself into evidence!

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

Official Records (Public Records) (p.34):

- Proving the absence or occurrence of an act, condition, or event
 - Records of such acts, conditions, or events were regularly made in the course of business; and,
 - Absence of the records is a trustworthy indication it did not occur

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

Official Records (Public Records) (p.34):

- Criteria for Public Records and Reports:
 - A written statement
 - By a public official
 - Setting forth
 - Activities of public office
 - Observations made or recorded in the course of legal duties
 - Not police reports in criminal cases
 - Factual findings of official investigations
 - Not in criminal cases
 - Unless circumstances indicate lack of trustworthiness
- Specific FRE Exceptions – See Text

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

- 2004/E-9 (4 minutes) State the foundation required for the admission of a document under the public records exception to the hearsay rule.

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

- 2004/E-9 (4 minutes) State the foundation required for the admission of a document under the public records exception to the hearsay rule.
- SUGGESTED ANSWER: It is admissible under FRE 803(8). A document that is a record or statement of a public office is admissible under the public records exception if it sets out the office's activities, concerns a matter observed while under a legal duty to report, (unless in a criminal case, it is a matter observed by law-enforcement personnel); or in a civil case or against the government in a criminal case factual findings from a legally authorized investigation, and neither the source of information nor other circumstances indicate a lack of trustworthiness.

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

2016/E-3 (6 minutes) Assume that C, the President of Charity, Inc., is still on the witness stand. During direct examination of C, TP shows C a two-page document comprised of (1) a photocopy of an IRS determination letter and (2) a cover letter. The photocopy is of a document on IRS letterhead that is signed by an appropriate official of the IRS and which states that Charity, Inc., is a tax-exempt charitable organization under §501(c)(3). The cover letter was signed by an appropriate person at the IRS and certifies that the attached photocopy of the determination letter is a true and accurate representation of the original determination letter (dated January 15, 1990) on file at the IRS. C testifies that C recognizes the determination letter, and that it is the document that C, on behalf of Charity, Inc., received in the mail from the IRS in 2000 and that C has kept in a secured file cabinet on the third floor of the organization's office complex. The IRS objects to the admission of the document. TP contests this contention. How should the Tax Court rule?

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

2016/E-3 (6 minutes) Assume that C, the President of Charity, Inc., is still on the witness stand. During direct examination of C, TP shows C a two-page document comprised of (1) a photocopy of an IRS determination letter and (2) a cover letter. The photocopy is of a document on IRS letterhead that is signed by an appropriate official of the IRS and which states that Charity, Inc., is a tax-exempt charitable organization under §501(c)(3). The cover letter was signed by an appropriate person at the IRS and certifies that the attached photocopy of the determination letter is a true and accurate representation of the original determination letter (dated January 15, 1990) on file at the IRS. C testifies that C recognizes the determination letter, and that it is the document that C, on behalf of Charity, Inc., received in the mail from the IRS in 2000 and that C has kept in a secured file cabinet on the third floor of the organization's office complex. The IRS objects to the admission of the document. TP contests this contention. How should the Tax Court rule?

SUGGESTED ANSWER: Overruled. The public record exception under FRE 803(8) applies because it is a formal written document, reviewed and approved and subject to clearances of a public office (IRS), and the statement concerns official activities, of matters observed under a legal duty to support, with knowledge. The document is self-authenticating under FRE 902(4)(A). A photocopy is admissible the same as an original when it is authenticated and there are no questions as to whether the document is genuine under FRE 1004. (12/12)

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

Past Recollection Recorded (p.36):

- Memo or record of facts
- Made from the personal knowledge of the declarant or a reliable source
- Made when the facts were fresh in memory
- Offered to refresh the recollection of a witness
 - Memory of the witness is exhausted
 - Declarant testifies it accurately reflects the former knowledge
 - May be read into evidence only (the document does not come in unless the adverse party offers it)

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

- 2004/E-10 (8 minutes) T is seeking to prove the date on which T received a telephone call from a person named Rodriguez. Direct examination of T proceeds with the following questions and answers:
 - Q. "What was the date on which you received the call from Mr. Rodriguez?" A. "I don't recall."
 - Q. "I show you what has been marked as T's Exhibit 2. Do you recognize it?" A. "Yes, it's the telephone log from my office."
 - Q. "Does that refresh your memory?" A. "It says here August 2, 2004." (b)(4 minutes) The examination continues as follows:
 - Q. "Did you record the date of the call in your log?" A. "No, it was recorded by my secretary, MJ, who keeps all the records."
 - Q. "How do you know if MJ recorded the date correctly?" A. "We follow a standard procedure for recording dates in the log, and MJ always follows that procedure. MJ never makes a mistake."
- T then offers the telephone log, T's Exhibit 2, into evidence. C objects.
- How should the Tax Court rule, and why?

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

- 2004/E-10 (8 minutes) T is seeking to prove the date on which T received a telephone call from a person named Rodriguez. Direct examination of T proceeds with the following questions and answers:
 - Q. "What was the date on which you received the call from Mr. Rodriguez?" A. "I don't recall."
 - Q. "I show you what has been marked as T's Exhibit 2. Do you recognize it?" A. "Yes, it's the telephone log from my office."
 - Q. "Does that refresh your memory?" A. "It says here August 2, 2004." (b)(4 minutes) The examination continues as follows:
 - Q. "Did you record the date of the call in your log?" A. "No, it was recorded by my secretary, MJ, who keeps all the records."
 - Q. "How do you know if MJ recorded the date correctly?" A. "We follow a standard procedure for recording dates in the log, and MJ always follows that procedure. MJ never makes a mistake."
- T then offers the telephone log, T's Exhibit 2, into evidence. C objects.
- How should the Tax Court rule, and why?
- SUGGESTED ANSWER: Objection sustained. Although this appears to be under the business records hearsay exception, T did not make the record. Contemporaneous, regularly kept business records may be admitted by the record maker or someone with personal knowledge or duty to record as a hearsay exception under FRE 803(6) (if kept by person of responsibility and there is no reason to doubt their veracity). MJ, the record maker, is not available to testify.
- FOR DISCUSSION: Could T qualify as a person with knowledge about the company's records? Also, note the difference between refreshing the witness's recollection with a writing, and trying to introduce the writing itself into evidence!

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

Prior Recorded Testimony (p.36):

- **Unavailable Declarant!**
- Testimony given under oath
- Given in a previous hearing or deposition
- Party or predecessor in interest against whom evidence is presented had opportunity and similar incentive to examine the testimony

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

- 2004/E-7 (5 minutes) T and S were limited partners in a limited partnership that owned certain depreciable property. C has proposed deficiencies to T and S with respect to their distributive shares of depreciation deductions of the limited partnership. C asserts that depreciation is not allowable for the taxable year in controversy because the property was not placed in service during the taxable year. T offers into evidence in T's Tax Court case the transcript of the testimony of Jones, who testified as a fact witness (as to when the property was placed in service by the partnership) for S in S's Tax Court case. Jones is on an extended vacation in Europe. Is the transcript of Jones' testimony admissible in T's Tax Court case? What foundation, if any, would make it admissible?

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

- 2004/E-7 (5 minutes) T and S were limited partners in a limited partnership that owned certain depreciable property. C has proposed deficiencies to T and S with respect to their distributive shares of depreciation deductions of the limited partnership. C asserts that depreciation is not allowable for the taxable year in controversy because the property was not placed in service during the taxable year. T offers into evidence in T's Tax Court case the transcript of the testimony of Jones, who testified as a fact witness (as to when the property was placed in service by the partnership) for S in S's Tax Court case. Jones is on an extended vacation in Europe. Is the transcript of Jones' testimony admissible in T's Tax Court case? What foundation, if any, would make it admissible?
- SUGGESTED ANSWER: The transcript of Jones' testimony is admissible if the earlier proceeding meets the conditions for the prior testimony hearsay exception and the witness is unavailable, and as long as an attempt was made to procure his attendance at trial. Testimony given at another hearing or deposition is not hearsay if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. Prior testimony can be used if the witness is unavailable under FRE 804(b)(1). Jones is absent from the hearing, the proponent cannot obtain his presence by process (out of the country), and the proponent did not make the witness unavailable.

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

Sensory Impression (p.37):

- Statement made describing or explaining an event or condition
- Made while or immediately after declarant was perceiving it
- Example: "Did you see Joe run that red light!"

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

Equivalency (p.37):

- This is the judge's catch-all (FRE 807)
- Not covered by FRE 803 or 804
 - Has equivalent circumstantial guarantees of trustworthiness equivalent to other exceptions
 - "More probative" than other reasonable available evidence
 - Justice will be served by admission into evidence
 - Timely notice was given to adverse party providing fair opportunity to respond

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

Expert Cross-Examination (p.37):

- Virtually any "learned treatise", etc.
- Established as a reliable authority by:
 - Testimony of another
 - Admission of the expert
 - Judicial notice
- Offered during examination of an expert
- May be read into evidence, but not admitted as an exhibit

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

- 2008/E-3 Assume that TP's state of mind is relevant to an issue, such as avoidance of certain penalties. TP offers to read into evidence three paragraphs of an authoritative accounting textbook. Assume she offers it to support her argument that she had a good-faith belief in the deductibility of a particular business expense having testified that she read and relied on the text.
- (a)(6 minutes) C objects, arguing that the text is hearsay. What would be the proper ruling of the Tax Court, and why?

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

- 2008/E-3 Assume that TP's state of mind is relevant to an issue, such as avoidance of certain penalties. TP offers to read into evidence three paragraphs of an authoritative accounting textbook. Assume she offers it to support her argument that she had a good-faith belief in the deductibility of a particular business expense having testified that she read and relied on the text.
- (a)(6 minutes) C objects, arguing that the text is hearsay. What would be the proper ruling of the Tax Court, and why?
- SUGGESTED ANSWER: Sustained. TP is not an expert and the proper foundation has not been met for the expert cross-examination hearsay exception. Unless an expert witness relies on it or the treatise is used to cross examine the witness, generally a learned treatise is not admissible under the exception in FRE 803(18). If foundation is met, portions may be read into evidence by the expert but the treatise is not itself admitted into evidence.
- ALTERNATIVE ANSWER FOR DISCUSSION: Overruled. The accounting textbook cannot be offered into evidence to prove the matter asserted; that the business expense is deductible. However, testimony regarding that text would not be excluded as the text is being used for a non-hearsay use: that it caused within TP a good faith belief which defeats the claim that she intended to commit tax fraud. Thus, the text would be admissible only to show the reasonableness of TP's reliance upon it.

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

Inconsistent Prior Statements (p.38):

- Prior statement of a witness
- Inconsistent with present statement at trial
- Given subject to penalty of perjury
- At a deposition, trial, or other proceeding
 - This is why you take depositions during discovery
 - Extends to interrogatories and requests for admissions signed under penalty of perjury
- Used to impeach the witness's testimony

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

Consistent Prior Statements (p.38):

- Prior statement of a witness
- Consistent with present testimony
- Used to rebut:
 - a charge of recent fabrication
 - or improper influence or motive

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

2018/E-10 (6 minutes) Assume that Jane (J) was allowed to testify to her opinion regarding TP's behavior (that "TP was evasive, very nervous, acted really strange and hurriedly left my presence after a few seconds"). Assume further that J completed her direct examination testimony and was not asked any questions by TP on cross-examination. The IRS then called Sandy (S) as its next witness. The IRS asks S whether she ever had any conversations with J about TP. S responds, "Yes I did. I remember that she called me on her cell phone in 2012." When asked about the substance of that conversation, S testified, "J told me that she had observed Ed (E) hand TP a large sum of money and when she approached TP to talk about it TP appeared evasive, very nervous, was acting really strange and had hurriedly left her presence after a few seconds." TP objects, arguing that S's testimony is hearsay. The IRS contends that the objection should be overruled since S' testimony constitutes a prior consistent statement. How should the court rule and why?

Presented by Frank R. Acuña, Attorney at Law

ADDEM P. BOPP, SEE ICI!

2018/E-10 (6 minutes) Assume that Jane (J) was allowed to testify to her opinion regarding TP's behavior (that "TP was evasive, very nervous, acted really strange and hurriedly left my presence after a few seconds"). Assume further that J completed her direct examination testimony and was not asked any questions by TP on cross-examination. The IRS then called Sandy (S) as its next witness. The IRS asks S whether she ever had any conversations with J about TP. S responds, "Yes I did. I remember that she called me on her cell phone in 2012." When asked about the substance of that conversation, S testified, "J told me that she had observed Ed (E) hand TP a large sum of money and when she approached TP to talk about it TP appeared evasive, very nervous, was acting really strange and had hurriedly left her presence after a few seconds." TP objects, arguing that S' testimony is hearsay. The IRS contends that the objection should be overruled since S' testimony constitutes a prior consistent statement. How should the court rule and why?

SUGGESTED ANSWER: Sustained. Prior consistent statement exception is allowed when the prior testimony is consistent and the parties had a similar opportunity and motive to develop it (even though the IRS didn't cross examine her), but FRE 804(b)(1) requires that J be unavailable to use this exception. Since she is being allowed to testify, she clearly is not unavailable. (12/12)

ALTERNATIVE ANSWER TO DISCUSS: Sustained. The prior consistent statement exception requires (1) a prior statement of a witness, (2) consistent with present testimony, (3) used to rebut a charge of recent fabrication or improper influence or motive. In this case, there is no mention of any claim that J's testimony was challenged as inconsistent, fabricated, or the result of improper influence or motive.

NOTE: The Consistent Statement Exception does not require unavailability. The Prior Recorded Testimony Exception requires (1) Unavailable Declarant (2) Testimony given under oath (3) Given in a previous hearing or deposition, (4) Where the party or predecessor in interest against whom evidence is presented had opportunity and similar incentive to examine the testimony

Presented by Frank R. Acuña, Attorney at Law


ADDEM P. BOPP, SEE ICI!

Identification of a Person (p.38):

- Technically, this is a non-hearsay use, not an exception
- Elements
 - Prior statement of a witness/declarant
 - Identifying a person
 - Made after perceiving that person

Presented by Frank R. Acuña, Attorney at Law

Questions?



Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay Exceptions

Plaintiff sues Defendant, claiming that Defendant was roofing and an asphalt "stringer" landed in his face, permanently damaging his eyesight. At trial, Defendant offers into evidence Plaintiff's employment application submitted two weeks after the incident, to which Plaintiff attached a certificate from his optometrist. The certificate states that Plaintiff's eyesight is perfect (a requirement for the job for which he was applying).

Does the certificate satisfy an exception to the hearsay rule?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay Exceptions

Passenger is injured when his bus crashes. In his suit against the Company, Passenger offers as evidence the exclamation of the driver, just before the crash "[Expletive]! I knew they messed up the axle replacement! We should have taken another bus!" Passenger claims this statement is an admission by a party-opponent. Company objects, claiming that the making of such a statement is outside the scope of the driver's duties, so that the statement is inadmissible. How do you rule?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay Exceptions

Biff and Boff, frat brothers, are going home from a wild party. Biff is driving when the car hits and injures Buffy, a pedestrian crossing the street at a crosswalk. Cop arrives five minutes later. Buffy sues Biff for negligence, claiming Biff was driving while intoxicated. Buffy offers the testimony of Cop: "At the scene, While everyone else was out of earshot, Boff told me: 'We were on our way home from a party, where we were all drinking like there was no tomorrow.'" Biff objects. Will Cop's testimony be admissible?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay Exceptions

Those frat boys are at it again. Biff ascends to the roof of the frat house and drops a Jello filled balloon on Boff's head. Boff says, "Ouch! I think my skull is fractured!" At Biff's trial on battery charges, Boff's comment is offered to prove Boff was in pain. Biff objects. How do you rule?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay Exceptions

After an intense bunch of final exams, Buffy is taken to the student health center on a stretcher. The attending physician asks what happened. Buffy says, "I was walking down the hall and slipped in some liquid coming from the science lab. I think my leg is broken." At Buffy's negligence trial against the University, the University claims that Buffy must have hurt her leg outside while playing Ultimate Frisbee with the frat boys. The Doctor is called to repeat what Buffy told him about what caused her injury. Is his testimony admissible?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay Exceptions

As proof that MacArthur returned to Corregidor in the Philippines, his statement "I shall return" is offered as evidence. Assuming MacArthur is still alive, is there a hearsay exception to cover this testimony?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay Exceptions

Frank and Bob work for a grocery store. Suspecting broken cases of lighter fluid, Frank says "Hey Bob, that pallet smells funny." He then suggests they open the cases to see what's inside. The case and the entire pallet explode. In a subsequent lawsuit, Frank's statement is offered under the "present state of mind" exception to the hearsay rule to prove that the crate was leaking. Is the statement admissible?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay Exceptions

Dad tells Son-In-Law, "I'm planning to give you my 73 Pinto next week." The very next week, the 73 Pinto goes up in flames, taking two city blocks with it. In a lawsuit for negligence, Son-In-Law denies ownership of Pinto. Dad's statement is offered as proof that Dad probably gave the Pinto to Son-In-Law. Son-In-Law objects, claiming the statement is inadmissible hearsay. Will the statement be admissible under the "present state of mind" exception?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay Exceptions

Snaky is on trial for horse thievery. He defends on grounds that he didn't realize the horse wasn't his. His friend, Sneaky, testifies: "He told me the day afterwards, 'You know, I took the wrong horse. I thought it was mine.' " The prosecution objects. Admissible?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay Exceptions

Frank claims he wrote the plays ascribed to Will. (He asserts that before he could publish them, Will stole the manuscripts and published them under his own name.) Frank offers the testimony of Will's friend, Fred, that, while Fred and Will were at a tavern, a glass fell on Will's head and shattered. Dazed and excited, Will shouted: "Frank wrote the plays!" Will objects. Frank claims the statement is admissible under the excited utterance exception to the hearsay rule. Is he right?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay Exceptions

Frank and Ned are chatting on their front porch one day, when they see Sam zoom by in his Corvette, through a red light, and into the side of another car. Frank looks on calmly, and comments, "There goes Sam, watching the women instead of the road again." At a subsequent trial concerning the accident, Frank's statement is offered into evidence to prove Sam wasn't paying attention to the road. Is the statement admissible, notwithstanding that Frank was unexcited when he made it?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay Exceptions

Bubba, an avid hunter, is out hunting one day. Unfortunately, one of his shots hits Clem, playing golf on a neighboring course with his friend Al. Clem sues Bubba for battery. By the time the case gets to trial, Clem's witness, Al, can't remember what happened. While Al is on the witness stand, he is handed some notes he took at the time of the incident. However, he still can't remember anything. If Al testifies that the notes were correct when made, under what hearsay exception, if any, can they now be read into the record?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay Exceptions

Sherrill sues the Nugget for injuries she claims she incurred lying on a faulty mattress. Sherrill offers as evidence the emergency room records of the hospital that treated her at the time. The records are regularly and scrupulously kept by personnel who attend to the patients and who must maintain such records. The records include Sherrill's statement: "The mattress at the Nugget was faulty." Is the statement admissible to show that the mattress was in fact faulty?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay Exceptions

Plaintiff brings a civil suit against Company, alleging that Company refused to hire Plaintiff and that the refusal was based on illegal racial discrimination. In its defense, Company seeks to introduce a report by the state Equal Employment Opportunity Commission, which recently conducted a review of Company's hiring practices, and concluded that Company did not practice racial discrimination in hiring. Are the report and this conclusion admissible under the official records exception, to prove that Company generally doesn't discriminate?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay Exceptions

A civil suit involves the issue of whether defendant, a cigarette company, knew that cigarettes could cause cancer in 1954. Plaintiff offers a letter found under the following circumstances: President (of the company) died in 1962. In his safe deposit box was found a carbon copy of a letter purporting to have been written by President to his son in 1953, in which he says, "Son, the scientists at the company have just finished experiments showing that smoking probably can cause lung cancer." The box was not discovered and opened until 1993. No other evidence has been offered proving that President actually wrote this letter. What hearsay exception, if any, allows the introduction of the letter into evidence for the purpose of proving that the scientists did the experiments referred to in the letter?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay Exceptions

Decedent is covered by an insurance policy that pays double in the event of an accidental death. The insurance company refuses to make the double payment, contending that Decedent died of natural causes. His widow sues the insurer. At trial, the insurer attempts to introduce Decedent's death certificate, which was filled out and signed by Decedent's doctor, in which the cause of death is listed as "brain tumor." The certificate is offered to prove that Decedent died of a brain tumor. Is the certificate admissible?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay Exceptions

Plaintiff sues Defendant for battery. Previously, Defendant was tried and convicted on criminal battery charges arising from the same incident (Plaintiff was the complainant). At the criminal trial, Witness had testified that he saw Defendant attack Plaintiff without provocation. Defendant cross-examined Witness at the criminal trial. In the current civil trial, will Witness's testimony be admissible, over Defendant's objection?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay Exceptions

Defendant is arrested for breaking and entering the Victim's house. Victim suffers a complete nervous breakdown after the crime, and can't testify. Instead, a sworn affidavit as to her recollection of the facts, given to the police immediately after the break-in, is offered under the "former testimony" exception to the hearsay rule. How do you rule?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay Exceptions

Witness appears at a trial on behalf of plaintiff. Defense counsel doesn't cross-examine her, although given the chance to do so. She subsequently travels internationally on business and is unable to be subpoenaed or to return for a subsequent trial where the parties and issues are substantially identical. When her recorded testimony is offered under the "former testimony" exception to the hearsay rule, defense counsel objects on the grounds that Witness wasn't cross-examined at the first trial. How do you rule?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay Exceptions

Maid rushes into Victim's study, only to find him on the carpet, bleeding profusely, with a sharpened umbrella through his chest. She rushes to him, props him up, as he mumbles feebly: "The butler did it." He slumps over and dies. At Butler's murder trial, the prosecutor offers Maid's testimony as to the Victim's statement, to prove Butler did it. Butler objects on hearsay grounds: "Everyone always says I did it." How do you rule?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay Exceptions

Brutus and friends attack Julius Caesar on the steps of the Capital. As Brutus stabs him, Caesar, believing himself mortally wounded, looks up, and exclaims, "Et tu, Brute?" Caesar unexpectedly survives, changing the course of history. At Brutus' attempted murder trial, Caesar is one of the spectators. A bystander at the stabbing, testifies and says: "I heard Caesar say, 'Et tu, Brute?'" On objection, is the statement admissible as a "dying declaration"?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay Exceptions

Scrooge is prosecuted for income tax evasion. He is elderly and has had several heart operations. At trial, the defense offers the testimony of Cratchit who will testify: "Scrooge's cousin, Tim, told me that he himself prepared Scrooge's tax return, that he, Tim, knew he had put some questionable deductions into the return, and that the old man knew nothing about any wrongdoing." The defense offers nothing further about the circumstances surrounding Tim's statement. The prosecutor objects. Is the statement admissible?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay Exceptions

Dad's will provides that, if Son reaches age 30 while Dad is still alive, Dad's estate is to go to Daughter. If Son doesn't reach 30 before Dad's death, then the estate is to go to Dad's other daughter, D-2. When Dad dies, Dad has been dead for three years, but his birth certificate can't be found so it's hard to prove how old he was at his death. In the lawsuit that ensues to determine who is entitled to Dad's estate, Daughter offers the testimony of Son's widow. She would testify that she lived with Son during the last year of his life, during which he told her he was 33. D-2 objects on hearsay grounds. Under what hearsay exception, if any, is Widow's statement admissible?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Hearsay Exceptions

Plaintiff sues Defendant under a Tavern Keeper's Law for injuries he received when Patron ran over him while he was crossing the street. Plaintiff claims the Defendant let Patron drink too much.) The tavern calls Patron as a witness, and expects him to testify that he was sober when he left the Tavern. In fact, on direct testimony, Patron says he may have had a few too many at the tavern, after all. Can the tavern now introduce a statement from Patron's pre-trial deposition, in which he claimed he left the bar sober, as substantive evidence that he was in fact sober?

Presented by Frank R. Acuña, Attorney at Law

Questions?



Presented by Frank R. Acuña, Attorney at Law

Exclusions & Limitations (p.38)

- Some types of evidence excluded or limited under a specific rule because:
 - Inherently untrustworthy
 - Unfair
 - Against Public Policy
- Additionally, the judge retains the discretion to exclude evidence for reasons not specifically set forth in the FRE

Presented by Frank R. Acuña, Attorney at Law

Exclusions & Limitations (p.38)

Character Evidence

- Rule: Evidence of a person's character is inadmissible to prove conduct on a particular occasion, unless there is an exception:
 - Is the evidence a form of character evidence?
 - Is there a non-conduct use to introduce character
 - If used to prove conduct, is there an exception to the rule
- Forms of Character Evidence:
 - Reputation in the Community
 - Personal Opinion of a Person's Character or Disposition
 - Other Acts Done by the Person

Presented by Frank R. Acuña, Attorney at Law

Exclusions & Limitations (p.39)

Character Evidence

- Non-Conduct Uses:
 - Character as an ultimate issue of a claim or defense
 - In tax cases, is it proof of intent or that penalties should apply?
- Knowledge of a Person's Character
 - Character witness may be asked if they have heard about specific instances
 - If denied, the questioning stops

Presented by Frank R. Acuña, Attorney at Law

Character Evidence (p.38)

General Rule: Evidence of a person's character or disposition is inadmissible proof of the conduct of that person on a particular occasion, except as otherwise permitted by law.

Issue Spotting Sequence:

1. Is the evidence a form of Character Evidence?
2. Is the evidence admissible to prove facts other than conduct?
3. If used to prove conduct, is the evidence admissible under a specific exception to the general rule?

Presented by Frank R. Acuña, Attorney at Law

Exclusions & Limitations (p.40)

- Exceptions to Character Evidence Rule
 - Character of the Accused (Mercy Rule)
 - Accused may offer either good reputation or personal opinion, but not specific acts in a criminal case
 - Once opened, government may rebut with reputation or personal opinion
 - Circumstantial Evidence (Other Acts) May Be Used to Prove
 - Motive
 - Opportunity
 - Knowledge or Intent
 - Preparation or Plan
 - Identity

Presented by Frank R. Acuña, Attorney at Law

Exclusions & Limitations (p.40)

- Exceptions to Character Evidence Rule
 - Habit, if used to prove actions in conformity with a habit or routine practice, or non-occurrence
 - E.g., sweep sheets in grocery store (which would also be a hearsay exception, but which one?)
 - Witness Credibility (may be used to impeach or rehabilitate)
 - Reputation for truth and veracity
 - Personal Opinion
 - Other Acts
 - Felony Convictions, Misdemeanor Convictions, Unconvicted Conduct

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Character Evidence

2006/E-5 (8 minutes) Assume that, in T's case, one of the issues is whether T's 2005 income tax return was timely filed. As some evidence that it was, T offers to testify and to introduce other evidence that T invariably filed every federal income tax return from 1980 through 2004 on time. Is this evidence relevant and admissible as some evidence that T's 2005 return was timely filed? Discuss.

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Character Evidence

2006/E-5 (8 minutes) Assume that, in T's case, one of the issues is whether T's 2005 income tax return was timely filed. As some evidence that it was, T offers to testify and to introduce other evidence that T invariably filed every federal income tax return from 1980 through 2004 on time. Is this evidence relevant and admissible as some evidence that T's 2005 return was timely filed? Discuss.

SUGGESTED ANSWER: Relevant evidence under FRE 401 is any evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. It should be admissible as this is a fact of consequence in the case.

Evidence of an individual's habit may be admitted under FRE 406 when relevant to prove that such conduct on a particular occasion was in conformity with habit or routine practice.

Evidence of timely filing returns for years before and after the issue is evidence of a pattern and makes it more probable there was a timely filing of the return at issue.

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Character Evidence

Father is seeking sole custody of Son from his former wife. Wife seeks to introduce character evidence showing that Father conducts "chemical experiments" which would create an unhealthy atmosphere in which to raise a child. Father's lawyer objects. How do you rule?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Character Evidence

Defendant in a criminal trial, wants to offer the testimony of a friend as to Defendant's good reputation, to prove he didn't commit the crime in question. Defendant's lawyer first shows that Friend is familiar with Defendant's reputation. Then, when the lawyer asks what that reputation is, Friend hesitates, then says: "Well, I haven't heard anything bad about him." Is this "negative" reputation testimony admissible?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Character Evidence

Defendant is on trial for murder of a pedestrian passing by. Neighbor appears as a reputation witness for Defendant, claiming his reputation in the community is "very good." On cross-examination, the prosecutor asks Neighbor: "Have you heard about Defendant stabbing his sainted mother in 1969?" Defense counsel objects to the question. How do you rule?

Presented by Frank R. Acuña, Attorney at Law

Some Notes on Impeachment (FRE 607-609)

- Character evidence rules have to do with affirmatively proving that someone did something because they had a "propensity" to do so
- However, impeachment is not proving propensity, but rebutting whether or not a witness was being honest
- FRE 608(b): Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of: (1) the witness; or (2) another witness whose character the witness being cross-examined has testified about

Presented by Frank R. Acuña, Attorney at Law

Some Notes on Impeachment (p.42)

- Impeachment by Criminal Convictions (FRE 609):
 - Felony convictions less than 10 years old
 - May be more than 10 years old, but highly susceptible to judicial discretion and advance notice must be given to the opposition
 - Probative vs. Prejudicial Standard
 - Must involve a dishonest act or false statement
 - Other requirements in the Rules

Presented by Frank R. Acuña, Attorney at Law

Impeachment

- 2018/E-5 (6 minutes) Assume that Fred (F), referenced in question 4, is still on the witness stand. On cross-examination, the IRS attorney asks F, "In 2014, did you apply for a job with Corporation X?" F replies, "Yes I did." The IRS attorney then asked F, "On that job application, did you misrepresent the extent of your education? Specifically, did you falsely state that you had a bachelors degree from State University?" TP objects to this question. How should the court rule?

Presented by Frank R. Acuña, Attorney at Law

Impeachment

- 2018/E-5 (6 minutes) Assume that Fred (F), referenced in question 4, is still on the witness stand. On cross-examination, the IRS attorney asks F, "In 2014, did you apply for a job with Corporation X?" F replies, "Yes I did." The IRS attorney then asked F, "On that job application, did you misrepresent the extent of your education? Specifically, did you falsely state that you had a bachelors degree from State University?" TP objects to this question. How should the court rule?
- SUGGESTED ANSWER: Overruled. It is always appropriate to impeach a witness as to credibility and specific acts of conduct or misconduct may be inquired about under FRE 607. (12/12)
- ALTERNATIVE ANSWER FOR DISCUSSION: Overruled. Under FRE 608, extrinsic evidence of specific instances of conduct may not be introduced to support or attack a witness's character for truthfulness unless, on cross-examination, they are probative of the character for truthfulness or untruthfulness of the witness or another witness who the witness is testifying about under cross-examination.

Presented by Frank R. Acuña, Attorney at Law

Impeachment

- 2018/E-7 (6 minutes) Assume that Fred (F), referenced in questions 4, 5, and 6 is still on the witness stand. Assume further that the court overruled the objection in question 6 and allowed the IRS to show F a copy of F's application to Corporation X. After reviewing the document, F testified, "Well, after reviewing it I stand by my earlier testimony; namely, that I did not make any misrepresentations on my application to Corporation X, including anything regarding my prior education." Convinced that F is lying on the witness stand, the IRS then seeks to admit into evidence F's application to Corporation X. TP objects. How should the court rule and why?

Presented by Frank R. Acuña, Attorney at Law

Impeachment

- 2018/E-7 (6 minutes) Assume that Fred (F), referenced in questions 4, 5, and 6 is still on the witness stand. Assume further that the court overruled the objection in question 6 and allowed the IRS to show F a copy of F's application to Corporation X. After reviewing the document, F testified, "Well, after reviewing it I stand by my earlier testimony; namely, that I did not make any misrepresentations on my application to Corporation X, including anything regarding my prior education." Convinced that F is lying on the witness stand, the IRS then seeks to admit into evidence F's application to Corporation X. TP objects. How should the court rule and why?
- SUGGESTED ANSWER: Sustained. The IRS can ask the question and show the document to refresh the witness's memory, however the document cannot come into evidence as it is not a prior convicted bad act under FRE 608(b). The IRS must accept the witness's answer as is. (12/12)

Presented by Frank R. Acuña, Attorney at Law

Impeachment

- 2016/E-9 (6 minutes) Assume that TP's brother, B, is on the witness stand and that during direct examination B provides testimony favorable to TP. On cross examination, the IRS seeks to admit into evidence a properly authenticated "Judgment and Conviction" order that reflects B's misdemeanor conviction for "bank fraud" in 2010. TP objects claiming that such evidence is inadmissible impeachment evidence. The IRS submits that such evidence is admissible. How should the court rule?

Presented by Frank R. Acuña, Attorney at Law

Impeachment

- 2016/E-9 (6 minutes) Assume that TP's brother, B, is on the witness stand and that during direct examination B provides testimony favorable to TP. On cross examination, the IRS seeks to admit into evidence a properly authenticated "Judgment and Conviction" order that reflects B's misdemeanor conviction for "bank fraud" in 2010. TP objects claiming that such evidence is inadmissible impeachment evidence. The IRS submits that such evidence is admissible. How should the court rule?
- SUGGESTED ANSWER: Overruled. A prior conviction may impeach witness credibility. Generally under FRE 609 any conviction, less than 10 years old and for a felony punishable by death, or imprisonment more than one year, can be established with extrinsic evidence proving the conviction. Extrinsic evidence involving conviction for a misdemeanor involving dishonesty or false statement can also be offered. A conviction on bank fraud is probative on witness truthfulness. (12/12)

Presented by Frank R. Acuña, Attorney at Law

Impeachment

- 2016/E-10 (6 minutes) Assume that TP's brother, B, is on the witness stand and that during direct examination B provides testimony favorable to TP. On cross examination, the IRS asks B whether B disclosed on an employment application to X Corporation two years ago that B had a prior felony conviction. B responds "Yes, I did." B had not disclosed this information, and the IRS seeks to admit extrinsic evidence to prove that B did not make this disclosure. TP objects to the introduction of this extrinsic evidence. The IRS submits that the introduction of such extrinsic evidence is proper. How should the court rule?

Presented by Frank R. Acuña, Attorney at Law

Impeachment

- 2016/E-10 (6 minutes) Assume that TP's brother, B, is on the witness stand and that during direct examination B provides testimony favorable to TP. On cross examination, the IRS asks B whether B disclosed on an employment application to X Corporation two years ago that B had a prior felony conviction. B responds "Yes, I did." B had not disclosed this information, and the IRS seeks to admit extrinsic evidence to prove that B did not make this disclosure. TP objects to the introduction of this extrinsic evidence. The IRS submits that the introduction of such extrinsic evidence is proper. How should the court rule?
- SUGGESTED ANSWER: Sustained. Extrinsic evidence of a prior bad act cannot be allowed under FRE 608(b). If counsel has a good faith basis, the question can be asked, but the witness's answer must be accepted as given. (12/12)

Presented by Frank R. Acuña, Attorney at Law

Impeachment

- 2012/E-2(b)(6 minutes) Assume that A was permitted to testify on direct examination to A's conversation with B as detailed in 2012/E-2.a. Assume further that it has been established that A is a professional tax return preparer, that A attended a social event on the evening of January 4, 2007, and that A had a conversation during that event with C. Finally assume, for purposes of this Question, that A is on the witness stand and is being cross-examined by TP. On cross-examination, TP asks A, "Is it true that on the night of January 4, 2007, you told C that you found nothing improper when you reviewed TP's tax return?" If the I.R.S. objects to this question on hearsay grounds, what is TP's best response, and explain how the Tax Court should rule.

Presented by Frank R. Acuña, Attorney at Law

Impeachment

- 2012/E-2(b) (6 minutes) Assume that A was permitted to testify on direct examination to A's conversation with B as detailed in 2012/E-2.a. Assume further that it has been established that A is a professional tax return preparer, that A attended a social event on the evening of January 4, 2007, and that A had a conversation during that event with C. Finally assume, for purposes of this Question, that A is on the witness stand and is being cross-examined by TP. On cross-examination, TP asks A, "Is it true that on the night of January 4, 2007, you told C that you found nothing improper when you reviewed TP's tax return?" If the I.R.S. objects to this question on hearsay grounds, what is TP's best response, and explain how the Tax Court should rule.
- SUGGESTED ANSWER: TP's best response is that the statement is being offered as a prior inconsistent statement offered to impeach A's credibility under FRE 607; as such it is not hearsay. The Tax Court should overrule the objection. (12/12)

Presented by Frank R. Acuña, Attorney at Law

Impeachment

- 2000/E-15 (3 minutes) The following facts apply to questions E-5 through E-19. The IRS asserts that Sam Taxpayer underreported his gross income and overstated his expenses on his Federal income tax return for 1999. Sam operates a small business, "Sam's Speedy Pizza Service," as a proprietorship. He employs 20 people. A trial in the United States Tax Court raised several evidence issues. After the direct examination of Billy was completed, he was cross-examined by counsel for Sam. The counsel asked: "Are you the same Billy Driver who was convicted of felony drunk driving in 1989, but did not serve any jail time because you were sentenced to three years probation?" There was an objection by the IRS on the ground of improper cross-examination. Should the objection be sustained? Answer yes" or no," then explain briefly.

Presented by Frank R. Acuña, Attorney at Law

Impeachment

- 2000/E-15 (3 minutes) The following facts apply to questions E-5 through E-19. The IRS asserts that Sam Taxpayer underreported his gross income and overstated his expenses on his Federal income tax return for 1999. Sam operates a small business, "Sam's Speedy Pizza Service," as a proprietorship. He employs 20 people. A trial in the United States Tax Court raised several evidence issues. After the direct examination of Billy was completed, he was cross-examined by counsel for Sam. The counsel asked: "Are you the same Billy Driver who was convicted of felony drunk driving in 1989, but did not serve any jail time because you were sentenced to three years probation?" There was an objection by the IRS on the ground of improper cross-examination. Should the objection be sustained? Answer yes" or no," then explain briefly.
- SUGGESTED ANSWER: Yes, Billy's drunk driving conviction is irrelevant and does not go towards his truthfulness. Even though it is a felony conviction (because it was punishable for over a year), it is over 10 years old, and is not admissible under FRE 609. A conviction that is more than 10 years old may be admissible if its probative value outweighs prejudicial effect (FRE 403). However, advance written notice of the intent to use the evidence is required.

Presented by Frank R. Acuña, Attorney at Law

Impeachment

- 2002/E-4 (3 minutes) Same facts as Question E-1. During its case, respondent called Cathy as a witness. Prior to the trial and during an interview with an IRS agent, she said that she was the CEO of a bank that was in the same city as SBI and that, in her opinion, John's salary was clearly excessive and unreasonable. She testified on direct examination that she was familiar with SBI and John's duties and responsibilities. She further testified that she believed that the salary John received was a reasonable amount for his responsibilities and the complexities of the SBI business. Respondent's counsel then attempted to question Cathy about the statement she made prior to trial concerning the salary being excessive. If petitioner's counsel objected on the basis that the IRS is attempting to impeach its own witness, how should the Tax Court rule? Briefly explain.

Presented by Frank R. Acuña, Attorney at Law

Impeachment

- 2002/E-4 (3 minutes) Same facts as Question E-1. During its case, respondent called Cathy as a witness. Prior to the trial and during an interview with an IRS agent, she said that she was the CEO of a bank that was in the same city as SBI and that, in her opinion, John's salary was clearly excessive and unreasonable. She testified on direct examination that she was familiar with SBI and John's duties and responsibilities. She further testified that she believed that the salary John received was a reasonable amount for his responsibilities and the complexities of the SBI business. Respondent's counsel then attempted to question Cathy about the statement she made prior to trial concerning the salary being excessive. If petitioner's counsel objected on the basis that the IRS is attempting to impeach its own witness, how should the Tax Court rule? Briefly explain.
- SUGGESTED ANSWER: Objection overruled. Any party may impeach a witness, including the calling party under FRE 607.

Presented by Frank R. Acuña, Attorney at Law

Impeachment

- 2002/E-9 (3 minutes) During her cross-examination, Shelia was asked whether two years earlier she had been convicted of driving under the influence of alcoholic beverages, which was a misdemeanor with a maximum sentence of six months in jail. Is this proper cross-examination. Explain briefly.

Presented by Frank R. Acuña, Attorney at Law

Impeachment

- 2002/E-9 (3 minutes) During her cross-examination, Sheila was asked whether two years earlier she had been convicted of driving under the influence of alcoholic beverages, which was a misdemeanor with a maximum sentence of six months in jail. Is this proper cross-examination. Explain briefly.
- SUGGESTED ANSWER: No. Under FRE 609(a)(2) a crime not involving dishonesty or false statement must be a felony (crime punishable by death or imprisonment for more than a year) that is less than 10 years old. The crime described is a misdemeanor, and cannot be used to impeach Sheila.

Presented by Frank R. Acuña, Attorney at Law

Impeachment

- 2006/E-4 Assume that the financial statement prepared by WA is eventually admitted into evidence, and that WA testifies that the statement "truly and accurately states the financial transactions of T's business for the 4th quarter of 2005." WA completes testifying and is excused from the hearing. T presents the remainder of T's evidence and rests. C, during C's case, offers into evidence a properly authenticated letter from WA to T, dated February 1, 2006, in which WA states, "As you requested, I changed some of the figures in the 4th Quarter 2005 report to improve the "bottom line." The letter then goes on to detail the figures that were changed. T objects to the admission of the letter. Assume that no evidentiary privilege applies to this letter.
- (a)(8 minutes) If T objects on the ground that the letter is hearsay, should that objection be sustained? Why or why not? Discuss.

Presented by Frank R. Acuña, Attorney at Law

Impeachment

- 2006/E-4 Assume that the financial statement prepared by WA is eventually admitted into evidence, and that WA testifies that the statement "truly and accurately states the financial transactions of T's business for the 4th quarter of 2005." WA completes testifying and is excused from the hearing. T presents the remainder of T's evidence and rests. C, during C's case, offers into evidence a properly authenticated letter from WA to T, dated February 1, 2006, in which WA states, "As you requested, I changed some of the figures in the 4th Quarter 2005 report to improve the "bottom line." The letter then goes on to detail the figures that were changed. T objects to the admission of the letter. Assume that no evidentiary privilege applies to this letter.
- (a)(8 minutes) If T objects on the ground that the letter is hearsay, should that objection be sustained? Why or why not? Discuss.
- SUGGESTED ANSWER: Yes, the objection should be sustained because it is an out of court statement offered to prove the matter asserted; that the 4th Quarter Report was altered, because there is no exception to hearsay. However, C could have used the letter to impeach WA when WA was testifying. If there is no hearsay exception that allows this letter in, it can only be allowed for impeachment purposes under FRE 613.
- FOR DISCUSSION: What about the Prior Inconsistent Statement exception?

Presented by Frank R. Acuña, Attorney at Law

Impeachment

- 2006/E-4 Assume that the financial statement prepared by WA is eventually admitted into evidence, and that WA testifies that the statement "truly and accurately states the financial transactions of T's business for the 4th quarter of 2005." WA completes testifying and is excused from the hearing. T presents the remainder of T's evidence and rests. C, during C's case, offers into evidence a properly authenticated letter from WA to T, dated February 1, 2006, in which WA states, "As you requested, I changed some of the figures in the 4th Quarter 2005 report to improve the 'bottom line.'" The letter then goes on to detail the figures that were changed. T objects to the admission of the letter. Assume that no evidentiary privilege applies to this letter.
- (a)(8 minutes) If T objects on the ground that the letter is hearsay, should that objection be sustained? Why or why not? Discuss.
- SUGGESTED ANSWER: Yes, the objection should be sustained because it is an out of court statement offered to prove the matter asserted; that the 4th Quarter Report was altered, because there is no exception to hearsay. However, C could have used the letter to impeach WA when WA was testifying. If there is no hearsay exception that allows this letter in, it can only be allowed for impeachment purposes under FRE 613.
- FOR DISCUSSION: What about the Inconsistent Prior Statement exception?
 - *Not. The inconsistent prior statement was not made under penalty of perjury!*

Presented by Frank R. Acuña, Attorney at Law

Exclusions & Limitations: Privileges (p.43)

Generally:

- If not asserted (must make an objection!), the privilege is waived
- Issue Spotting
 - Is there a protected relationship/status?
 - Was there a communication?
 - Was it confidential when made?
 - Has the holder (or the participant on the holder's behalf) asserted the privilege?
 - Was there a voluntary waiver or failure to object to disclosure?

Presented by Frank R. Acuña, Attorney at Law

Exclusions & Limitations: Privileges (p.45)

Particular Privileges:

- Attorney/Client (Client = Holder)
- Attorney Work Product (Attorney = Holder)
- Self Incrimination (Fifth Amendment)
- Clergy/Penitent (Penitent = Holder)
- Physician Patient (Patient = Holder)
- Psychotherapist/Patient (Patient = Holder)
- Spousal Privilege (Witness = Holder)
- Informant Privileges

Presented by Frank R. Acuña, Attorney at Law

Exclusions & Limitations: Privileges (p.48)

Unsettled Privileges:

- Privacy
- Taxpayer
- Accountant Client
- Journalist/Sources

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Privileges

- 2000/E-18 (2 minutes) The IRS asserts that Sam Taxpayer underreported his gross income and overstated his expenses on his federal income tax return for 1999. Sam operates a small business, "Sam's Speedy Pizza Service," as a proprietorship. He employs 20 people. A trial in the United States Tax Court raised several evidence issues. Finally, counsel for Sam asked Billy, when he swore to tell the truth at the trial, whether he also believed in God. There was an objection to the question on the ground of improper cross-examination. Is this a permissible question? Answer "yes" or "no," then explain briefly.

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Privileges

- 2000/E-18 (2 minutes) The IRS asserts that Sam Taxpayer underreported his gross income and overstated his expenses on his federal income tax return for 1999. Sam operates a small business, "Sam's Speedy Pizza Service," as a proprietorship. He employs 20 people. A trial in the United States Tax Court raised several evidence issues. Finally, counsel for Sam asked Billy, when he swore to tell the truth at the trial, whether he also believed in God. There was an objection to the question on the ground of improper cross-examination. Is this a permissible question? Answer "yes" or "no," then explain briefly.
- SUGGESTED ANSWER: No. FRE 610 prohibits inquiry as to religious belief or opinion. Evidence of the witness's religious opinions is not admissible for the purpose of showing that by reason of their nature the witness's credibility is either impaired or enhanced. (3/3)

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Privileges

2002/E-8 (6 minutes) The IRS asserts that Sam Taxpayer underreported his gross income and overstated his expenses on his Federal income tax return for 1999. Sam operates a small business, "Sam's Speedy Pizza Service," as a proprietorship. He employs 20 people. A trial in the United States Tax Court raised several evidence issues). One month before the trial, Paula was at a cocktail party where she met a stranger, Sheila. After a brief conversation, Paula discovered that Sheila was a lawyer. Paula immediately said to her: "I just got a deficiency notice from the IRS. They caught me claiming bogus entertainment expenses." Will the conversation be protected by Paula's attorney-client privilege? Explain briefly.

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Privileges

2002/E-8 (6 minutes) The IRS asserts that Sam Taxpayer underreported his gross income and overstated his expenses on his Federal income tax return for 1999. Sam operates a small business, "Sam's Speedy Pizza Service," as a proprietorship. He employs 20 people. A trial in the United States Tax Court raised several evidence issues). One month before the trial, Paula was at a cocktail party where she met a stranger, Sheila. After a brief conversation, Paula discovered that Sheila was a lawyer. Paula immediately said to her: "I just got a deficiency notice from the IRS. They caught me claiming bogus entertainment expenses." Will the conversation be protected by Paula's attorney-client privilege? Explain briefly.

SUGGESTED ANSWER: No. To be privileged under FRE 501 the consultation must be made for purpose of obtaining legal services, and must take place in confidence. The attorney need not be paid or retained, and in fact may refuse to represent the client, yet privilege will apply to appropriate communications. Here the individuals met at a party; Paula spoke without regard to the presence of third persons. The conversation did not take place with Sheila acting as a legal advisor.

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Privileges

2000/E-6 (4 minutes) The IRS asserts that Sam Taxpayer underreported his gross income and overstated his expenses on his Federal income tax return for 1999. Sam operates a small business, "Sam's Speedy Pizza Service," as a proprietorship. He employs 20 people. A trial in the United States Tax Court raised several evidence issues. The next cross-examination question asked Sam to relate what he told attorney Lee Baker about his (Sam's) income and deductions for 2000. Lee Baker is a prominent tax attorney in the local area. He is not representing Sam in this current tax case, nor has he ever represented Sam. After hearing Sam out, attorney Baker declined the case. At trial, when the IRS attorney asked Sam "What did you tell Mr. Baker about your income and deductions for 2000?" there was an objection. Is this a permissible cross-examination question? Answer "yes" or "no," then explain briefly.

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Privileges

2000/E-6 (4 minutes) The IRS asserts that Sam Taxpayer underreported his gross income and overstated his expenses on his Federal income tax return for 1999. Sam operates a small business, "Sam's Speedy Piza Service," as a proprietorship. He employs 20 people. A trial in the United States Tax Court raised several evidence issues. The next cross-examination question asked Sam to relate what he told attorney Lee Baker about his (Sam's) income and deductions for 2000. Lee Baker is a prominent tax attorney in the local area. He is not representing Sam in this current tax case, nor has he ever represented Sam. After hearing Sam out, attorney Baker declined the case. At trial, when the IRS attorney asked Sam "What did you tell Mr. Baker about your income and deductions for 2000?" there was an objection. Is this a permissible cross-examination question? Answer "yes" or "no," then explain briefly.

SUGGESTED ANSWER: No. All information related to the representation of a client is protected by the legal advisor (also called attorney-client) privilege, even for prospective clients, except if a legal compulsion to disclose exists (such as when the attorney's services are sought to commit a crime or fraud, the attorney is accused of wrong-doing or any other breach of duty, or the attorney is trying to collect a fee). Privilege belongs to the client, who has the right to assert it under these circumstances. FRE 501.

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Privileges

2014/E-4. TP's petition to the Tax Court asserts that no §6662(b)(1) penalty is warranted according to §6664(c)(1) because TP believed TP had reasonable cause for, and acted in good faith with respect to, not reporting the \$100,000 as gross income. TP elects to take the witness stand. TP testifies that, prior to filing TP's 2009 tax return, TP (1) consulted with a tax attorney (who prepared and delivered to TP a written memorandum explaining the tax attorney's conclusions), (2) obtained advice from two online tax preparation programs, and (3) read at the City Local Library several books and materials on federal income taxation. TP further testified that all of these sources either stated directly (or, at the very least, strongly suggested) that the \$100,000 need not be reported as gross income on TP's tax return. On cross-examination, the IRS asks TP, the following: "You testified on direct that your tax attorney prepared and delivered a written memorandum which detailed the attorney's conclusions regarding whether the \$100,000 should be reported on your individual return as gross income. Can you please produce that memorandum for our review?" TP objects, arguing that the memorandum prepared by TP's attorney is privileged matter. How should the Tax Court rule?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Privileges

SUGGESTED ANSWER: Overruled.

The memorandum was between attorney and client and, ordinarily, would be excluded on the basis of the attorney-client privilege.

However, where TP testified that (s)he relied on tax attorney's memo in deciding not to report the \$100,000, TP placed the memo at issue as to TP's state of mind with a "reliance on counsel" defense and thus waived the attorney-client privilege as a matter of law.

Note that only TP can waive attorney-client privilege and that in *Ad Investment 2000 Fund LLC* (142 TC 13 (4/16/14)), the court ruled that petitioner's affirmative defenses to the accuracy related penalties put into contention the state of mind of those who acted for the partnership and the partnership's good faith efforts to comply with the tax law, and the 6 attorney opinions had to be produced.

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Privileges

ConArtist visits Attorney and says, "I'm planning on bilking millions of innocent people out of their life savings in a fraudulent real estate investment scheme and I need your help in setting it up." Attorney agrees, and they set to work. When ConArtist is subsequently tried for fraud, Attorney is called as a witness by the state. ConArtist objects to his testimony, claiming attorney/client privilege. How do you rule?

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Privileges

Duuude is knocked unconscious in a barroom brawl. He is rushed to the Emergency Room, where he is examined and treated by Doc. As Doc is examining Duuude, a packet of cocaine falls from Duuude's pocket. At Duuude's trial for possession of a controlled substance, the prosecutor calls Doc to testify as to what he saw in the emergency room. Duuude objects, claiming doctor/patient privilege. How do you rule?


Presented by Frank R. Acuña, Attorney at Law

Pop Quiz: Privileges

Bonnie and Clyde successfully rob a series of banks. After accumulating an adequate amount of cash, they settle down and marry. At Clyde's subsequent federal trial for one of the bank robberies, the prosecution seeks to introduce Bonnie's testimony as to conversations she and Clyde had at the time of the robbery. Bonnie is willing to testify, because she's been told it will help her get a lighter sentence when she is tried later. Clyde objects. Is the testimony admissible?

Presented by Frank R. Acuña, Attorney at Law

Questions?



Presented by Frank R. Acuña, Attorney at Law

FRE 403 (p.49)

Evidence may be excluded if

- Its probative value is substantially outweighed by danger of
 - Unfair prejudice
 - Confusion of the issues
 - Misleading a jury
 - Considerations of undue delay, waste of time, or cumulative evidence
- Remember: Cumulative evidence. Always put on your best sources first!

Presented by Frank R. Acuña, Attorney at Law

Procedural Matters (p.50)

- Attorney must make a record for judgment or appeal
- Objections must be timely and set forth the specific grounds for the objection
- If objection sustained, proffering attorney must make timely "offer of proof" to preserve record
- Procedural matters beyond timeliness of an objection or offer of proof are typically the subject of an exam question (e.g., "What sanctions are available to a judge if an attorney or party repeatedly violates court rules or orders?")

Presented by Frank R. Acuña, Attorney at Law

Procedural Matters

- 2006/E-1 T calls WA, T's former attorney-accountant, as a witness. WA is not representing T at this hearing and is no longer T's attorney-accountant. T seeks to introduce a financial statement prepared by WA showing receipts and disbursements of T's business for the 4th quarter of 2005. Assume that WA prepared the statement in January 2006 in the regular course of WA's duties as T's attorney-accountant, and that the statement was given to T and only T by WA for T's use in managing T's business. After establishing that the document was so prepared, T asks: "Does this financial statement (T's Exhibit 1) truly and accurately state the financial transactions of T's business for the 4th quarter of 2005?" Assume that, if permitted to answer, WA would answer "yes."
- (a)[8 minutes] C objects on the sole ground that the document is hearsay. Explain how the Tax Court should rule.

Presented by Frank R. Acuña, Attorney at Law

Procedural Matters

- 2006/E-1 T calls WA, T's former attorney-accountant, as a witness. WA is not representing T at this hearing and is no longer T's attorney-accountant. T seeks to introduce a financial statement prepared by WA showing receipts and disbursements of T's business for the 4th quarter of 2005. Assume that WA prepared the statement in January 2006 in the regular course of WA's duties as T's attorney-accountant, and that the statement was given to T and only T by WA for T's use in managing T's business. After establishing that the document was so prepared, T asks: "Does this financial statement (T's Exhibit 1) truly and accurately state the financial transactions of T's business for the 4th quarter of 2005?" Assume that, if permitted to answer, WA would answer "yes."
- (a)[8 minutes] C objects on the sole ground that the document is hearsay. Explain how the Tax Court should rule.
- SUGGESTED ANSWER: Objection sustained at this time. The proper foundation hasn't yet been laid for the business records exception under FRE 803(6) on them for business and tax filing purposes. (5/5)

Presented by Frank R. Acuña, Attorney at Law

Procedural Matters

- 2006/E-1 T calls WA, T's former attorney-accountant, as a witness. WA is not representing T at this hearing and is no longer T's attorney-accountant. T seeks to introduce a financial statement prepared by WA showing receipts and disbursements of T's business for the 4th quarter of 2005. Assume that WA prepared the statement in January 2006 in the regular course of WA's duties as T's attorney-accountant, and that the statement was given to T and only T by WA for T's use in managing T's business. After establishing that the document was so prepared, T asks: "Does this financial statement (T's Exhibit 1) truly and accurately state the financial transactions of T's business for the 4th quarter of 2005?" Assume that, if permitted to answer, WA would answer "yes."
- (b)[8 minutes] Explain what additional foundation, if any, could T have laid to make the document admissible.

Presented by Frank R. Acuña, Attorney at Law

Procedural Matters

- 2006/E-1 T calls WA, T's former attorney-accountant, as a witness. WA is not representing T at this hearing and is no longer T's attorney-accountant. T seeks to introduce a financial statement prepared by WA showing receipts and disbursements of T's business for the 4th quarter of 2005. Assume that WA prepared the statement in January 2006 in the regular course of WA's duties as T's attorney-accountant, and that the statement was given to T and only T by WA for T's use in managing T's business. After establishing that the document was so prepared, T asks: "Does this financial statement (T's Exhibit 1) truly and accurately state the financial transactions of T's business for the 4th quarter of 2005?" Assume that, if permitted to answer, WA would answer "yes."
- (b)(8 minutes) Explain what additional foundation, if any, could T have laid to make the document admissible.
- SUGGESTED ANSWER: T must show that Exhibit 1 is substantially the same condition today as when it was prepared, and lay foundation to properly establish the business record exception under FRE 803(6): the underlying records were made and kept in the ordinary course of business, at or near the time from information transmitted by someone with knowledge. If not made and kept by WA, the underlying records must first be authenticated by T or another witness with knowledge of T's record keeping or a custodian to show it is a record of a regularly conducted activity. The accountant testified the record was made in regular practice, but not that it was kept in the course of a regularly conducted activity.

Presented by Frank R. Acuña, Attorney at Law

Procedural Matters

- 2006/E-1 T calls WA, T's former attorney-accountant, as a witness. WA is not representing T at this hearing and is no longer T's attorney-accountant. T seeks to introduce a financial statement prepared by WA showing receipts and disbursements of T's business for the 4th quarter of 2005. Assume that WA prepared the statement in January 2006 in the regular course of WA's duties as T's attorney-accountant, and that the statement was given to T and only T by WA for T's use in managing T's business. After establishing that the document was so prepared, T asks: "Does this financial statement (T's Exhibit 1) truly and accurately state the financial transactions of T's business for the 4th quarter of 2005?" Assume that, if permitted to answer, WA would answer "yes."
- 2006/E-2(b) (5 minutes) If the Tax Court sustains the objection, what should T do next? Explain in detail the procedure T should follow and why.

Presented by Frank R. Acuña, Attorney at Law

Procedural Matters

- 2006/E-1 T calls WA, T's former attorney-accountant, as a witness. WA is not representing T at this hearing and is no longer T's attorney-accountant. T seeks to introduce a financial statement prepared by WA showing receipts and disbursements of T's business for the 4th quarter of 2005. Assume that WA prepared the statement in January 2006 in the regular course of WA's duties as T's attorney-accountant, and that the statement was given to T and only T by WA for T's use in managing T's business. After establishing that the document was so prepared, T asks: "Does this financial statement (T's Exhibit 1) truly and accurately state the financial transactions of T's business for the 4th quarter of 2005?" Assume that, if permitted to answer, WA would answer "yes."
- 2006/E-2(b) (5 minutes) If the Tax Court sustains the objection, what should T do next? Explain in detail the procedure T should follow and why.
- SUGGESTED ANSWER: Make an offer of proof that the records would be admissible to establish them as underlying business records [or a summary of them] and T's good faith reliance on them for business and tax filing purposes. (5/5)

Presented by Frank R. Acuña, Attorney at Law

Procedural Matters

- 2010/E-2 (6 minutes) Suppose T calls her secretary, S, to testify to certain conversations. Before S can answer, the Tax Court sustains C's objection to the question. T disagrees with that ruling. At the conclusion of the trial, the Tax Court decides the case in favor of C, and T appeals. To preserve for appeal the Tax Court's alleged error in rejecting T's evidence, what must T have done at the time the objection was sustained? Describe specifically what T must have done.

Presented by Frank R. Acuña, Attorney at Law

Procedural Matters

- 2010/E-2 (6 minutes) Suppose T calls her secretary, S, to testify to certain conversations. Before S can answer, the Tax Court sustains C's objection to the question. T disagrees with that ruling. At the conclusion of the trial, the Tax Court decides the case in favor of C, and T appeals. To preserve for appeal the Tax Court's alleged error in rejecting T's evidence, what must T have done at the time the objection was sustained? Describe specifically what T must have done.
- SUGGESTED ANSWER: A timely objection or motion to strike must be made stating the specific ground of objection (if not apparent from the context) or an offer of proof stating what the evidence would prove must be made if the ruling excludes evidence. The error must affect a substantial right and not be harmless error under FRE 103. (6/6)

Presented by Frank R. Acuña, Attorney at Law

Form of the Question (p.53)

- This is best studied by looking at lots of questions and practicing objections:
 - Leading
 - Narrative
 - Argumentative
 - Assumes Facts Not In Evidence
 - Vague, Ambiguous, Confusing, or Unintelligible
 - Compound
 - Misstates Evidence
 - Cumulative
 - Asked and Answered

Presented by Frank R. Acuña, Attorney at Law

Form of the Question (p.53)

- This is best studied by looking at lots of questions and practicing objections:
 - Improper Impeachment
 - Beyond the Scope of Direct or Cross
 - Foundation Problems
 - Inadmissible Opinion
 - Conclusion
 - Speculation
 - Lacks Foundation
 - Calls for Legal Conclusion

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz – Form of the Question

- 2014/E-1. In TP's case-in-chief, TP calls Witness (W) to the witness stand. First, TP asks W to state W's name. After W stated W's name, TP then asks W the following question: "And you are employed as the 'Chief Reference Librarian' at the City Local Library, is that correct?" The IRS objects to the form of the question. Explain how the Tax Court should rule.

Presented by Frank R. Acuña, Attorney at Law

Pop Quiz – Form of the Question

SUGGESTED ANSWER: Overruled.

Leading questions tend to suggest the answer, and they are generally not permitted on direct examination. However, they are allowed to establish preliminary background information (as done in these facts), or when dealing with an adverse or hostile witness, to refresh memory, or when questioning a timid witness. (12/12)

Presented by Frank R. Acuña, Attorney at Law

A Note on Refreshing Recollection

- Even though not admissible, a writing may be used to refresh a witness's recollection
 - Must lay proper foundation of exhausting the witness's present recollection
 - Establish that there is something that could refresh their recollection
 - Allow the witness to review the document
 - Provide the document to opposing counsel for review
 - The notes themselves are not admitted into evidence
 - Counsel may comment on the witness's memory having to be refreshed

Presented by Frank R. Acuña, Attorney at Law

A Note on Refreshing Recollection

- 2002/E-11 (3 minutes) During the respondents' case, IRS Agent Alan testified as a witness. He testified that he had met with the Juan concerning the payment items. When Counsel for respondent asked Alan whether Juan had made any statement during the meeting, Alan replied that he could not remember what Juan had said. Petitioner's counsel objected to Alan reviewing the report of the meeting he had written to refresh his memory because the report had not been admitted into evidence. How should the court rule? Explain briefly.

Presented by Frank R. Acuña, Attorney at Law

A Note on Refreshing Recollection

- 2002/E-11 (3 minutes) During the respondents' case, IRS Agent Alan testified as a witness. He testified that he had met with the Juan concerning the payment items. When Counsel for respondent asked Alan whether Juan had made any statement during the meeting, Alan replied that he could not remember what Juan had said. Petitioner's counsel objected to Alan reviewing the report of the meeting he had written to refresh his memory because the report had not been admitted into evidence. How should the court rule? Explain briefly.
- SUGGESTED ANSWER: Objection overruled. A witness may refresh his or her memory before or during testimony from written notes made or adopted when the matter was fresh in the witness's memory under FRE 602. However the written notes must be made available to opposing counsel once used to refresh the memory. The notes themselves are not admitted into evidence.

Presented by Frank R. Acuña, Attorney at Law

Last Pop Quiz: Procedural Matters and Form of the Question

2000/E-4 (4 minutes) The following facts apply to questions E-1 through E-4. The IRS asserted a deficiency against Ted Taxpayer with respect to his 1999 tax return due to unreported income and disallowed deductions. A Tax Court trial resulted. Both Ted as well as the government moved to have trial witnesses excluded until they gave their testimony in open court. The court issued its standard ruling in such situations, a general exclusionary order prohibiting witness presence until the time that the person testifies. In addition to attempting to strike evidence from the record, what other sanctions might an attorney request when a witness is shown to have attended court proceedings prior to the time of his testimony, contrary to the court's instructions? List the remedies which a party might request when an opposing witness improperly attends court in cases where the judge has entered a general order excluding witnesses so they cannot hear the testimony of other witnesses.

Presented by Frank R. Acuña, Attorney at Law

Last Pop Quiz: Procedural Matters and Form of the Question

2000/E-4 (4 minutes) The following facts apply to questions E-1 through E-4. The IRS asserted a deficiency against Ted Taxpayer with respect to his 1999 tax return due to unreported income and disallowed deductions. A Tax Court trial resulted. Both Ted as well as the government moved to have trial witnesses excluded until they gave their testimony in open court. The court issued its standard ruling in such situations, a general exclusionary order prohibiting witness presence until the time that the person testifies. In addition to attempting to strike evidence from the record, what other sanctions might an attorney request when a witness is shown to have attended court proceedings prior to the time of his testimony, contrary to the court's instructions? List the remedies which a party might request when an opposing witness improperly attends court in cases where the judge has entered a general order excluding witnesses so they cannot hear the testimony of other witnesses.

SUGGESTED ANSWER: Remedies that can be requested include:

- declaring a mistrial
- barring a witness from testifying.
- holding a witness in contempt.
- dismissing any or all of the pending case [could ask the court to render default judgment]
- imposing monetary sanctions against counsel.
- establishing the matter sought with the moving party's claim.
- imposing any other sanction deemed appropriate by the court.

Note: Remedies can be found in Tax Court Rule 145.

Presented by Frank R. Acuña, Attorney at Law

Last Pop Quiz: Procedural Matters and Form of the Question

2008/E-1(c) (6 minutes) T calls Y as a witness. T claims that Y, an associate of X, was present at meetings between T and X on July 25. When questioned, Y cannot remember the date or details of the meetings. However, Y has notes that he claims he took at the meetings. The notes include the date (July 25) and details of the meetings. Can Y's notes be admitted or read into evidence as proof of the date and content of the meeting? If so, what foundation would be required for admission of this evidence, and in what form would it come?

Presented by Frank R. Acuña, Attorney at Law

Last Pop Quiz: Procedural Matters and Form of the Question

2008/E-1(c) (6 minutes) T calls Y as a witness. T claims that Y, an associate of X, was present at meetings between T and X on July 25. When questioned, Y cannot remember the date or details of the meetings. However, Y has notes that he claims he took at the meetings. The notes include the date (July 25) and details of the meetings. Can Y's notes be admitted or read into evidence as proof of the date and content of the meeting? If so, what foundation would be required for admission of this evidence, and in what form would it come?

SUGGESTED ANSWER: Yes, if properly authenticated they may be read into the record under FRE 803(5). The required foundation includes: Y once had knowledge about event (meeting on July 25), but at trial cannot recall to sufficiently testify accurately, Y prepared or adopted the notes of the July 25 meeting while it was fresh in Y's mind, and Y must also assure that the notes are accurate.

Presented by Frank R. Acuña, Attorney at Law

Last Pop Quiz: Procedural Matters and Form of the Question

2004/E-10 (8 minutes) T is seeking to prove the date on which T received a telephone call from a person named Rodriguez. Direct examination of T proceeds with the following questions and answers:

Q. "What was the date on which you received the call from Mr. Rodriguez?" A. "I don't recall."

Q. "I show you what has been marked as T's Exhibit 2. Do you recognize it?" A. "Yes, it's the telephone log from my office."

Q. "Does that refresh your memory?" A. "It says here August 2, 2004."

(a)(4 minutes). C objects to A's last response. How should the Tax Court rule and why?

Presented by Frank R. Acuña, Attorney at Law

Last Pop Quiz: Procedural Matters and Form of the Question

2004/E-10 (8 minutes) T is seeking to prove the date on which T received a telephone call from a person named Rodriguez. Direct examination of T proceeds with the following questions and answers:

Q. "What was the date on which you received the call from Mr. Rodriguez?" A. "I don't recall."

Q. "I show you what has been marked as T's Exhibit 2. Do you recognize it?" A. "Yes, it's the telephone log from my office."

Q. "Does that refresh your memory?" A. "It says here August 2, 2004."

(a)(4 minutes). C objects to A's last response. How should the Tax Court rule and why?

SUGGESTED ANSWER: Objection sustained. While this is an example of an attempt to refresh memory (which is a hearsay exception under FRE 612) T read the answer from the log. If he had merely refreshed his memory, then testified from the refreshed memory, it would be acceptable.

Presented by Frank R. Acuña, Attorney at Law

Last Pop Quiz: Procedural Matters and Form of the Question

2018/E-6 (6 minutes) Assume that Fred (F) is on the witness stand. Assume further that the court overruled the objection in question 5 and allowed F to answer the question ("On that job application, did you misrepresent the extent of your education? Specifically, did you falsely state that you had a bachelors degree from State University?"). F then replied, "I have absolutely no recollection of making any misstatements regarding that fact or any other fact on that application." The IRS attorney then asks F, "If I showed you a copy of your application to Corporation X might that refresh your memory?" TP objects, arguing that the IRS should not be allowed to show F that document. How should the court rule and why?

Presented by Frank R. Acuña, Attorney at Law

Last Pop Quiz: Procedural Matters and Form of the Question

2018/E-6 (6 minutes) Assume that Fred (F) is on the witness stand. Assume further that the court overruled the objection in question 5 and allowed F to answer the question ("On that job application, did you misrepresent the extent of your education? Specifically, did you falsely state that you had a bachelors degree from State University?"). F then replied, "I have absolutely no recollection of making any misstatements regarding that fact or any other fact on that application." The IRS attorney then asks F, "If I showed you a copy of your application to Corporation X might that refresh your memory?" TP objects, arguing that the IRS should not be allowed to show F that document. How should the court rule and why?

SUGGESTED ANSWER: Overruled. It is a writing to refresh memory under FRE 612. Once the witness cannot recall, a document can be used to refresh memory. The witness can read the document, put it aside, then testify about the events with refreshed memory. The document is not put into evidence, and the witness cannot read aloud from the document. Opposing party may ask to review the document. (12/12)

Presented by Frank R. Acuña, Attorney at Law

Last Pop Quiz: Procedural Matters and Form of the Question

2016/E-8 (6 minutes) Assume that TP calls TP's brother, B, to the witness stand. During direct examination, B testifies that B recalls having a telephone conversation with TP in early April 2013 regarding the filing of TP's 2012 tax return [the conversation in Question 5]. When asked by TP to testify to the precise contents of this conversation with TP, B testified that B could not remember the precise contents. TP wants to refresh B's memory of this conversation by showing B an IRS document that summarizes an earlier interview that an IRS agent had with TP that includes details regarding TP's April 2013 conversation with B. The IRS objects arguing that this is an improper means to refresh B's memory. TP counters that this method of refreshing B's recollection is proper. How should the court rule?

Presented by Frank R. Acuña, Attorney at Law

Last Pop Quiz: Procedural Matters and Form of the Question

2016/E-8 (6 minutes) Assume that TP calls TP's brother, B, to the witness stand. During direct examination, B testifies that B recalls having a telephone conversation with TP in early April 2013 regarding the filing of TP's 2012 tax return [the conversation in Question 5]. When asked by TP to testify to the precise contents of this conversation with TP, B testified that B could not remember the precise contents. TP wants to refresh B's memory of this conversation by showing B an IRS document that summarizes an earlier interview that an IRS agent had with TP that includes details regarding TP's April 2013 conversation with B. The IRS objects arguing that this is an improper means to refresh B's memory. TP counters that this method of refreshing B's recollection is proper. How should the court rule?

SUGGESTED ANSWER: Overruled. Under FRE 612, any document can be used to refresh the witness's memory. Once the witness cannot recall an event, the document used to refresh memory is read silently then put away and the witness must be able to testify from the refreshed memory. The document itself is not evidence. The opposing party is entitled to have the entire writing produced, to inspect it, and to cross-examine the witness. (12/12)

Presented by Frank R. Acuña, Attorney at Law

Last Pop Quiz: Procedural Matters and Form of the Question

2016/E-1 (6 minutes) In the case-in-chief, TP calls C as the first witness. C testifies that C is the President of Charity, Inc., a non-profit organization. C testified that, in November 2012, C approached TP's residence and rang the doorbell. C then testified that TP answered the door and that C and TP engaged in a conversation about Charity, Inc. After this testimony, TP asked C the following question: "Is it true that you, C, told TP that your organization, Charity, Inc., had been in existence since 2000, that the organization sought to improve the lives of the less affluent members of American society, that you were seeking donations to assist with this endeavor, and that all contributions were tax deductible?" The IRS objects, arguing that the form of the question (the phraseology of the question) is improper. TP disputes this contention. How should the Tax Court rule?

Presented by Frank R. Acuña, Attorney at Law

Last Pop Quiz: Procedural Matters and Form of the Question

2016/E-1 (6 minutes) In the case-in-chief, TP calls C as the first witness. C testifies that C is the President of Charity, Inc., a non-profit organization. C testified that, in November 2012, C approached TP's residence and rang the doorbell. C then testified that TP answered the door and that C and TP engaged in a conversation about Charity, Inc. After this testimony, TP asked C the following question: "Is it true that you, C, told TP that your organization, Charity, Inc., had been in existence since 2000, that the organization sought to improve the lives of the less affluent members of American society, that you were seeking donations to assist with this endeavor, and that all contributions were tax deductible?" The IRS objects, arguing that the form of the question (the phraseology of the question) is improper. TP disputes this contention. How should the Tax Court rule?

SUGGESTED ANSWER: Sustained. The question is leading (which would be generally permitted under FRE 611(c) on cross examination, to impeach a witness, and on direct exam 1) to establish preliminary, background info as in this case, 2) when questioning an adverse witness or someone associated with an adverse party, 3) to help jog a witness's memory, and 4) when dealing with a timid or young witness, and is also a compound question, trying to elicit more than one fact in a single question. As such the form of the question is not proper. (12/12)

Presented by Frank R. Acuña, Attorney at Law

Last Pop Quiz: Procedural Matters and Form of the Question

2000/E-8 (2 minutes) The IRS asserts that Sam Taxpayer underreported his gross income and overstated his expenses on his Federal income tax return for 1999. Sam operates a small business, "Sam's Speedy Pizza Service," as a proprietorship. He employs 20 people. A trial in the United States Tax Court raised several evidence issues. IRS counsel asked questions on cross-examination about a previous conviction. Sam then answered a few questions on redirect. His attorney asked him to briefly explain the circumstances of his prior banking conviction. If allowed to testify, Sam would say that there was a bank employee's mistake that resulted in a computation error and ultimately caused Sam's conviction, which conviction was not really attributable to any fraud on Sam's part. However, before Sam could make his explanation, there was an objection by the government: "Objection, improper redirect." Is this a permissible redirect examination question? Answer "yes" or "no," then explain briefly.

Presented by Frank R. Acuña, Attorney at Law

Last Pop Quiz: Procedural Matters and Form of the Question

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SUGGESTED ANSWER: Yes, a witness on redirect can expand on statements or evidence developed during cross-examination. This witness has additional information to offer regarding his conviction, not a mere restatement or recitation of previous testimony so is allowed to explain the details of the conviction under FRE 609.

NOTE: Counsel must be careful not to include part of the explanation in the question, thereby leading the witness on redirect (which is not the case here as the witness is asked to briefly explain the circumstances).

Presented by Frank R. Acuña, Attorney at Law

Last Pop Quiz: Procedural Matters and Form of the Question

2006/E-3 (5 minutes) On direct examination of T, T's attorney asks T, "Isn't it a fact that you were in Miami, Florida, on January 15, 2006?" (Assume the question calls for relevant evidence.) Does C have any proper objection? If so, what is that objection and why is the question improper? Are there any exceptions to the rule you have just described? If so, list and describe them.

Presented by Frank R. Acuña, Attorney at Law

Last Pop Quiz: Procedural Matters and Form of the Question

2006/E-3 (5 minutes) On direct examination of T, T's attorney asks T, "Isn't it a fact that you were in Miami, Florida, on January 15, 2006?" (Assume the question calls for relevant evidence.) Does C have any proper objection? If so, what is that objection and why is the question improper? Are there any exceptions to the rule you have just described? If so, list and describe them.

SUGGESTED ANSWER: The objection would be for improper impeachment – generally leading questions can't be asked on direct examination. Exceptions are when you have a hostile aggressive witness, timid witness, child, getting background information etc. to discredit the person testifying, etc.

ALTERNATE ANSWER FOR DISCUSSION: Objection, leading. However, if a witness is hostile, timid, or a child, or the question is to elicit background information or to impeach a witness, leading questions may be used.

Presented by Frank R. Acuña, Attorney at Law

Last Pop Quiz: Procedural Matters and Form of the Question

2004/E-4 (4 minutes) What is a "leading question"? List and describe the exceptions to the rule that leading questions are not proper on direct examination.

Presented by Frank R. Acuña, Attorney at Law

Last Pop Quiz: Procedural Matters and Form of the Question

2004/E-4 (4 minutes) What is a "leading question"? List and describe the exceptions to the rule that leading questions are not proper on direct examination.

SUGGESTED ANSWER: Leading questions are those that suggest the answer. On direct they can be used 1) with timid or young witnesses, 2) to refresh memory, 3) to establish background information, or 4) to be used with hostile or adverse witnesses.

Presented by Frank R. Acuña, Attorney at Law

Last Pop Quiz: Procedural Matters and Form of the Question

2004/E-6 (3 minutes) Assume that in T's case-in-chief, T testifies in support of various deductions. However, T does not testify concerning a deduction for a trip to Hawaii in 2003 that is one of the deductions disallowed by the IRS. When C cross-examines T, can C properly ask T questions about that trip? Why or why not?

Presented by Frank R. Acuña, Attorney at Law

Last Pop Quiz: Procedural Matters and Form of the Question

2004/E-6 (3 minutes) Assume that in T's case-in-chief, T testifies in support of various deductions. However, T does not testify concerning a deduction for a trip to Hawaii in 2003 that is one of the deductions disallowed by the IRS. When C cross-examines T, can C properly ask T questions about that trip? Why or why not?

SUGGESTED ANSWER: No, the scope of cross examination is limited to the issues raised on direct examination and impeachment. If the Hawaiian trip was not brought up on direct examination, it cannot be used during cross.

PRACTICE NOTE: If T failed to testify as to deductions, why would C ask questions and help T out on cross-examination?

Presented by Frank R. Acuña, Attorney at Law

Last Pop Quiz: Procedural Matters and Form of the Question

2002/E-14 (3 minutes) Same facts as E-13. During widow's cross-examination, she was asked whether her husband had ever told her where he had obtained the painting. Petitioner objects to the question on the basis that the question is beyond the scope of proper cross examination. What is the test the court should apply in determining whether to sustain the objection?

Presented by Frank R. Acuña, Attorney at Law

Last Pop Quiz: Procedural Matters and Form of the Question

2002/E-14 (3 minutes) Same facts as E-13. During widow's cross-examination, she was asked whether her husband had ever told her where he had obtained the painting. Petitioner objects to the question on the basis that the question is beyond the scope of proper cross examination. What is the test the court should apply in determining whether to sustain the objection?

SUGGESTED ANSWER: The scope of cross examination is limited to issues raised on direct and impeachment of witnesses. If possession of the painting was part of the scope of direct examination, or if it is probative of the witness's factual knowledge about the value of the painting, cross examination regarding its acquisition is permissible. FRE 611.

Presented by Frank R. Acuña, Attorney at Law

Questions?



Presented by Frank R. Acuña, Attorney at Law

Tuesday Night Review

- Tactic:
 - Real Friends Have Evidence Lectures at **403 PM** Frequently
 - ADDEM P. BOPP, SEE ICI!
- Focus on Issues
- Short answers that
 - Directly respond to the call of the question
 - Frame the issue/conclusion
 - Recite the law
 - Apply relevant facts, if necessary

Presented by Frank R. Acuña, Attorney at Law

Tuesday Night Review – 2010 Questions

Note the Difference Between 2010 and 2021 Questions:

2010 Exam:

For purposes of Evidence Questions 1-4, assume the following facts. Taxpayer (T), a self-employed web-site designer, has filed a petition with the Tax Court to redetermine a deficiency as set forth in a notice of deficiency. The alleged deficiency arises from the disallowance of certain claimed business expense deductions. T works out of her home office. The Commissioner (R) has answered, both parties have followed all proper pre-trial procedures, and the case is now at trial. Unless otherwise stated, assume that each question calls for relevant evidence, that is, evidence that is material and probative as to some issue in the case.

2010 E-1 (6 minutes) Suppose T's travel records in a computer database program called TravelKeeper. The program is an off-the-shelf software program available in computer stores. The TravelKeeper database has fields to record all pertinent details of her travels, including dates, locations, persons, itemized expenses, and all other information that would be necessary to justify a travel expense deduction. To substantiate her deductions for a business trip to Chicago on January 13-17, 2010, T offers into evidence a printout of data from TravelKeeper for the relevant time period.

(a) (2 minutes) Tax represents T. What objection or objections would you anticipate C might make to this printout if you fail to lay an adequate foundation for its admission? In other words, what rules of evidence are implicated by the offer of this evidence?

(b) (10 minutes) What foundation(s) do you have to lay to meet any possible objection or objections to this evidence? Include the elements of each foundation and describe, in general, how T would lay that foundation.

(c) (10 minutes) Suppose the evidence shows that although the trip was in January, the data was not entered into the database until March 15, when it was entered as part of the process of preparing her tax return. T's secretary, S, entered the data into the computer based on notes that T made in her calendar during the trip, and recedes T's trip in her file. How does this affect the admissibility of the printout? Discuss.

(d) (6 minutes) As part of the foundation for this printout, does T need to call any witness other than herself to testify? Could any part of the foundation be done by affidavit? Explain.

2010 E-2 (6 minutes) Suppose T calls her secretary, S, to testify to certain conversations. Before S can answer, the Tax Court sustains C's objection to the questions it disallows with that ruling. The Tax Court declares the case is over at C, and T appeals. To preserve the objection to the questions, the Tax Court alleged error in rejecting T's evidence, what must T have done at the time the objection was sustained? Describe specifically what T must have done.

2010 E-3 (5 minutes) To prove the date, location, and program of the Chicago meeting, T asks the Tax Court to take judicial notice of certain web pages available on the sponsoring organization's web site. The web site archives this information for meetings going back five years. C objects. What would be the proper ruling of the Tax Court, and why?

Presented by Frank R. Acuña, Attorney at Law

Tuesday Night Review – 2010 Questions

Note the Difference Between 2010 and 2021 Questions:

2010 Exam:

For purposes of Evidence Questions 1-4, assume the following facts. Taxpayer (T), a self-employed web-site designer, has filed a petition with the Tax Court to redetermine a deficiency as set forth in a notice of deficiency. The alleged deficiency arises from the disallowance of certain claimed business expense deductions. T works out of her home office. The Commissioner (R) has answered, both parties have followed all proper pre-trial procedures, and the case is now at trial. Unless otherwise stated, assume that each question calls for relevant evidence, that is, evidence that is material and probative as to some issue in the case.

2010 E-4 (6 minutes) T called her accountant, A, to prepare a report in which A summarized and categorized the expenses claimed by T associated with the meeting. T submitted the report during settlement negotiations with the IRS. When no settlement could be reached, T testified that the report was the report during trial of the case. C indicated that he would object to the introduction of the report on the grounds that the report was submitted to C during settlement negotiations and, accordingly, was evidence of conduct or statements made in compromise of negotiations and barred under Federal Rule of Evidence 408. T filed a motion in limine, requesting a ruling on the admissibility of the report. What would be the proper ruling of the Tax Court, and why? Assume that, previously, the requirement of Tax Court Rule 13(a)(1) have been satisfied.

2010 E-5, T, a different taxpayer, has filed a petition with the Tax Court to redetermine a deficiency as set forth in a notice of deficiency. C's notice of deficiency states that T2 underreported his taxable income for the years 2003, 2004, and 2005. The statute of limitations has run for those years unless the underpayments for those years were due to fraud, and C has alleged that the underpayments were fraudulent. The case is on trial in the Tax Court.

(a) (6 minutes) Assume that T2 has not yet testified at the trial. T2 seeks to call his mother-in-law, M, as a character witness to testify that T2 has an excellent reputation for honesty and truthfulness. C objects to M's testimony. What would be the proper ruling of the Tax Court, and why?

(b) (6 minutes) Assume that T2 has not yet testified at the trial. T2 seeks to call his mother-in-law, M, as a character witness to testify that in his opinion, T2 is a highly intelligent person. C objects to M's testimony. What would be the proper ruling of the Tax Court, and why?

(c) (6 minutes) Assume that T2 has not yet testified at the trial. T2 seeks to call his mother-in-law, M, as a character witness to testify that T2 has an excellent reputation for honesty and truthfulness. C objects to M's testimony, and M testifies that T2 has an excellent reputation for honesty and truthfulness. On cross-examination, C asks T2, "Have you ever heard anything adverse with regard to his honesty and truthfulness?" M answers, "A, No, sir." C then asks M, "Q. Are you aware that in 2007, T2 pleaded guilty in state court to willfully and knowingly attempting to evade state income tax by filing false and fraudulent state income tax returns?" T2 objects and moves to strike the question as improper under the law of evidence. What would be the proper ruling of the Tax Court, and why?

(d) (6 minutes) Assume that T2's objection is overruled, and M answers, "No, sir, I have never heard that and I think you must be mistaken, it's not true." C then offers to introduce into evidence a certified copy of the conviction. T2 objects. What would be the proper ruling of the Tax Court, and why?

Presented by Frank R. Acuña, Attorney at Law

Tuesday Night Review – 2021 Questions

Question E-35

(6 minutes) TP asks W (hereinafter "W") on direct examination the following question: "You testified a few minutes ago that you and TP have been work colleagues for the past 15 years. And you further testified that you and TP had conversations regarding TP's tax returns. Please tell us what TP said to you with respect to TP's tax returns." RS objects on hearsay grounds. How should the Court rule on the objection?

Question E-36

(6 minutes) The RS asks W on cross-examination the following question: "You just testified a moment ago that you were present during a deposition of S (in an un-used case) and that S testified that S was TP's federal income tax preparer. What did S say during S's deposition with regard to the preparation of TP's 2018 tax return?" TP objects, arguing that, if S is allowed to testify, S's testimony would violate the best evidence rule. How should the Court rule on the objection?

Question E-37

(6 minutes) The RS asks W on cross-examination the following question: "I want to direct your attention to 2014 when you were in college at State University. Is it true that you were accused of plagiarism?" TP objects. How should the Court rule on the objection?

Question E-38

(6 minutes) The RS asks W on direct examination the following question: "When called as a witness by TP, you testified that you and TP have been work colleagues for the past 15 years. And you further testified that you and TP had conversations regarding TP's federal income tax returns. Please tell us what TP said to you with respect to TP's federal income tax returns." TP objects on hearsay grounds. How should the Court rule on the objection?

Question E-39

(6 minutes) The RS asks TP on cross examination the following question: "Isn't it true that you seriously considered not filing a tax return in 1999?" TP objects. How should the Court rule on the objection?

Presented by Frank R. Acuña, Attorney at Law

Tuesday Night Review – 2021 Questions

Question # 40:
 (6 minutes) The IRS on cross-examination asks W the following question: "On direct examination you testified that you have been TP's accountant for the past 15 years. But isn't it true that just two months ago you told a friend that you are not now and have never been an accountant?" TP objects. How should the Court rule on the objection?

Question # 41:
 (6 minutes) Assume that in Question 40 that the judge overrules the objection and allows W to answer the question. W responds as follows: "That is not true. I never made such a statement to my friend over lunch." The IRS asks no additional questions. Later in the trial, the IRS calls to the witness stand the friend who had lunch with W. The IRS asks the friend whether W admitted during their lunch that W was not and had never been an accountant. TP objects, arguing that the IRS is seeking to admit improper extrinsic evidence. How should the Court rule on the objection?

Question # 42:
 (6 minutes) TP asks W on cross-examination whether two years ago W had been convicted for perjury. The IRS objects. How should the Court rule on the objection?

Question # 43:
 (6 minutes) TP calls S to the witness stand. S testifies to the following: "In 2019, I was having lunch with a friend, and I told my friend that, as TP's federal income tax return preparer, it is my intention to electronically file TP's tax return on TP's behalf in the next two weeks." The IRS objects. How should the Court rule on the objection?

Question # 44:
 (6 minutes) TP seeks to introduce a copy of a business record through the testimony of a custodian of the business records of TP. When asked by TP if the business record was a record that was regularly prepared and maintained by that business, the custodian replied as follows: "No, it is not a document that is regularly prepared and maintained. It is a document that is prepared very infrequently, but I recognize it as a document that is prepared by the business." TP seeks to admit the document. The IRS objects. How should the Court rule on the objection?

Presented by Frank R. Acuña, Attorney at Law

Tuesday Night Review – 2014 Questions

- 2021/E-1 (6 minutes) TP asks W (hereinafter "W") on direct examination the following question: "You testified a few minutes ago that you and TP have been work colleagues for the past 15 years. And you further testified that you and TP had conversations regarding TP's tax returns. Please tell us what TP said to you with respect to TP's tax returns." IRS objects on hearsay grounds. How should the Court rule on the objection?

Presented by Frank R. Acuña, Attorney at Law

Tuesday Night Review – 2014 Questions

- 2021/E-1 (6 minutes) TP asks W (hereinafter "W") on direct examination the following question: "You testified a few minutes ago that you and TP have been work colleagues for the past 15 years. And you further testified that you and TP had conversations regarding TP's tax returns. Please tell us what TP said to you with respect to TP's tax returns." IRS objects on hearsay grounds. How should the Court rule on the objection?

Presented by Frank R. Acuña, Attorney at Law

Tuesday Night Review – 2014 Questions

- 2021/E-1 (6 minutes) TP asks W (hereinafter "W") on direct examination the following question: "You testified a few minutes ago that you and TP have been work colleagues for the past 15 years. And you further testified that you and TP had conversations regarding TP's tax returns. Please tell us what TP said to you with respect to TP's tax returns." IRS objects on hearsay grounds. How should the Court rule on the objection?

Presented by Frank R. Acuña, Attorney at Law

Tuesday Night Review – 2014 Questions

- SUGGESTED ANSWER: Sustained. Therefore, there is no hearsay exclusion or exception for this testimony. (12/12)
- LAW PROFESSOR SUGGESTED ANSWER: Objection hearsay. The court should sustain the objection. W is relaying TP's out of court statement and it is hearsay under FRE 801. The statement TP is trying to elicit will be offered for the truth of the matter asserted to bolster TP's case. There are no exceptions to the impermissible hearsay statement. (Note) The statement does NOT qualify as non-hearsay under FRE 801(d)(2)(A) as a party's own statement because it is the TP's own witness on direct and is not offered against the party.
- HYBRID ANSWER: Sustained. The statement is being offered by TP's own witness on direct, and is not offered against a party. Therefore, there is no hearsay exclusion or exception for this testimony.

Presented by Frank R. Acuña, Attorney at Law

Tuesday Night Review – 2014 Questions

- 2021/E-2 (6 minutes) The IRS asks W on cross-examination the following question: "You just testified a moment ago that you were present during a deposition of S [in an unrelated case] and that S testified that S was TP's federal income tax preparer. What did S say during S's deposition with regard to the preparation of TP's 2018 tax return?" TP objects, arguing that, if S is allowed to testify, S's testimony would violate the best evidence rule. How should the Court rule on the objection?

Presented by Frank R. Acuña, Attorney at Law

Tuesday Night Review – 2014 Questions

- SUGGESTED ANSWER: Overruled. S may testify regarding his memory and experience of the conversation. The best evidence rule relates to documents. (12/12)
- LAW PROFESSOR SUGGESTED ANSWER: Objection "Best Evidence Rule." The Court should overrule this objection under FRE 1002. The IRS's question concerns W's personal knowledge of S's prior testimony. The Best Evidence Rule does not apply because the IRS is not trying to prove the content of a document. The Best Evidence Rule is a rule of admissibility that pertains to a writing when the contents of a document are contested. Here W is asked to provide personal testimony about what he heard during a deposition; he is not required to produce the deposition transcript (original writing).
- ALTERNATIVE ANSWER: Overruled. S may testify regarding his memory and experience of the conversation. The best evidence rule relates to writings when the content of documents are contested, not conversations. (12/12)

Presented by Frank R. Acuña, Attorney at Law

Tuesday Night Review – 2014 Questions

- 2021/E-3 (6 minutes) The IRS asks W on cross-examination the following question: "I want to direct your attention to 2016 when you were in college at State University. Is it true that you were accused of plagiarism?" TP objects. How should the Court rule on the objection?

Presented by Frank R. Acuña, Attorney at Law

Tuesday Night Review – 2014 Questions

- SUGGESTED ANSWER: Overruled under FRE 607, any party can impeach a witness, and under FRE 608, a prior bad act, such as plagiarism, can be asked to impeach the witness's credibility for truthfulness, but if the witness denies it, no extrinsic evidence can be allowed; the IRS must accept the answer as is. (12/12)
- LAW PROFESSOR SUGGESTED ANSWER: Objection, Improper Character. The court should overrule the objection, under FRE 607, with good faith, counsel is permitted to inquire on cross examination about the witness's prior misconduct (and specific acts of conduct) that goes to a character trait of truthfulness or dishonesty (plagiarism). This is true even if the prior bad acts did not result in a conviction under FRE 608. By testifying, W has placed his credibility at issue, and being accused of plagiarizing a paper goes to the witness's truthfulness. The IRS will be stuck with W's answer and is not permitted to provide extrinsic evidence to prove the plagiarism.

Presented by Frank R. Acuña, Attorney at Law

Tuesday Night Review – 2014 Questions

- 2021/E-4 (6 minutes) The IRS asks W on direct examination the following question: "When called as a witness by TP, you testified that you and TP have been work colleagues for the past 15 years. And you further testified that you and TP had conversations regarding TP's federal income tax returns. Please tell us what TP said to you with respect to TP's federal income tax returns." TP objects on hearsay grounds. How should the Court rule on the objection?

Presented by Frank R. Acuña, Attorney at Law

Tuesday Night Review – 2014 Questions

- 2021/E-4 (6 minutes) **The IRS asks W on direct examination the following question:** "When called as a witness by TP, you testified that you and TP have been work colleagues for the past 15 years. And you further testified that you and TP had conversations regarding TP's federal income tax returns. Please tell us what TP said to you with respect to TP's federal income tax returns." TP objects on hearsay grounds. How should the Court rule on the objection?

Presented by Frank R. Acuña, Attorney at Law

Tuesday Night Review – 2014 Questions

- SUGGESTED ANSWER: Objection overruled. This would be admissible as an opposing party statement per FRE 801. (12/12)
- LAW PROFESSOR SUGGESTED ANSWER: Objection Hearsay. Exemption - Statement by Opposing Party. The court should overrule the objection, hearsay is defined as an out of court statement made by a declarant offered to prove the truth of the matter asserted, FRE 801. But when the statement is offered by the IRS against the opposing party, it is not hearsay and is permissible under FRE 801(d)(2). The TP should not be able to hide behind the rule against hearsay and is accountable for prior statements. The IRS is the only one permitted to offer this statement against the TP's position at trial.
- ALTERNATIVE ANSWER: Overruled. Unlike Question 1, in which the testimony was offered by TP, here the testimony is being offered by the IRS as an opposing party statement under FRE 801(d)(2).

Presented by Frank R. Acuña, Attorney at Law

Tuesday Night Review – 2014 Questions

- 2021/E-5 (6 minutes) The IRS asks TP on cross examination the following question: "Isn't it true that you seriously considered not filing a tax return in 1999?" TP objects. How should the Court rule on the objection?

Presented by Frank R. Acuña, Attorney at Law

Tuesday Night Review – 2014 Questions

- SUGGESTED ANSWER: Sustained, relevance. Thought process from 22 years ago would not have a bearing on today. (12/12)
- LAW PROFESSOR SUGGESTED ANSWER: Objection, Relevance & Unfair Prejudice: The court should sustain the objections, facts related to the 1999 tax year are not relevant under FRE 401 to the 2018 taxable year. Furthermore, the court should disallow the question as unfairly prejudicial under FRE 403.
- ALTERNATE ANSWER: Objections: Relevance; Rule 403. Court should sustain on both grounds. Intent 22 years prior to the year in question is not relevant, and the question is unfairly prejudicial under FRE 403.

Presented by Frank R. Acuña, Attorney at Law

Tuesday Night Review – 2014 Questions

- 2021/E-6 (6 minutes) The IRS on cross-examination asks W the following question: "On direct examination you testified that you have been TP's accountant for the past 15 years. But isn't it true that just two months ago you told a friend that you are not now and have never been an accountant?" TP objects. How should the Court rule on the objection?

Presented by Frank R. Acuña, Attorney at Law

Tuesday Night Review – 2014 Questions

- SUGGESTED ANSWER: Overruled; the witness can be impeached based on inconsistent statements. (12/12)
- LAW PROFESSOR SUGGESTED ANSWER: Objection: Improper Impeachment. The court should overrule the objection and allow IRS to impeach W's testimony under FRE 607. The witness's credibility is at issue as soon as they take the stand. IRS may impeach W's prior testimony by providing conflicting evidence.

Presented by Frank R. Acuña, Attorney at Law

Tuesday Night Review – 2014 Questions

- 2021/E-7 (6 minutes) Assume that in Question 6 that the judge overrules the objection and allows W to answer the question. W responds as follows: "That is not true. I never made such a statement to my friend over lunch." The IRS asks no additional questions. Later in the trial, the IRS calls to the witness stand the friend who had lunch with W. The IRS asks the friend whether W admitted during their lunch that W was not and has never been an accountant. TP objects, arguing that the IRS is seeking to admit improper extrinsic evidence. How should the Court rule on the objection?

Presented by Frank R. Acuña, Attorney at Law

Tuesday Night Review – 2014 Questions

- SUGGESTED ANSWER: Overruled. The Friend's testimony is being offered to impeach W and is not improper. Extrinsic evidence is evidence presented to support or disprove evidence. This is clearly its purpose and it permissible. (12/12)
- LAW PROFESSOR SUGGESTED ANSWER: Objection, Improper extrinsic evidence. The court should overrule the objection and allow the testimony of the friend. The extrinsic evidence is being offered to impeach the W and is permitted. A witness's credibility may be attacked or supported by testimony about their character for truthful or untruthfulness. FRE 613(b) allows IRS to bring extrinsic evidence (W's friend's testimony) if it relates to a non-collateral matter (being a tax return preparer). The Court should permit the TP to redirect and confront the witness giving them the opportunity to explain or deny.

Presented by Frank R. Acuña, Attorney at Law

Tuesday Night Review – 2014 Questions

- 2021/E-8 (6 minutes) TP asks W on cross-examination whether two years ago W had been convicted for perjury. The IRS objects. How should the Court rule on the objection?

Presented by Frank R. Acuña, Attorney at Law

Tuesday Night Review – 2014 Questions

- SUGGESTED ANSWER: Overruled. It is appropriate to question the witness for the conviction of dishonesty or false statement under FRE 609. (12/12)
- LAW PROFESSOR SUGGESTED ANSWER: Objection – Improper Character Evidence, Improper Impeachment. The Court should overrule IRS's objection under FRE 609 because it involves a dishonest act or false statement (perjury) and was during the last ten years (here 2). Prior bad acts and convictions are generally inadmissible. However, this is a felony that is less than 10 years old, and it's a question that is being used to impeach the witness' veracity for telling the truth. The trier of fact may determine the witness's credibility.

Presented by Frank R. Acuña, Attorney at Law

Tuesday Night Review – 2014 Questions

- 2021/E-9 (6 minutes) TP calls S to the witness stand. S testifies to the following: "In 2019, I was having lunch with a friend, and I told my friend that, as TP's federal income tax return preparer 'it is my intention to electronically file TP's tax return on TP's behalf in the next two weeks.'" The IRS objects. How should the Court rule on the objection?

Presented by Frank R. Acuña, Attorney at Law

Tuesday Night Review – 2014 Questions

- SUGGESTED ANSWER: Objection overruled. Under FRE 803(3) state of mind is an exception to hearsay. (12/12)
- LAW PROFESSOR SUGGESTED ANSWER: Objection Hearsay – Exception Then Existing Mental Condition "State of Mind." The Court should overrule the objection under FRE 803(3). Although self-serving statements are generally not permitted, this statement is hearsay but meets the hearsay exception for "state of mind." The statement shows the state of mind and plan of S to do something in the future (intent to file the returns).

Presented by Frank R. Acuña, Attorney at Law

Tuesday Night Review – 2014 Questions

- 2021/E-10 (6 minutes) TP seeks to introduce a copy of a business record through the testimony of a custodian of the business records of TP. When asked by TP if the business record was a record that was regularly prepared and maintained by that business, the custodian replied as follows: "No, it is not a document that is regularly prepared and maintained. It is a document that is prepared very infrequently, but I recognize it as a document that is prepared by the business." TP seeks to admit the document. The IRS objects. How should the Court rule on the objection?

Presented by Frank R. Acuña, Attorney at Law

Tuesday Night Review – 2014 Questions

- SUGGESTED ANSWER: Overruled. Even though it is not a document that is regularly prepared and maintained by the business, it is an infrequent item. However, the custodian of the business record verified that it is a document that is prepared by the business and should be admissible as intrinsic evidence for a business record, according to the best evidence rule. (12/12)
- LAW PROFESSOR SUGGESTED ANSWER: Objection Hearsay. The court should overrule the objection, the records meet the Hearsay Exception for Regularly Conducted Business Activity. It can be argued that TP laid the proper foundation to meet the exception under FRE 803(6). TP called a witness, a custodian with personal knowledge of the record keeping process and meets the following foundation: A) the record was made at or near the time of the event by someone with knowledge, B) it was kept in the course of a regularly conducted activity of a business, C) making the record was a regular practice (even if not frequent) D) by a person with knowledge. Furthermore, the exception favors the admission of evidence unless there is a showing by the IRS that it lacks indicia of trustworthiness, and there are no facts that the records were created for litigation.
- ALTERNATIVE ANSWER: Objection: Hearsay; Lacks Foundation. Sustained as to hearsay and lacks foundation to qualify as a business record. TP should then offer to prove the foundation for the Business Records Exception to the Hearsay Rule under FRE 803(6), or offer that the document is admissible under FRE 807, permitting the judge to overrule the objection because the document bears equivalent circumstantial guarantees of trustworthiness equivalent to other exceptions.

Presented by Frank R. Acuña, Attorney at Law

And a Final Gift:

Alison and Christina, Frank's children, sue Sherrill for wrongful death. At trial, the children attempt to introduce testimony by a Las Vegas physician, Doc, that Frank sought treatment and told Doc, "Oy! All those evidence questions by Sherrill's crazy students! They've given me a terminal headache!!!" At trial, what would Sherrill's objection(s) be, how would the children respond, and would Doc's testimony be admissible?

Presented by Frank R. Acuña, Attorney at Law

Questions?



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