Problem Supplement

AN ANALYTICAL APPROACH TO EVIDENCE
Text, Problems, and Cases

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PROBLEM SUPPLEMENT

Chapter 1: The Case of People v. Johnson

People v. Johnson – Case Synopsis

Your textbook begins with an edited transcript of a real criminal trial called *People v. Johnson*. The case was tried in the Superior Court of California, Del Norte County. Defendant James Johnson, an inmate confined in the maximum security unit of Pelican Bay State Prison serving time on a rape conviction, was charged with two counts of battery on a prison guard, a felony. The trial, completed within a single day, involved fairly simple facts and featured unimpressive performances by the prosecutor and defense counsel. Some instructors find it to be a useful starting point for an evidence course as a vivid illustration of the trial as an arena in which evidence issues are played out; even a routine trial with lawyers "phoning it in" can provide an interesting window into the litigation system. Despite these considerations, your professor may make the decision ***not*** to assign the trial transcript as required reading.

Because the textbook occasionally draws on *People v. Johnson* as a source of factual examples, both in the explanatory text and in a handful of discussion problems, the following short synopsis of the facts of *Johnson* is provided. This synopsis should be sufficient to allow the references to the case to make sense to you even without your having read the trial transcript.

Background

In March 1992, James Johnson was serving a sentence on a rape conviction at Pelican Bay State Prison, a "state of the art" maximum security prison designed to house the state's most violence-prone inmates. Johnson was held in the Security Housing Unit (SHU), a special unit designed to control prison gang members. A federal class action lawsuit was brought by SHU inmates at around the same time as the *Johnson* state criminal prosecution, claiming that the conditions of confinement – including isolation, frequent use of excessive force by guards, frequent punitive use of lockdowns, and denial of basic medical care – violated the Eight Amendment's prohibition of cruel and unusual punishment. A federal district judge found for the inmates on most of their claims.

This is all background information that did not come into evidence at trial, though it may well have been relevant. It is conceivable that some of the jurors, residing in the same county as the prison, would have been aware of some of it. And it is likely that the jurors would have had acquaintances, friends or even relatives who worked at the prison, the county's largest employer.

Evidence at Trial

The story offered to the jury at trial began with Johnson learning that the guard's office was withholding a package sent to Johnson through the mail. When Johnson's request to see a sergeant to complain about the withheld package was ignored, Johnson "protested" by refusing to return his dinner tray. Because SHU was on lockdown, the inmates had been fed in their cells by having food trays slid through a "food port" in the cell door. According to Johnson's cellmate, George Butler, the guard collecting the trays told Johnson "you'll be sorry," and left.

Shortly afterward, a "cell extraction" team consisting of three guards, Officers Huston, Van Berg and Walker, entered Johnson's cell. (A "cell extraction team" is trained to forcibly remove items or inmates from their cells.) At this point the defense and prosecution versions of events diverge. According to the prosecution, the guards intended only to retrieve Johnson's food tray. As soon as they entered the cell, Johnson lunged at the lead officer, Walker, and began punching and wrestling with him. An altercation ensued in which Johnson was eventually handcuffed. As a result of the altercation, Huston sustained a one-inch gash on his shin and Van Berg sustained a bone chip in his thumb. Both Huston and Van Berg admitted that they did not know specifically how they sustained their injuries, other than that these occurred during the altercation; neither testified that Johnson touched him (even though unlawful touching is an essential element of battery). The prosecution's evidence, if believed, showed that Walker was punched by Johnson, but Johnson was not charged with battery on Walker for reasons that remain obscure. (There were indications that Walker had a history of using excessive force on inmates, which may explain the prosecutor's decision not to pursue that charge.)

Three witnesses testified for the defense: Johnson's cellmate, Butler; Green, another inmate; and Johnson himself. All three had serious felony convictions, and it came out, over defense counsel's objection, that Butler and Johnson were fellow gang-members. According to the defense, Johnson assumed that once the extraction team arrived, they were going to beat him up. He tried to protect himself by covering up with his hands and arms, and did not throw any punches. The defense witnesses testified that Walker had a reputation for violence toward inmates.

The defense moved for a directed verdict of acquittal on the ground that no prosecution witness testified that Johnson actually touched the two alleged victims, Huston and Van Berg. The trial court denied the motion – perhaps improperly – and Johnson was ultimately convicted. His conviction was upheld on appeal.

Chapter 3: Relevance, Probative Value, and the Rule 403 Dangers

Rule 403

3.14. Ross was arrested by the FBI on charges of using counterfeit checks to purchase used cars from individual sellers. He made the following statements while being booked at the FBI field office, after he had been given the Miranda warnings:

(a) "I'm hoping that federal prison is better than state prison … and that they sell protein supplements like they do in state prison."

(b) "I want to hurry up and get to Milan (a federal prison) so I can start lifting weights."

The prosecution wants to offer these statements against Ross at his trial through the testimony of an FBI agent who overheard them. What would be the theory of relevance? If Ross objects under FRE 403, how should the court rule? Note that the statements could be admitted against Ross as "party admissions" under the hearsay rule, FRE 801(d)(2)(A).

3.15. Douglas is being prosecuted for burglary. The prosecutor offers W_1 to testify that Douglas usually wore a black "New York Yankees" cap and jacket and W_2, an expert on gangs, to testify that in Douglas's neighborhood such black clothing is likely to signify membership in a gang. The prosecutor argues that this is relevant circumstantial evidence that Douglas committed the burglary, since gang members are more likely to commit burglaries than people who are not members of gangs.

The defense attorney objects under Rules 401 and 403 to the testimony of W_1 and W_2 and argues that if the objection is overruled, the defense will have to call W_3, another gang expert, to testify that wearing the cap and jacket does not show gang membership and that gang members are no more likely to commit burglary than anyone else. Defense counsel would also call W_4, Douglas's brother, to testify that Douglas is an avid Yankees fan. What arguments can be made for and against admission of the testimony of W_1 and W_2?

3.16. D is charged with knowingly transmitting two images of child pornography through interstate commerce via his computer. He denies making any such transmission and claims that many other people use his computer. To prevent the jury from viewing the two images, the defendant offers to stipulate that the two images are child pornography in that they "contain visual depictions of minors under the age of eighteen, engaging in sexually explicit conduct." Should the trial judge accept this stipulation or permit the jury to see the images? If the images are shown, consider what limiting instruction the court should give.

Chapter 4: Foundation

FRE 602: Practical Applications

4.21. You are the lawyer for the plaintiffs in Problem 3.2 at page 148. What questions would you ask to lay the foundation for the following witnesses?

(a) An elderly retired neighbor who lives near the bus stop where Paul was injured and who says he can offer eyewitness testimony that Paul was standing on the

gravel shoulder when he was hit.

(b) A coworker of Denise Driver who, you suspect, could testify that after the accident Driver said to her, "I shouldn't have been in such a hurry."

(c) Another of Driver's coworkers who could testify that, from chatting with other bus drivers, she believes that Driver feels guilty about the accident. Should this testimony be admitted?

4.22. The plaintiff's deceased husband suffered from asbestos-related diseases as a result of his occupational exposure to asbestos. At issue is whether the decedent was exposed to products manufactured by defendant OCF. In his deposition, the decedent identified an OCF product as an asbestos material with which he knew he had worked. But he also testified that his memory was adversely affected by the morphine he was taking: "It throws me out of gear. It's killing my brain. I'm screwed up. Sometimes my memory goes to heck, sometimes it doesn't." OCF claims that the deposition shows that the decedent was confused, inconsistent, and not certain about his knowledge of the OCF product. Do you think the court should strike the decedent's deposition testimony pursuant to FRE 601 or FRE 602?

FRE 901—Practical Applications: Generic Foundation Questions for Various Exhibit Types

4.23. During his trial on federal charges of drug sales, the defendant challenges the authenticity of Exhibit 8, a tape recording offered against him, claiming that the tape was altered to incriminate him. X, a confidential informant employed by the federal Drug Enforcement Administration (DEA), testified that he recorded four conversations, during which drug sales were made, that he had with the defendant between July 17 and July 19, 2004; that he used a microrecording device to make these recordings; that Exhibit 8 is the microcassette upon which the conversations were recorded; that he turned the cassette and recorder over to his DEA contact without altering the tape in any way; that he has not seen the cassette and recorder since; and that he recognizes his own voice and the voice of the defendant. Is this testimony sufficient to establish the authenticity of Exhibit 8 under either the percipient witness or "silent witness" foundation? Why?

4.24. John Packer was convicted of the crime of conspiring to collect debts by extortionate threats of violence. Key evidence at trial included FBI tape recordings of telephone calls made to the victim of the threats. In these calls, threats were made by a man calling himself Tony G. The recordings were authenticated through the testimony of an FBI agent who was unable to identify the voice of the person calling himself Tony G. Later in the trial, the recordings were connected to Packer through the testimony of two State Troopers. State Trooper A identified the "Tony G voice" as that of Packer, based upon hearing Packer speak when Trooper A was present at his arrest a year previously. State Trooper B also identified the voice as that of Packer. Trooper B had known Packer since childhood. On cross-examination, Trooper B admitted that he was asked by the FBI "to identify the voice of Packer" rather than being asked merely to identify the voice. Does

the testimony of Troopers A and B satisfy FRE 901?

4.25. Robert Grant is charged with two counts of selling crack cocaine. The evidence against him is based on the testimony of DEA Agent Mary Gray, who was working undercover. An informant, now deceased, told Agent Gray that she could get crack from "Bobby" but did not tell her "Bobby's" last name. Agent Gray can testify as follows: (1) in August 2010 she met with the person introduced to her as "Bobby" and the informant; (2) Bobby sold her 30 grams of crack cocaine for $2,000; (3) Bobby gave her his pager number; (4) later in August she paged Bobby and asked to buy more crack cocaine; (5) Bobby met her the next day and sold her 50 grams of crack for $3,000. These two sales are the basis for charges against Bobby.

However, at Bobby's trial in 2011, Agent Gray cannot positively identify the defendant Robert Grant as "Bobby." No lineup identification was ever made. There is some evidence linking Grant to the pager number used by "Bobby," but there is also evidence that many other people had access to this pager.

The government plans to offer Gray to testify that in November 2010 she paged Bobby, he called back, she recognized his voice, she then recorded their telephone conversation during which Bobby agreed to sell her one kilo of crack cocaine, and that Exhibit 10 is the recording she made, which is a true and accurate recording of her conversation with Bobby. This sale never actually took place. Why is Exhibit 10 relevant? What is it claimed to be? Has it been authenticated? What does it prove about the defendant's guilt?

The government then offers DEA Agent Randy Jones, who processed Robert Grant at the federal lock-up after Grant's arrest in April 2011. Jones will testify that he recognizes the voice of "Bobby" on the tape as Robert Grant's voice. Is the tape now admissible to prove that "Bobby" is Robert Grant?

4.26. Able, Bold, and Curry (the protesters) participated in an anti-war protest in Freedom National Historic Park on July 4, 2010. The protest started peacefully but got out of control, and Park Rangers moved in to restore order. The three protesters were arrested and found guilty of "refusing to obey the lawful order of a Park Ranger."

At the trial, a Park Ranger, Officer Miller, testified that he made a two-hour videotape of the entire protest with a hand-held video camera. He further testified that he was familiar with the camera that he used; that it had operated correctly on the day in question; and that following the protest, he removed the videocassette from the camera and labeled it with his name and the date and gave it to the video technician at the Park Ranger office. However, the tape that the government produced at trial was only 15 minutes long. This tape, admitted as Exhibit 5, was not in the cassette that had been labeled by Officer Miller. There was no witness who could testify as to how it was created or about what happened to Miller's video after it was delivered to the Park Ranger technician. Miller testified, "I picked up this tape at the Park Ranger station before bringing it to court" and "to the best of my recollection, this tape shows pretty much what I saw at the last 15 minutes of the protest on July 4th."

The video portrays rowdy scenes of a protest in Freedom Park. In these scenes, Able, Bold, and Curry can be seen throwing garbage at park statues. Many other demonstrators

are wearing "death" masks. The Park Rangers can be heard ordering groups of demonstrators to "back off," to "disperse," and finally to "lie down on the ground," and Able, Bold, and Curry are visible in the video. They remained standing both during and after the giving of these orders.

Assume all proper objections were made under the FRE that we have studied so far. Did the trial judge commit error in admitting the video into evidence?

4.27. Return to Problem 3.4, State v. Blair, at page 137. Police found a postcard in Norma's apartment postmarked September 12, 2010. In handwriting it says "See you at 9:00 P.M. on the 14th." It is signed "Jimmy." The government claims that Jimmy Blair wrote this postcard. Why is it relevant? What options are there to authenticate it?

4.28. Return to Problem 3.5 on page 138. How would Broadback's attorney lay the foundation for item (b), the excerpt from the Official Rules of the Soccer League?

4.29. Return to Problem 3.2, Pedroso v. Driver, at page 136. Driver testifies that she received a letter in the mail from the School Board, which she identifies as Exhibit A, urging her to return to work. Driver's attorney offers Exhibit A into evidence. Plaintiffs object for lack of authentication. How should Driver's attorney respond? What result?

Exhibit A

San Ramon School Board
2001 Main Street
San Ramon, CA 94901

Dear Ms. Driver,

The San Ramon School Board urges you to return to your work as a school bus driver as soon as you feel able to do so. You have always been a safe driver, and the tragic accident of a month ago does not change our high opinion of you.

/S/ Jean Smith

President, San Ramon School Board

4.30. Kleenit Kleaning Company is suing Travellers Insurance Company for coverage of the costs of cleaning up a toxic waste site Kleenit created between 1967-1970. Unfortunately, the alleged policy of insurance is lost. To establish that payments were made from 1967-1970 from Kleenit to Travellers, Kleenit proffers expense ledgers for those years that show such payments. The ledgers, found in Kleenit's offices, are handwritten, at times illegible, with some notations that are indecipherable. A former Kleenit employee would testify that an outside accountant, Mr. Nash, would have prepared the ledgers in connection with Kleenit's year-end accounting, and that Nash kept the ledgers in his own office until he retired, at which time he transferred the documents to Kleenit's office. Nash is deceased. Are the ledgers admissible under FRE 901? Consider all options.

FRE 902 and Foundation for Exhibits.

4.31. To prove that two persons are not U.S. citizens and have been illegally smuggled into the United States, the government offers their alleged passports from Poland. To authenticate the documents, an INS supervisory inspector, with extensive experience in conducting inspections to exclude persons from the United States, testifies that he recognizes the passports as genuine Polish passports. When asked the basis for his opinion, he states: "They're identified as such right on the document." Sufficient?

In the same case, the INS inspector offers Volume Two of the INS Handbook of Regulations, which, on its title page, states that it is issued by the Department of Homeland Security and bears a facsimile of the official seal of the Department. When asked how he recognizes the exhibit as the genuine volume he answers "Look at the title page." Sufficient? What is the difference between the passports and Volume Two?

Preliminary Fact Questions Under FRE 104

4.32. Return to Problem 4.25, the Robert Grant problem. Would the doctrine of conditional admissibility apply to the government's proof? How? Was a "factual condition" proved under FRE 104(b)? Which fact?

4.33. Defendant Cox is charged with the murder of David Lee. Cox's close friend Hamley was in jail at the time of Lee's murder, charged with molesting Lee's child. In fact, four days before Lee's murder, Hamley was charged at a court hearing with three additional felonies based on David Lee's testimony. The court refused to reduce Hamley's bond despite testimony from Hamley's mother. Cox was not present at that hearing, although he spent almost every day at the Hamley house during this time. At Cox's murder trial, the state offers a deputy prosecutor to testify about what happened at the Hamley court hearing, on the theory that Cox murdered Lee as an act of retaliation against Lee because Hamley was still imprisoned. Cox objects to this testimony on the ground that the state has not proved beyond a reasonable doubt that Cox knew what happened at the court hearing. What should the trial court do?

The Best Evidence Rule

4.34. Defendant Smith was convicted of the crime of being a felon in possession of a firearm under 18 U.S.C. §922(g). One element of this crime is that the firearm had traveled in interstate commerce. To prove this element, the district court admitted the testimony of Agent Andrews of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). The Agent testified that "based on [his] training and experience," he was able to determine that "Smith's Talon Industries Model T200 pistol was manufactured in Montana." On cross-examination, the Agent acknowledged that he had never been to the factory in Montana, nor had he talked to any of the employees at that factory, but that he had consulted an ATF computerized database that had been compiled "over many, many years as agents have done this practice and had communication with various firearms manufacturers from around the world." Defendant Smith has appealed on the ground that Smith's testimony was inadmissible in violation of FRE 1002. What

result?

4.35. In a libel suit, the plaintiff alleges that the defendant sent a typewritten letter to plaintiff's employer with defendant's signature on it, stating that plaintiff was a liar and thief. The plaintiff offers a black and white photocopy of the letter into evidence, properly authenticated by the employer's assistant who made the photocopy from the original letter as soon as it was received. The defendant claims that the signature is not his and objects pursuant to FRE 1002 and 1003 that the copy is inadequate for handwriting analysis of the signature since he always used a special colored ink. What result? What if the assistant testifies that he made a thorough search for the original that proved fruitless? Would this make the copy admissible? Or could the plaintiff testify as to the contents of the letter and forget about the photocopy?

Chapter 5: The Character, Propensity, and Specific Acts Rules

Rule 404(b)

5.51. Patty Wurst is being tried for bank robbery. She asserts the defense of duress based on the contention that her codefendants, members of a religious cult, kidnapped her and threatened to kill her if she did not participate in the robbery. In rebuttal, the prosecution offers evidence that Wurst had robbed a convenience store a year before her alleged kidnapping. Is the evidence admissible?

5.52. Martha Woods is charged with the murder of her eight-month-old preadoptive foster son, Paul. Paul was placed with Ms. Woods when he was five months old. Up to that time he had been a normal, healthy baby. On five occasions during the first month that he was with Ms. Woods, Paul suffered instances of gasping for breath and turning blue from lack of oxygen. On the first four occasions, he responded to mouth-to-mouth resuscitation. On the last occasion he went into a coma and died a week later.

On each occasion Paul was in Ms. Woods's custody and only she had access to him. On each occasion Paul was taken to the hospital, and on the first four occasions he was released after several days in apparently good health. A pathologist testified as an expert witness for the prosecution that Paul's death was not an accident. The witness said he was 75 percent certain that Paul's death was homicide caused by smothering, and he attributed the 25 percent doubt to the possibility of some disease currently unknown to medical science.

The government offers to prove Ms. Woods has had custody of or access to nine children who suffered a minimum of 20 episodes of cyanosis (a blue coloring due to lack of oxygen). Three of the children were her own; two were adopted; two were relatives; and two were children of friends. Seven of the nine children died.

Should the evidence be admitted?

Rule 406

5.53. How should the court rule in the following cases?

(a) A bank teller seeks to withdraw a guilty plea to theft on the ground that it was involuntary. To prove that the teller entered the plea with full awareness of his rights and the consequences of the guilty plea, the state offers to prove the trial judge's habit of providing defendants with this information before accepting a plea. The proffered evidence consists of the judge's testimony about her own practices and three transcripts from unrelated cases in which the judge informed defendants of their rights and the consequences of a guilty plea.

(b) In a medical malpractice suit against a drug manufacturer, the defendant claims that it is not liable because its sales representative fully informed the treating doctor of the dangers associated with the drug. The defendant offers the testimony of the sales representative that he had a habit of discussing the dangers of the drug in question with physicians, that the discussion included information about a particular study detailing the dangers, and that the presentations to physicians would "go virtually the same way with every physician."

(c) In a medical malpractice suit against a doctor, the plaintiff alleges that she was not adequately informed about the risks of the surgery she underwent. To establish the doctor's practice of not providing adequate information for an informed consent, the plaintiff offers the testimony of three other patients of the defendant. They will all testify that they had the same procedure as the plaintiff and that the information they received about the surgery was virtually identical to the information the plaintiff claims to have received. Should this evidence be admissible? Would your answer change if there were only two such witnesses? Seven witnesses? Ten?

Similar Happenings

5.54. Layla Calhoun's estate has brought a wrongful death action against the R&D Railroad. Calhoun was killed instantly when her car collided with a train at a railroad crossing. The crossing is a busy one with more than 10 trains passing by every day. Calhoun was traveling east and the train was traveling north. The crossing had warning signs and lights but no crossing gates. The plaintiff's expert, a traffic engineer, will testify that the crossing was abnormally dangerous, primarily because of the absence of a crossing gate. The plaintiff would like to introduce the following evidence:

(a) a report about the crossing prepared by the traffic engineer for litigation in a different case eight years ago; the report reaches essentially the same conclusion that the engineer is going to testify to now;

(b) evidence of five other accidents occurring at the same intersection;

(c) the opinion of a former head of the National Transportation Safety Board that the defendant has "corporate indifference" to safety issues.

How much of this evidence should be admissible? For what purpose(s)? With respect to

the evidence in (b), what additional information may be important to your answer? For example, should it matter whether the accidents occurred at the same time of day or whether the trains and the automobiles were coming from the same direction as the train and automobile involved in this suit?

5.55. Peter French has brought a sex discrimination suit against his former employer, Acme Mortgage Co. French had worked as a loan originator, whose job it was to procure applications for mortgage loans. He claims that Jane Brown, a loan processor, engaged in sexually provocative behavior and that she refused to process the loan applications he secured unless he would have sex with her. French has a document, purportedly signed by his and Brown's supervisor recommending that French be fired. The document says, "French has complained to me about Brown's sexual harassment. The situation has become intolerable. I know French's complaints are true, but in the current market it's easier to replace an originator than a processor. I recommend we fire French." Shortly after the date on the document, French was fired.

Acme claims never to have seen the document prior to the litigation. Moreover, Acme personnel will testify that they were unaware of any sexual harassment complaints about Brown and that French was fired for inadequate job performance.

Acme wishes to introduce into evidence:

(a) a written contract between French and a former employer, Don Wilson, that contains terms extremely favorable to French along with the testimony of Wilson that his signature is a forgery, that there was no such agreement, that he saw the document for the first time after French had brought a breach of contract suit against him, and that French ultimately lost the law suit;

(b) evidence that French was unsuccessful in two suits against other former employers.

How much of this evidence should be admissible?

Rule 405

5.56. The defendant has been charged with perjury before a federal grand jury. As part of its case-in-chief the prosecutor offers the following evidence:

(a) W_1's testimony that he knows of at least five occasions on which the defendant has lied.

(b) W_2's testimony that the defendant has a reputation in the community for dishonesty.

As part of the defense, the defendant offers the following evidence:

(c) W_3's testimony that the defendant has a reputation in the community for honesty. Which pieces of evidence are objectionable?

5.57. Return to Problem 5.35 at page 293, where the defendant has been charged with committing perjury before a federal grand jury. Assume that there is no objection to W_3's testimony that the defendant has a reputation in the community for honesty.

On cross-examination of W_3 the prosecutor asks:

(a) "Did you know that the defendant was convicted of perjury five years ago?"

(b) "Did you know that last year the defendant was arrested and charged with obtaining money by false pretenses?"

(c) "Have you heard that the defendant was investigated for filing a false income tax return ten years ago?"

(d) "Have you heard that the defendant was convicted of assault last year?"

In rebuttal, the prosecution offers the following evidence:

(e) W_4's testimony that in her opinion the defendant is a very dishonest person.

(f) W_4's testimony that this opinion is based on her having observed the defendant lie and cheat on several previous occasions.

Which pieces of evidence are objectionable?

Rules 412-415

5.51.

Steve Sanders, a 21-year-old college junior, is charged with the rape of Betty Brown, a classmate. According to the prosecution, the rape occurred during their first (and only) date. Sanders admits having had intercourse, but he claims that Brown consented. The prosecution offers the following pieces of evidence:

(a) the testimony of Ann Williams, a 16-year-old high school student, that she recently had consensual sexual intercourse with Sanders;

(b) the testimony of Ellie Wilson, another student, that on her first date with Sanders he was extremely aggressive and ripped some of her clothing before she could stop him;

(c) a wallet belonging to Mary Miller that was seized from Sanders's room and Mary Miller's testimony that one month ago a masked man raped her in the laundry room of the dormitory and stole her wallet (Sanders claims that he found the wallet on a street corner the night before it was seized from his room, and that he was studying in the library at the time of the rape).

How should the court rule prior to the adoption of FRE 413-415? After their adoption?

Chapter 7: The Impeachment And Rehabilitation Of Witnesses

Rule 608

7.35. Defendant is charged with the sale of heroin. Two alleged purchasers and the arresting officer will be prosecution witnesses. There is evidence that one alleged purchaser in recent years has threatened and intimidated individuals who could offer incriminating evidence against him for his own drug trafficking activity and that the other alleged purchaser lied under oath in a civil action 13 years ago. The arresting officer, according to the defendant, stole $1,400 from the defendant at the time of the arrest. The officer denies the charge. The government has filed a motion in limine asking the court to preclude the defendant from asking about these incidents during cross-examination of the witnesses. How should the court rule?

7.36. Davenport, a former police officer, is charged with obstructing justice by revealing the name of an undercover informant to the subject of an investigation. The prosecution has developed the following information about Davenport:

(a) Prior to the criminal charge, the police department had fired Davenport after an administrative hearing, which resulted in findings that Davenport had committed a number of offenses including the alleged obstruction of justice.

(b) Three years ago Davenport was suspended by the police department for 30 days for misappropriating departmental gasoline. Davenport took the gasoline for personal use and signed another officer's name in the gas log.

(c) Two years ago Davenport was found to have taken a subway pass from a young man and ripped it up. Davenport denied taking the pass, but another officer found the pass, and Internal Affairs determined that Davenport had been lying.

(d) Last year Alma Jones complained to the police department about Davenport's conduct when he arrested her for speeding. She claims that he was verbally abusive, that he threw her on the hood of the car and put a gun to her head, and that he offered to give her only a warning if she would have sex with him.

Assume Davenport will testify in his defense and deny the obstruction charge. To what extent and how can the prosecution use the above information in cross-examining Davenport? Please prepare specific questions for the prosecutor to ask.

7.37. The defendant is being tried for sexually molesting his seven-year-old stepdaughter. The stepdaughter is one of the prosecution witnesses. Consider whether any of the following evidence should be admissible:

(a) After the prosecution has presented its case, the defendant calls several witnesses to testify that the stepdaughter is manipulative and often lies.

(b) During the cross-examination of one of these witnesses, the prosecution asks whether the witness is aware of the fact that the stepdaughter recently admitted breaking an expensive antique even though she could easily have blamed her

brother for the incident.

(c) During cross-examination of the defendant, the prosecutor inquires about whether the defendant molested his former wife's daughter. (The prosecutor knows that there was a complaint filed against the defendant with respect to that incident, that the charges were dropped, and that the defendant was divorced shortly thereafter.)

(d) During cross-examination of the defendant, the prosecutor also inquires about whether the defendant misrepresented his college class standing in campaign speeches made three years ago during an unsuccessful campaign for a legislative seat.

(e) As part of its rebuttal, the prosecution calls a clinical psychologist who had examined the stepdaughter. The psychologist offers to testify that (i) she never had trouble with the stepdaughter saying things that were untrue and (ii) psychological research shows that less than 1 percent of child sexual abuse claims are false.

7.38. Doris Delorme has been charged with possession of heroin with intent to sell. The heroin was discovered in a small private airplane in which Doris and Wally Winter, an alleged co-conspirator, were riding. Wally initially testified that Doris was part of their conspiracy and that Doris knew the heroin was on the airplane. The prosecutor then offered to elicit from Wally that he had pleaded guilty pursuant to a plea agreement that included a commitment to testify truthfully against Doris and, if requested, to take lie detector tests. What objection can Doris make to this evidence? What objection could Doris make if the prosecutor offered the evidence only after Doris had established that she had just obtained a divorce from Wally's brother and that Wally was convicted of perjury three years ago?

Rule 609

7.39. James Burton is being prosecuted for illegal weapons possession. The weapon, a pistol, was found during a legal search of the house where James was living. The house is owned by James's mother, Teresa, and she has testified that the pistol belonged to a former boarder. Fifteen years ago Teresa was convicted of making a false statement under oath and third degree larceny. The convictions were the result of her having made false statements on an application for food stamps. Can the prosecutor introduce evidence of these convictions?

7.40. Mary Davenport is charged with possession of cocaine discovered during a legal search of the vehicle she was driving. In her defense she establishes that she had borrowed the car from a friend, and she testifies she had no idea that the cocaine was present. On cross-examination can the prosecution introduce evidence that nine years ago she was convicted of attempted possession of a controlled substance? Would your answer

be different if, on direct examination, Mary not only denied knowledge of the cocaine in the car but also testified, "With the education my father gave me not to get involved in drugs, I never did"? Why?

7.41. Alex Dean is being prosecuted for murder. He has testified that he was with a friend at the time of the alleged killing. On cross-examination the prosecutor asked Alex if he had falsely stated that he had no criminal record on a job application filed with the Acme Parts Co. three years ago. Alex responded that he had applied for a job with Acme and that he had not lied on the job application form. The prosecutor now offers into evidence (1) Alex's job application form in which he responded "No" to the question whether he had ever been convicted of a crime and (2) a public record of Alex's conviction for armed robbery seven years ago. Alex has objected to the admissibility of both documents. What result?

Other Impeachment Techniques

7.42. Joyce Addison has filed a racial discrimination in employment suit against State University, which recently fired her. On cross-examination of Joyce can the university ask about allegations of racial discrimination that she made against two previous university employers?

7.43. Dan Duncan is charged with possession of cocaine with intent to distribute. After the prosecution has completed its case, Duncan testifies that he works with disabled children and would not smuggle drugs for a million dollars; and he portrays himself as an anti-drug counselor who teaches kids to stay away from drugs. In its rebuttal case, can the prosecution offer witnesses to testify that (a) Duncan has been arrested for possessing cocaine and (b) Duncan sold them cocaine?

Chapter 8: The Hearsay Rule

FRE 803(1) & (2)

8.85. Two armed men entered a check-cashing store at 9:00 A.M. just after a delivery of currency and robbed the delivery man of over $20,000. They fled the scene in a beige car, driven by a third person. Fifteen minutes later, the police received an anonymous 911 call in which the caller stated: ''[I]n the 1660 block . . . of 32nd Street, these guys just dumped this beige car. Apparently, they stole it [be]cause they jumped into another car and took off.'' The caller also gave the license plate number of the deserted car, which turned out to be the beige getaway car. At 10:00 A.M., based on the 911 call, police officers found the beige car where the 911 caller had stated it was. A search by FBI agents recovered an anonymous note that was on the front seat. This note stated: ''Light green ZPJ-254. They changed cars; this is the other car.'' A check on the light green car

revealed that it was a green 1978 Buick registered to Anita Young, wife of defendant Mitchell Young. Mitchell Young was arrested later that same day, driving the green Buick. Young is charged with robbery, and with aiding and abetting robbery as the driver of the getaway car.

As the prosecutors, prepare direct examinations for the foundation witnesses for the 911 call and the note, and try to get them admitted into evidence.

8.86. After a morning of skiing at Timber Mountain, Joe and his wife, both intermediate skiers, had lunch and then rode the Wolf chairlift to the top of Red Run. Red Run is a groomed, intermediate-level run below the Wolf chair. As Joe skied down first, he was spotted by an off-duty Timber Mountain Lodge employee who was on the Wolf chairlift. The employee witnessed Joe skiing down Red Run, then lose control and crash headfirst into a tree near the edge of the run. There was a partially exposed tree stump near the area where Joe had lost control and crashed.

The employee skied down to Joe in five minutes, after having alerted Timber Mountain Ski Patrol about the accident. By that time, Joe's wife was also present. Joe was unconscious, bleeding from the mouth, and turning blue. Joe's wife was screaming for help. A vacationing nurse stopped and administered CPR to Joe. When the ski patrol arrived, Joe's wife overheard the employee say, "What took you so long? Someone might die here." The ski patrol asked the employee, "What happened?" Joe's wife claims that she overheard the employee tell the ski patrol that he had seen Joe hit a stump, then crash into a tree, hitting his head on the tree.

Joe is partially disabled from the accident and cannot remember what happened. He and his wife have sued Timber Mountain for negligence in maintaining a hazardous condition, the stump, on Red Run. Timber Mountain defends on the basis that Joe was an inexperienced skier and crashed into the tree on his own. At trial, the court excludes the wife's testimony about the employee's statements for the following reasons: that they were made 15 or 20 minutes after witnessing Joe's fall; that they were made in response to the ski patrol's inquiry and not spontaneously; and that the employee and Joe were strangers. If Joe and his wife lose at trial, what would you argue on appeal to overturn the trial court's exclusion of the wife's testimony?

FRE 803(3)

8.87. David White has been sued by the driver of an automobile that was hit by David's car, a blue Mazda, driven by David's wife Brenda White. Brenda was allegedly driving 100 MPH on a freeway between her home in the country and Central City. Is the following testimony admissible?

(a) W_1 testifies that on the morning of the accident, Brenda White said, "I love to drive my car at 100 MPH."

(b) W_2 testifies that on the morning of the accident, Brenda White said, "I intend to speed all the way to Central City."

(c) A bystander testifies that two miles before the accident a hitchhiker said, "I believe that blue car just sped right by me going 100 MPH."

(d) A bystander testifies that, at the scene of the accident, a hitchhiker said, "I remember that blue car sped right by me going 100 MPH."

8.88. Plaintiffs run a political advocacy group that is distributing pamphlets and soliciting signatures for a petition in Anderson County. Plaintiffs are suing a group of county officials, alleging that the officials have abridged Plaintiffs' First Amendment rights by actively encouraging residents to file criminal complaints for harassment against them. Ellen, a county resident, did file such a complaint. Defendants offer the testimony of Ellen's neighbor that, on the morning before Ellen went to the police station to file her complaint, she told the neighbor that she wanted to file a criminal complaint against Plaintiffs because she was so upset by their harassment. Plaintiffs object on grounds of hearsay. What result?

8.89. Return to Problem 8.39 in the textbook. To prove that he gave proper advice to his patient, Tom Hay, Defendant Dr. Gatwick offers a cab driver who picked up a man and woman at the ER at the time Tom and Barbara Hay were leaving the hospital. The cab took them to a home address that admissible evidence will show is the home of Tom and Barbara Hay. The cab driver will testify that he overheard the man say to the woman: "I don't care what the doctor said, I hate hospitals." Is the cab driver's testimony admissible?

8.90. In an antitrust action by small retailers of beer against Beer World, a supermarket-style beer distributorship, the plaintiff-retailers must prove damages caused by loss of business to Beer World on account of Beer World's illegally low prices. Several retailers plan to testify that they were told by customers, some identified and some not identified, that the customers "are buying beer from Beer World because of lower prices." As counsel for the retailers, for what purpose would this testimony be admissible? As counsel for Beer World, what objections would you make to this testimony?

8.91. Oscar Small is charged with the kidnapping and murder of Spenser Reed, who has disappeared. The prosecution claims Small is engaged in extensive cocaine trafficking; that Small hired Reed to do house cleaning for him; that Reed stole cocaine from Small's house; and that Small found this out and retaliated by snatching Reed off the street, forcing Reed into his car, and murdering him. Small explains the presence of Reed's fingerprints in the car by claiming that Reed came over to his house, they took a friendly drive together, and Reed then left. The prosecutor calls several friends of Reed to testify as follows. Is their testimony admissible?

(a) W_1: "On the Saturday he disappeared, Reed looked very nervous. He said to me, 'I'm afraid of seeing Small.' "

(b) W_2: "A week before he disappeared, Reed said, 'I don't ever want to see Small again.' "

(c) W_3: "A few days before he disappeared. Reed said to me, 'I'm afraid of Small

because he got really violent with me when he found out about the cocaine I took.' "

(d) W_4: "A few days before he disappeared, Reed said to me, 'I think Small is going to kill me.' "

8.92. Frank Jackson is charged with the murder of Steve Smart, whose body was found in a public park on Sunday, April 4.

(a) The prosecution offers the following testimony of Barbara Berry: "When I spoke to Steve on Saturday, April 3, he said, 'I'm meeting Frank Jackson later tonight.'"

(b) Instead of (a), the prosecution offers the following testimony of Carl Cole: "I spoke with Steve on the afternoon of April 3. He said he had to work at home all weekend to finish a report that was due Monday and that he was stuck in his apartment working unless Frank Jackson was available to meet him for a few hours."

FRE 803(4)

8.93. Jenkins, a federal prison inmate, is charged with committing an assault resulting in serious bodily injury to another inmate. At trial, an emergency room physician who treated the victim testified on direct that "there was reportedly—and I got this second- or thirdhand as I often do in the ER—a loss of consciousness in the ambulance." Admissible?

8.94. Defendant is charged with sexually abusing his nine-year-old stepson. When the alleged child victim was being examined by Dr. Wolfe, he denied that defendant was abusing him. Victim's mother then asked to speak to Dr. Wolfe and told the doctor that defendant had "brainwashed" the victim and that the victim had been abused by defendant. At defendant's trial, may Dr. Wolfe testify as to what the mother said?

FRE 803(6)

8.95. Nutra Pet Products markets its wares by placing demonstrators in pet specialty stores. The demonstrators set up tables, display Nutra products, and answer customer questions. From May 2012 to May 2015, 330,000 demonstrations took place. Nutra's main competitor, AIMS, Inc., became concerned that Nutra demonstrators were making disparaging comments about AIM's dog food, and has sued Nutra for deceptive trade practices, namely a practice of making false statements about AIMs products. AIMS had a long-standing practice of conducting an annual "mystery tour" during which 25 mid-level employees visited retail pet stores throughout the country as "mystery shoppers" (i.e., concealing their identity as AIMs employees) to learn about marketplace conditions. In 2014-2015, the mystery tours focused on stores in which Nutra demonstrations were taking place. The AIMS employees were instructed to engage Nutra demonstrators in conversation, then leave the store and make an immediate record of what happened on a standardized form. At trial, AIMs wants to introduce a number of the standardized forms that report statements made by Nutra demonstrators, such as that AIMs products contain carcinogens, sugar, animal fat from roadkill, and other ingredients harmful to dogs. As

attorney for AIMs, plan out how you would lay a foundation for these records and overcome a hearsay objection. As attorney for Nutra, plan your strategy for keeping the records out of evidence.

8.96. Plaintiff Narr has filed an employment discrimination complaint against Columbia Community College for refusing to renew her teaching contract on grounds of her national origin. The College defends on the ground that the failure to renew was based on Narr's poor teaching performance and the numerous administrative problems that she caused. Plaintiff has filed a motion in limine to exclude the following exhibits, properly authenticated documents written prior to the decision not to renew Narr, offered by the College:

(a) Handwritten notes signed by students criticizing Narr's teaching over the course of the semester.

(b) Anonymous handwritten comments by students on the formal course evaluation forms for Narr's classes that are distributed by Columbia at the end of each semester and kept in the regular course of the college's business.

(c) Two e-mails written by one of Narr's departmental colleagues describing his observation of Narr's failure to follow important departmental policies. One e-mail was addressed to Narr, and the other to Narr's department chair.

(d) Another e-mail by the same colleague to the chair describing a student's complaints about Narr's ineffectual teaching and poor attitude toward students.

(e) A memorandum to the department chair from an administrative assistant in the department chronicling years of complaints from faculty about Narr and her own problems with Narr.

(f) A log recorded by the department chair of the numerous issues faculty members have raised about Narr, written at the request of Columbia's Director of Human Resources.

How should the court rule on Narr's motion? Consider all applicable evidence rules. If you were the judge, would you want to request additional information from the parties before ruling on the motion?

8.97. Return to Problem 8.39 in the textbook. To prove that he gave proper advice to his patient, Tom Hay, Defendant Dr. Gatwick will offer the properly authenticated hospital chart of Hay's visit to the ER. Dr. Gatwick will testify that during and immediately after an ER exam he always dictates notes for the chart to the ER nurse who is also attending the patient. He testifies that the nurse always makes handwritten notes in the chart while he is dictating. The handwritten notes in Hay's chart state: "Hospital tests advised. Patient refusing to be admitted to Hospital." Are these notes in the chart admissible?

8.98. Plaintiff is suing Chem-Clean manufacturing company for personal injuries resulting from his use of a Chem-Clean household cleaning product. Plaintiff was taken to the hospital emergency room. Plaintiff's medical records contain the following notation made by the emergency room physician: "Burn appears to be second degree.

Covers area approximately 6 inches in diameter. Patient said he was using Chem-Clean cleaning product when he got burned. " Can Plaintiff obtain the admission of this entire record without the testimony of the physician? Using what hearsay exceptions? What if plaintiff were suing Clean-rite company instead, and alleged that he had been using a Clean-rite product. Could Clean-rite obtain the admission of the entire medical record? Using what exceptions?

8.99. Ronald has been diagnosed with chronic pulmonary disease and has been hospitalized several times. He has filed suit against the manufacturer of the butter flavorings used at his place of employment, the American Popcorn Factory. He claims that exposure to the chemical ingredients in defendant's flavorings has caused his illness. Ronald has filed a motion in limine to prevent defendant's use of certain statements in his own medical files kept by his own treating physician, Dr. Farr. Ronald seeks to exclude the following statements:

(1) With regard to his [Ronald's] pulmonary status, he has improved significantly since being here. His daughter states that their house is basically, the word they have used to describe it is filthy, which may be contributing somewhat to his pulmonary problems. Daughter has insisted that he will not be going home until the house is thoroughly cleaned.

(2) Apparently, his home environment is quite dirty with animal feces, etc., in the house.

(3) He has had long-standing problems with his lungs. Actually, this was improved through hospitalization, and the daughters feel that this may be due to his home environment, which they call filthy.

Ronald admits that these statements are in Dr. Farr's handwriting and that Dr. Farr was in charge of Ronald's medical care when he wrote the notes. Ronald objects to defendant's use of these statements on grounds of FRE 401, 602, 801, and 403.

FRE 803(8)

8.100. A defendant in a criminal case, charged with kidnapping and assault, has filed a Motion to Suppress statements made by him to three law enforcement officers following his indictment, arrest, and request for assistance of counsel. The defendant claims that continued questioning by the three officers violated his right to counsel under the Sixth Amendment. At the suppression hearing, the prosecution offers the report of FBI Agent Peters, who observed the defendant's arrest and questioning. The report was prepared several weeks after the defendant's Motion was filed. It includes Peters's own recollection of events, including that he, and the three other officers whom he interviewed, never heard the defendant say that he wanted to speak to an attorney.

(a) Can the prosecution secure the admission of this report under any Rule 803 hearsay exception? Could the officers use this report if the defendant were pursuing a civil rights claim against them for money damages?

(b) Could the defendant secure the admission of a written finding made by a police

department review board, after a full hearing, that a year ago the same three officers had denied an arrestee the assistance of counsel by ignoring her requests for an attorney?

8.101. Harris, on trial for possession of crack cocaine with intent to sell, claims in his defense that the drugs were planted in his apartment by a police detective who had a vendetta against him and had harassed him three times while Harris was on parole. Harris claims that he called Wilkins, his parole officer, as he was required to do, each time he had an encounter with the detective. Wilkins has retired. The prosecution offers the testimony of Wilkins's replacement to testify that "it is normal policy for probation officers to make an entry in a probationer's file for each contact with the probationer, and there are no notations in Harris's file indicating that he contacted Wilkins." Is this testimony admissible to prove that Harris did not tell Wilkins about any alleged police harassment?

8.102. A Liberian corporation, Bridgeton, seeks to enforce in federal court the final judgment rendered in its favor by the Supreme Court of Liberia against Citibank. Citibank is defending against the enforcement action by challenging the legitimacy of the Liberian judicial system, claiming that Liberia's courts do not constitute a system of jurisprudence likely to secure an impartial judgment, and thus Bridgeton's judgment is unenforceable in the United States. As proof of its claim, Citibank offers the U.S. State Department Country Reports for Liberia for the years 1994-1997. Country Reports are prepared annually by area specialists at the Department of State and report on human rights conditions prevailing in the subject country. Federal law requires their annual submission to Congress. In describing their preparation, the State Department says that "[w]e have given particular attention to attaining a high standard of consistency despite the multiplicity of sources and the obvious problems related to varying degrees of access to information, structural differences in political and social systems, and trends in world opinion regarding human rights practices in specific countries." Are the Country Reports admissible?

FRE 804(b)(1)

8.103. Defendant was charged with interstate transmission of child pornography via computer. At trial, after the government rested its case, defendant sought the admission of the transcript of a witness's grand jury testimony in lieu of live testimony. The court found the witness to be unavailable. In the grand jury proceeding, the following had occurred: The witness testified that she resided with defendant during the time of his alleged illegal activity, that she had access to his computer with his own password, and that she never saw any child pornography. The prosecutor had then asked about her opportunity for observing the pornography, whether she had seen a particular digital image, and then explored the witness's relationship with defendant and their living arrangements. The government objects to the admission of the grand jury testimony on the basis of United States v. Salerno, page 552, supra. What result?

FRE 804(b)(2)

8.104. A doctor, dying from non-Hodgkins lymphoma, brought a strict product liability suit against the manufacturer of an herbicide containing 2, 4-D acid, which he alleged was the cause of his disease. After his death, the doctor's wife, as executor of his estate, was substituted as plaintiff. Eight days after filing the complaint, the doctor gave a sworn, videotaped statement to the effect that in the 1940s, when he was a teenager, he worked for a crop dusting service in Montana mixing 2, 4-D herbicide products and loading them into crop dusting aircraft. He stated that he recalled the labels on the 2, 4-D barrels and that the defendant, Dow Chemical, was the manufacturer. He also stated that his lymphoma was in "stage four," the disease's final incurable stage. Based upon his experience with patients, he stated that he might survive three months.

In fact, the doctor's condition did worsen and he died in two months. In the intervening time, he and his wife traveled to Yugoslavia on a religious pilgrimage, which he believed was the last resort to receiving healing. May his recorded statement be admitted pursuant to FRE 804(b)(2)?

FRE 804(b)(3)

8.105. Burton is charged with robbery and use of a firearm during a crime of violence, both in connection with the robbery of an Oriental rug store, Carpets of Asia, in Carmel, California. The government's theory is that the robbery was masterminded by Wilson, who was also charged but who remains at large. Wilson's girlfriend, Carla, was a U-Haul employee who rented out trucks illegally used by Wilson in other rug store robberies. Carla was arrested and charged with conspiracy to rob a rug store. Unbeknownst to Wilson, she then began to cooperate with the FBI once she was out on bail. Over the next six months, Carla surreptitiously tape recorded numerous conversations with Wilson. In one recording, Wilson gave a detailed account of the Carmel rug store robbery. Wilson said that he recalled how he told the others that they probably only had five minutes for the robbery due to the store alarm timer, which would probably automatically reset itself and notify the police. He recalled how Burton had shown "a lot of heart" during the robbery and had told a female customer who had wandered into the store during the robbery that the store was closed for remodeling. He told Carla that money from the robbery had been used to pay her bail. Alleging that Wilson is unavailable, the government offers Carla's tape recording in evidence against Burton. What result?

FRE 804(b)(4)

8.106. Plaintiff Maureen Sullivan has sued No-State Life Insurance Company for failure to pay benefits due upon the death of her husband, Stephen. One of the disputed issues is Stephen's age at the time of death. On direct examination of Maureen, her attorney asks her:

Q: What is your husband's date of birth?

DEFENSE COUNSEL: Objection, hearsay. This witness has no firsthand knowledge and could only know based on what someone told her.

BY PLAINTIFF'S COUNSEL: Ms. Sullivan, did your husband ever tell you what his birthdate was?

DEFENSE COUNSEL: Hearsay, Your Honor. Her husband cannot possibly have remembered firsthand, as a newborn baby, the date of his own birth. He could only know this by being told.

What should plaintiff's counsel argue?

FRE 807

8.107. Four victims of abduction and brutal torture during the reign of terror conducted by El Salvadoran Security Forces in 1979 are suing two El Salvadoran military commanders. The suit is filed in federal court in Florida, where the two defendants reside, and seeks compensatory and punitive damages pursuant to federal and state law. One element of plaintiffs' claim requires proof that the defendants had actual or constructive knowledge of ongoing criminal conduct by troops over which they had command.

To prove actual or constructive knowledge, plaintiffs seek to introduce a properly authenticated English language translation of a tape-recorded diary kept by the Archbishop of El Salvador, Oscar Arnulfo Romero. Romero kept this diary from March 1978 until his assassination in 1980 while conducting a Mass. He created the diary by making notes throughout each day of events connected with his ministry, including meetings and conversations with various individuals. Later that same day he would dictate a narrative version of these notes into a portable tape recorder. These tapes (but not the notes) were preserved, copied, transcribed and translated, as can be proved by authenticating witnesses. Their contents were not made public until 1990. An early entry in the diary states that "I want this diary to be a record of the chancery team and of the life of the archdiocese." Entries in the diary state that meetings were held between the archbishop and both of the defendants in 1978 and 1979. The diary states that human rights abuses, the acts of violence committed by the security forces, the need for remedial action, and even the archbishop's public denunciation of one of the defendants were discussed. Both defendants deny ever meeting with the archbishop. There is also evidence that the archbishop made statements critical of the defendants and the security forces during his "homilies" that were broadcast throughout the country. The defendants deny hearing the homilies. Is the Romero diary admissible under FRE 807? What other hearsay exceptions might apply?

Chapter 9: Opinion Testimony by Lay and Expert Witnesses

FRE 901

9.15. Defendant was driving his car, and crashed into Plaintiff's car at an intersection. Plaintiff alleges that Defendant was driving over the speed limit, was intoxicated, and ran a red light. To establish these facts, Plaintiff wants to call W_1, who was at the scene and will testify that Defendant, when he exited his car, was wobbly and looked like he was drunk, and that the smell of alcohol was detectable. W_2 will testify that he was getting his hair cut in a barber shop about a mile away from the accident and observed Defendant's car "whiz by the barber shop going about 70 miles an hour." W_3 will testify that she heard the squeal of tires that could only be made by a car greatly exceeding the speed limit trying to stop quickly, that she looked up and "thought she saw Defendant's car enter the intersection while the light was against him" but she "can't be positive that's so." W_4, also at the scene, will testify that the first thing Defendant did when he got out of his car after the wreck is walk toward Plaintiff's car, trip over a small piece of wire, get up, and say, "My God, I need another drink," although W_4 isn't absolutely sure that Defendant said "another." Can all these witnesses testify accordingly?

9.16. In his capacity as an auto parts delivery driver, Jack Miller delivered metal tubing to Prairie Center Muffler. Miller was directed to place the tubing on a storage rack inside Prairie Center. The storage rack had been constructed by Prairie Center a number of years prior and was not affixed to the wall or the floor.

Miller alleges that while loading the tubing onto the storage rack, both the metal tubing and the storage rack fell onto him, causing him to fall to the ground and be seriously injured. Miller alleges that by constructing the rack to hold metal tubing, but failing to secure the rack to the wall, Prairie Center created and maintained an unreasonably dangerous condition, which ultimately caused the rack, with the metal tubing, to fall over on him and to cause him serious injury.

Miller concedes that he did not see the rack fall because he had his back to the rack when it allegedly fell over. He would testify as follows:

> The rack had approximately six levels of support arms on which the tubing was to be stacked. The support arms were made of either metal rods or metal tubing. I placed the various diameters of tubing on the various support arms and turned my back to the rack. When I was 4 or 5 feet away from the rack, with my back to it, the rack tipped over and one of the metal support arms struck me on my left upper back/left shoulder, dug into my left upper back, left shoulder, and left arm, and threw me to the floor.
>
> I have been a weightlifter all my life and am familiar with weights and forces. I also had extensive experience handling, lifting, and carrying the tubing that I was placing on the rack. The force and weight of what hit me was such that I know it was the rack — it could not have only been the metal tubing. Had the metal tubing fallen off the rack and hit me, it would not have had the weight or the force to have dug into my back, shoulder and arm nor would it have had the weight or the force to have thrown me to the ground.
>
> Further, I know that the rack tipped over because of the distance I was from the

> rack when it hit me and threw me to the ground. Had the metal tubing rolled off the support arms, they would have cascaded downward like a waterfall. They would not have flown horizontally across the room, five or six feet above the ground, and struck me in the upper back and shoulder. Nor would the tubing have had the force necessary to push me to the ground. On the other hand, the rack tipping over would have reached me, where I stood, and would have had the force to have knocked me to the ground.

Should Miller's testimony be admissible lay opinion under Rule 701? Argue for and against admissibility.

9.17. Mr. Sheley regularly abused his wife, violently beating her, running her over with a car, and threatening her with a gun and other deadly weapons. Though Mrs. Sheley had never before responded with force, she killed him during one of his brutal attacks. On that occasion, Mrs. Sheley shot and killed her husband with a handgun while Mr. Sheley threatened her and her daughters with a shotgun.

Mr. Sheley had previously purchased a life insurance policy that provided for double benefits in the case of accidental death. Under Georgia law, the death of an insured spouse during a domestic dispute is considered accidental for the purposes of redeeming life insurance if the decedent reasonably believed that his wife would not respond to his aggression with force. Gail, Mrs. Sheley's daughter, testified that she believed that Mr. Sheley never thought that Mrs. Sheley would shoot him. After the jury found the death to have been accidental, the insurance company appealed. It argued that Gail's testimony should not have been admitted under Rule 701 because Gail could not have had personal knowledge of Mr. Sheley's subjective state of mind and that Gail's opinions were therefore not rationally based upon her perceptions. Should the appellate court reverse?

9.18. In a real estate deal gone sour, several hotel chains were sued for breach of contract by DIJO, Inc., the real estate developer for a project in Tunica, MI. The project never got beyond the planning stages. During the portion of the trial on lost profits, Kerry Skinner (a lay witness, representing DIJO's potential lender and otherwise uninvolved in the project) testified that "based on projected earnings of $1 million per year, the value of the Project to DIJO was $8,000,007." Skinner was a knowledgeable financial consultant, but his testimony revealed that he had little significant actual knowledge about DIJO and its operations. The jury later returned an $8 million plaintiff's verdict. Should Skinner's testimony have been permitted?

9.19. Police officers in New Bern, North Carolina, found Eddie Roberts on his kitchen floor, dead from a bullet wound to the head. At the trial of Don Duncan, a witness, Dove, testified that he saw a man fire a rifle into Roberts's kitchen. "It was dark, but the man looked to be about the same size and height of Don Duncan." The witness was familiar with Duncan's appearance because he was acquainted with Duncan and had seen him earlier on the day of the murder. Again explaining what he had witnessed, the witness stated:

> I couldn't tell what kind of clothes he had on. The rifle sounded like a .22 — in my opinion, it was a .22. I had a chance to see the man, but I couldn't tell who he was. After he shot the rifle, he climbed over the fence and crossed Broad Street. He was

about the same size and height of Don. I am not willing to identify any man that I couldn't see his face. There are hundreds of people in town who are the same height and I have seen a lot of people in this town who are the same size.

Is all of Dove's testimony admissible?

9.20. On April 12, 1964, Texas Gulf Sulfur Company issued an optimistic press release about the results of its recent exploratory drilling in Timmins, Ontario. The press release led to a substantial increase in the price of the company's stock, benefiting several corporate officials who had purchased large quantities of the stock only days before. The SEC filed charges of insider trading against the corporate officials and charged the company with making a misleading statement that might make reasonable investors rely on it. The SEC introduces several investors who testified as lay witnesses that the press release created erroneous impressions. Should this testimony be allowed?

9.21. Annie Hester worked in the BIC Corporation's order-processing department for seven years before BIC merged its order-processing department with its customer service department. Beck, the manager of the new department, may have shown favoritism to those employees from the old customer service department and thus there was some tension in the new group. Despite Beck's recommendation of an employee from the old customer service department, Hester was promoted to a group leadership position for which she was well qualified. After only a few months in the new position, customers began complaining about Hester's performance and Beck transferred her to another department. Hester sued BIC for race discrimination, alleging that Beck had given white Group Leaders additional training and feedback and had promoted a white employee with fewer qualifications than Hester to replace her. Hester called four lay witnesses who were prepared to testify to the following:

(1) Mary Ende, a white file clerk, believed that Beck treated those from the customer service department like "stepchildren." She did not know anything about Hester's performance as a Group Leader. (2) Darlene Miller, a white employee who had worked with Hester prior to the merging of the two departments, felt that Beck "was mean to everyone in order-processing, but she was more mean to Hester." Like Ende, Miller admitted that she, too, had no personal knowledge of Hester's job performance. (3) Patricia Wright, an African-American receptionist who had been fired from BIC, had had the chance to observe Beck's treatment of Hester but was more eager to testify that her own termination had been because of race and that she had received mysterious racist phone calls around the time of her dismissal. (4) Lillian Turner, an African-American employee, had observed on two or three occasions Beck treating Hester with "borderline disrespect and condescension" but had never seen Beck treating white employees in this way. Turner was herself suing BIC for racial discrimination and wished to explain that, absent any other reason, she believed she must have been treated poorly because of her race.

How, if at all, should the trial judge limit this testimony?

9.22. Two former corporate executives of Cal Micro, Henke and Douglas, were accused of being part of a false revenue reporting conspiracy that portrayed the company

as a good investment option when in reality it was struggling. Proving that Henke and Douglas had knowledge of the false reporting scheme was critical to the government's case. To do this, it called Wade Meyercord, Douglas's replacement as Chairman of Cal Micro's Board of Directors, and asked him about the Board's reasons for terminating the defendants:

Q. [Prosecution]: What happened next . . . ?

A. [Meyercord]: There was another Board meeting in October of '94, so that the — later that month. I don't recall the exact date. At which time, if I recall correctly, we removed Mr. Douglas as Chairman of the company, and I was elected Chairman.

Q. Why did you remove — yeah, why did you remove Mr. Douglas?

[Defense counsel]: Objection, Your Honor.

The court: You can rephrase that, counsel.

Q. [Prosecution]: If you know, what — how did the Board reach that decision?

[Defense counsel]: Your Honor, that's simply an opinion that they reached — conclusion that they reached.

The court: Well, no. I think the witness can testify as to the understanding that he has of the reason that the Board took that action. That's, I think, the appropriate question. All right? With that in mind, Mr. Meyercord, what is your understanding of the reason that the Board took the action which you did in removing Mr. Douglas as Chairman of the Board?

A. Because we felt there was — we removed Mr. Douglas as Chairman because we felt there was a high probability that he knew that the revenues had been misstated and that we could not in good conscience leave him in that position . . . .

Q. [Prosecution]: Did Mr. Henke resign around this time period?

A. [Meyercord]: Yes, he did.

Q. And was — were you aware of the fact that he had negotiated a severance package with Mr. Douglas?

A. I became aware later, yes.

Q. Well, Mr. Meyercord, did the Board accept this severance packet?

A. No, we did not.

Q. Why not?

[Defense counsel]: Well, I object to it, Your Honor, on the same grounds that we've objected to the other documents, that it's prejudicial, and it's — actually this is testimony.

The court: Well, now, no speaking objections, Mr. Hallinan. What's the basis of the objection?

[Defense counsel]: Well, first of all, under the circumstances, it's so prejudicial. That's

one. Second of all, there's no basis for it, doesn't show any special knowledge. And third of all, it calls for an opinion of this witness.

The court: Overruled. The witness may testify as to his understanding of the reason that the Board took the action which it did.

[Meyercord]: The Board — the Board did not feel that a severance package for Mr. Henke was appropriate given the evidence we had in front of us.

Q. What evidence was that?

[Defense counsel]: Well, there, Your Honor. Object to that.

The court: Objection overruled.

A. The evidence that the revenue had been misstated.

Q. Did you have an understanding as a Board — did you learn as a Board member what Mr. Henke's role was in that?

[Defense counsel]: Your Honor, what relevance — ?

The court: Objection overruled.

Q. Did you learn in the investigation — ?

The court: What was the witness's understanding of the facts?

[Prosecution]: Right.

Q. What was your understanding of the facts as they concerned Mr. Henke?

A. My understanding of the facts were that Mr. Henke must have known about this — about the revenue misstatements.

[Defense counsel]: Well, I'll move to strike that. That is just an opinion, he "must have known." That shouldn't even be before the jury, Your Honor.

The court: Objection overruled.

[Prosecution]: No further questions, Your Honor.

The defendants appealed the conviction. Should the court have excluded the opinion testimony that the defendants "must have known"?

9.23. Latana Slayton worked as a corrections officer for the Ohio Department of Youth Services with her coworker Corry Appline. In a suit against her employer, Slayton alleged that the DYS maintained a hostile work environment in which she was required to endure routine sexual harassment. Appline, she claimed, encouraged the young men to drop their towels while Slayton was on shower duty, sent her to check on an inmate who he knew was masturbating at the time, and provided the inmates with sexually explicit movies and music that referred to women as "bitches." On several occasions, Slayton sought redress from her superiors, who never took any action to remedy the situation. During the jury trial, the judge permitted the lay opinions of Slayton's supervisors that

the alleged conduct violated its internal sexual harassment policy. During the testimony of one of the supervisors, the judge interrupted to ask: "Hypothesize that the plaintiff's testimony is true. In your view does that constitute under the terms of your policy, the state's policy, does that constitute sexual harassment in the workplace?" The supervisor answered that it would. After a verdict for the plaintiff, the defense appealed claiming that the lay opinions of the supervisors were inadmissible because they spoke to the ultimate issue. Was the trial judge right to allow the testimony?

9.24. Joe, a United States citizen of Filipino dissent, is suing his employer for discrimination. Joe asserts that he was denied a promotion because of his national origin. His employers counter that they decided to hire from outside the company because of certain perceived dissension within the ranks of its present employees. The employers called one of their directors, Mr. Queeg, to the witness stand. Queeg had taken part in the hiring of the new employee. Defense counsel asked Queeg, "Is it true that you did not believe that Joe had been discriminated against in the interview process because of his national origin?" Over the defense's objection, Queeg was allowed to answer that counsel's statement was correct. Should Queeg's opinion testimony have been allowed before the jury?

FRE 702

9.25. Ms. Elcock fell and was injured while shopping in a Kmart store. In her suit against the Kmart Corporation, Dr. Copemann, a vocational rehabilitationist, testified that through his evaluation and treatment of Ms. Elcock he found her to be depressed and suffering from disorders linked to her pain and inability to adapt, and that all of her ailments were brought on by her fall at Kmart. He went on to opine that Ms. Elcock would never recover and would always be 50 percent to 60 percent vocationally disabled. Copemann testified that he valued Elcock's injuries using the Fields (comparing pre- and post-injury access to labor market) and Gamboa (more holistic approach, examining extent of injury and client's perceptions among other factors) analyses. The jury returned a verdict in favor of the plaintiff and awarded her $650,000. The Kmart Corporation appealed. In reviewing the trial record the appellate court found that Dr. Copemann was adequately qualified to testify, but it also noted that his testimony failed to meet several of the *Daubert* factors. First, the court found that Copemann had not provided "an inkling as to the standards controlling his method — i.e., how he excludes for other variables, such as Elcock's pre-existing injuries or job limitations — an expert trying to reproduce Copemann's method would be lost." Second, the plaintiff introduced evidence that both the Gamboa approach and the Fields approach to vocational rehabilitation assessments have received general acceptance in the field. Dr. Copemann, however, had testified that he used a "hybrid methodology," employing some aspects of both techniques. There was no evidence demonstrating that this "hybrid" had reached a level of general acceptance. Are these shortcomings in Dr. Copemann's testimony sufficient for a finding of abuse of discretion? How should the appellate court rule?

9.26. Rhonda Woods and Darla Burns worked as operators of a specially designed forklift called the TSP. Both Woods and Burns were injured on the job when they were struck by empty wooden pallets while driving the TSP down narrow warehouse aisles.

Both sued the manufacturer of the TSP, alleging negligence in the design, maintenance, and operational warnings. Daniel Pacheco, who had a B.S. degree in mechanical engineering and had been a registered Professional Engineer for 30 years, was prepared to testify for the plaintiffs. Everyone agreed that Pacheco's credentials were adequate. In his investigation prior to trial, Pacheco read the depositions of the plaintiffs and 10 other people who had knowledge relevant to the incidents, he reviewed the defendant's manufacturing and service documents for the TSP, and he read the TSP's sales brochures, a training manual, and engineering drawings. Pacheco explained that he had seen photographs of the TSP and had read the manufacturer's literature but had never operated or observed another person operating the TSP. Despite this, he was prepared to testify that it was his opinion that an extension of the existing wire mesh guard would have prevented the plaintiffs' injuries and that an alternative warning would have been more effective to this end as well. At the time of the pretrial hearing to determine the admissibility of his testimony, he had not drafted such an alternative warning to present to the court. Should Pacheco be allowed to testify to both or either of these opinions?

9.27. Soon after Kenneth Goodwin purchased a MTD lawnmower, he suffered an eye injury while cutting the grass in front of his home. He had to undergo eye surgery for a cut in his cornea and sued MTD Products for the dangerous and defective design of its mower. During the trial, Goodwin testified that he had been mowing about five feet from his house when he felt something hit his left eye. He stated that when he later returned to the spot, he found a plastic wing nut with a slice mark in it. Goodwin proposed to the jury the theory that the mower was defective in that the motor's vibrations had loosened the wing nut, allowing it to fall into the cutting blades. The nut then shot out at about 190 mph and ricocheted off the plaintiff's house and into his left eye.

In support of this theory, lawn mower experts testified about the manufacture, design, and condition of the mower, and medical experts testified about his eye injury. To rebut this evidence, MTD called Gunter Plamper, its vice president in charge of product development and safety. Plamper explained why he felt MTD's mower was safe but when he tried to explain that it was impossible for a wing nut to cause Goodwin's eye injury, the attorney for the plaintiff objected. What were the best grounds for this objection and how should the judge rule?

Later, the defense attorney tried to elicit from Plamper his expert opinion about whether he believed Goodwin when he stated that he was in the operator's zone behind the lawnmower with the discharge chute facing down when he was injured. The plaintiff's attorney again objected. How should the court rule?

9.28. Officer Muirhead was sued for use of excessive force by Mr. Nimely, who was rendered paraplegic when Muirhead shot him after an armed chase on foot. During the trial, the plaintiff offered the testimony of several experts to the extent that Muirhead's shot was fired while Nimely was facing away from him, fleeing. The defense countered with the testimony of Dr. Stuart Dawson, a consulting expert in forensic pathology. Dawson testified that regardless of the actual course of events, Muirhead probably perceived Nimely as turning to face him as Muirhead fired; thus Muirhead's use of force would have been justified (since Nimely was armed at the time). Dawson's testimony on the "misperception" of Officer Muirhead was based in part on his review of Muirhead's

pre-trial deposition, in which Muirhead related his belief that Nimely was turned to face him when the shot was fired. Dawson further testified that he based his expert opinion on his independent conclusion that Muirhead must not have been lying in his account of the course of the events leading up to the shot:

Q: Now, Doctor Dawson, did you also review the deposition testimony of Police Officers Muirhead and McCarthy?

A: Yes.

Q: Was there testimony about what Mr. Nimely was doing at the time Sergeant Muirhead thought he shot him consistent with your findings?

. . .

A: Well, yes and no. There was testimony that Mr. Nimely was turning, but taken literally, the testimony wasn't consistent with the facts because the literal testimony was that the officer felt that he shot directly in front of the chest of Mr. Nimely but he did say that Mr. Nimely was in the process of turning, so in effect my analysis considered both of those aspects and realized they could basically be synthesized in something reasonable.

Q: In doing your analysis, in light of — what you described as the entrance and exit wound and trajectory of the bullet, did you consider that the police officer who said that he shot him straight in the chest wasn't telling the truth?

A: That certainly is one of the considerations that goes through your mind, is perhaps the officer is simply lying about the incident. I considered that possibility and — but fairly quickly rejected it as being the less likely of the things that happened.

Q: Why did you reject it? . . .

A: Well, I rejected it because, you know, in — it's generally an acceptable concept that police officers aren't going to discharge their weapons —

MR. KELTON: Judge, I object to what is an acceptable concept of what police officers will do.

THE COURT: Overruled. The witness is explaining his answer. He may complete it.

A: Thank you, Judge. What it boils down to is police officers don't discharge weapons lightly because the discharge of a weapon creates all kinds of problems . . .

THE COURT: . . . You may continue with your answer.

A: Thank you. It causes problems of criminal litigation, civil litigation, et cetera. The other thing is, it's reasonable to infer that a police officer is going to know that whenever a discharge does occur, there is going to be a big investigation and that will include forensic examination of wounds, so it didn't make much sense to me that the police officer would say that the person was shot in the front if it would be obvious to the police officer that an investigation would be done and that would show the person was shot in the back.

The jury found for the defense. Should Dawson's testimony have been permitted?

9.29. The defendant, Mr. Salimonu, is being tried for conspiracy to import heroin, a federal offense. As one of the elements of the crime, the prosecution has the burden of proving that Mr. Salimonu knew, and was in contact with, another member of the conspiracy. To this end, it presented tape recordings of incriminating conversations between "Laddie" and McKinnon and between "Laddie" and Petrosino. McKinnon and Petrosino are alleged co-conspirators. A voice exemplar that contains a recording of Salimonu's voice was also played for the jury for purposes of comparison. The prosecution seeks to convince the jury that "Laddie" was in fact Mr. Salimonu.

To refute this argument, Salimonu wishes to introduce the testimony of two expert witnesses to establish that Laddie's voice and Salimonu's voice on the exemplar are different. Robert Berkovitz, the developer of a spectogram computer program that plots the frequency and magnitude of speech signals, is prepared to testify that substantial differences between the spectograms of the two voices indicate that the tapes are of two different people. Dr. Stephen Cushing, a linguist, has listened to the tapes and, based on this, is willing to testify that the two voices were different.

In the voir dire, Dr. Cushing states that he has listened to the tapes several times and has distinguished 14 differences between the two voices. Cushing admits that he has had no training or special certification in voice identification or comparison, and that he has only engaged in voice recognition procedures two or three times before. He also concedes that a person may be able to disguise his voice and that he does not know whether the voice in this exemplar is disguised. Finally, Cushing states that a layperson without training in linguistics would be able to discern the same differences that he has by listening to the tapes. Should the trial judge allow both experts to testify?

FRE 703 & 705

9.30. Waitress Tina Brennan received an electric shock from a coffee maker while working and allegedly developed fibromyalgia as a result. Ms. Brennan brought a personal injury suit against Reinhart Corp., the manufacturer and installer of the coffee maker. At trial, her vocational rehabilitation counselor Mr. Ostrander testified that in his opinion Ms. Brennan's fibromyalgia would be a permanent condition. As part of the basis for this conclusion, Ostrander stated that Ms. Brennan's rheumatologist had reported that the plaintiff had "permanent partial impairment of 11 percent of the whole person" and that her specialist in physical medicine and rehabilitation had also examined the patient and agreed with Ostrander's analysis. The defense objected to Ostrander's use of out-of-court hearsay, pointing out that both the rheumatologist and the specialist would be unavailable for cross-examination and, although the rheumatologist had given testimony by deposition, he had not mentioned the 11 percent impairment conclusion. The jury returned a verdict for the plaintiff and the defendant appealed, maintaining that the trial court erred in allowing Ostrander to summarize the opinions of others. Should the appellate court reverse?

9.31. David Ricci was an environmental engineer doing testing on defendant companies' biomass smoke stack when he fell to his death from a platform surrounding the stack. The platform was about 80 feet from the ground and a ladder ran up the stack's

side to the platform. No eyewitnesses saw the fall but Ricci's father inferred that his son inadvertently stepped through the platform ladderway opening that admittedly was missing safety guards, and sued the stack's owner based on this theory. Defendants inferred that the fall occurred as the son descended the ladder.

A safety inspector was qualified as an expert for the plaintiff and testified at trial that it was more probable than not that Ricci had inadvertently fallen through the ladderway opening. This opinion was based in part on statements from Ricci's father and coworkers that Ricci was always careful and that it was his practice to wear gloves while climbing. The defense objected. Do you think the father's and coworkers' testimonials are of the type of data "reasonably relied upon by experts in the particular field"?

FRE 704

9.32. Taxpayer D was accused of making erroneous deductions from his taxable income. The government claimed that he owed over $200,000. The tax court in which the case was heard excluded two letters from certified public accountants that contained analyses that led to the conclusion that the law did not preclude Taxpayer D from making these deductions. Taxpayer D appealed, arguing that Rule 704(a) supports the admission of these reports. Did the court err?

9.33. Mark Bruck's business was failing when he purchased additional insurance to cover a building into which he moved equipment and highly flammable substances. The building burned down and Bruck was charged with arson and bank fraud. At trial, the prosecution called an expert who testified as follows:

Q: (By Asst. U.S. Attorney Kinder). Based on the training and experience you have had in arson investigations, have you learned that there's certain indicators in an arson for profit scheme that you look for?

MR. MURRAY [Defense counsel]: Objection.

THE COURT: He may testify.

A: Yes.

Q: Did you find any of those indicators for the investigation of the Advance Resins' fire?

A: Yes, I did.

Q: What were they?

A: The fire was deliberately set in multiple locations. The fire was set for economic —

MR. MURRAY: I object and move to strike. That is a conclusion left to the jury's determination, not this agent's.

THE COURT: Well, he may give his opinion based on his experience, background and training, and on the number of fires he's investigated, teaching experience and so

forth. Based on that, he may give his opinion as to whether or not it was a set fire and to show how he determined it.

After his conviction, Bruck argued on appeal that the expert's testimony was inadmissible under Rule 704(b). Was it error for the court to allow the expert to testify in this way?

Chapter 12: Privileges

Attorney-client Privilege

12.38. Ed Brown has been charged with assault. At a pretrial hearing to determine Brown's competence to stand trial, the attorney called himself as a witness for the purpose of explaining how difficult it was to communicate with Brown. The attorney's testimony included the details of three quite different stories that Brown had told at various times about the incident in question. The court found Brown competent to stand trial. At trial, where Brown was represented by a different attorney, the prosecutor called the former attorney to testify about Brown's earlier inconsistent statements regarding the crime. Brown has objected on the ground that his statements are protected by the attorney-client privilege. What result?

12.39. Connolly was laid off as a part of a reduction in workforce by his employer, Athens Enterprises. He sued the company, alleging that it discriminated against him on the basis of race, in violation of federal and state law. Connolly, who is white, offered evidence that the company considered federal Equal Employment Opportunity reasons when it reduced its workforce, specifically that it targeted white employees for elimination while keeping less qualified minorities. Davis, an in-house attorney for Athens, advised the company regarding the layoffs. He prepared a memo from the law department on proposed guidelines for implementing the cutbacks. In addition, he advised the company regarding possible legal problems with the lists of employees the company proposed to fire. Connolly moved to compel the production of these documents, arguing that they were not privileged because they were prepared in the ordinary course of business, and not for the purpose of giving legal advice. Should the documents be produced? With regard to the lists, would it make a difference if they were prepared at the request of the law department?

Marital Privilege

12.40. Arlene is suing the Major League Broadcasting Corp. (MLBC) for employment discrimination. She alleges violations of the Equal Pay and Fair Labor Standards Act and of Title VII. MLBC has subpoenaed Arlene's husband, Fred, to give deposition testimony that might involve conversations he had with the plaintiff. Specifically, MLBC wants to ask Fred about the following: (1) Fred's assistance with his wife's job search following her departure from MLBC; (2) his observation of injuries suffered by his wife in an automobile accident that may bear on injuries allegedly suffered in this case; (3) Fred's conversations with his wife concerning incidents of

harassment allegedly occurring at MLBC; (4) miscellaneous areas including his knowledge of Arlene's work habits, what her last evaluation at MLBC was before she lost her job, and her claim against MLBC; and (5) his knowledge of Arlene's confrontation with her supervisor at her new job. Can Fred claim marital communications privilege?

Prior to her husband's deposition, Arlene asserts the marital communications privilege to block his testimony regarding these conversations. Should the court uphold the privilege as to each of the areas MLBC wants to discover?