

## Evidence Topic 1: Problems for Class Discussion

The following are a few very basic questions and problems suitable for discussion during the first class in the Evidence law course. They are designed to encourage you to begin to look at some of the codified rules of evidence and to make rudimentary analyses in applying them.

Except for #1 and #2, all answers can be found among the *rules assigned for this topic*. No additional research is necessary.

For the evidence problems below, as well as for all problems assigned during the course, I will want you to get into (or continue with) the habit of being very precise in your analyses. Furthermore, as to rules citations, you must cite not only the main part of the rule but any subpart that applies as well. This will be a standing requirement for the course.

1. The Federal Rules of Evidence (FRE) apply in all Federal civil and criminal trials, and in various other Federal proceedings. List in order the parts, or stages, of a typical criminal jury trial and be prepared to discuss what happens at each stage. Note that there is no rule of evidence that will give you this information; rather, you will have to do a little research here.
2. A former law student who worked as a clerk for an experienced trial lawyer told me that the lawyer made this comment one day: "I don't get concerned about Evidence rules. The trial judges have discretion to do pretty much whatever they want to and they are never reversed on appeal." If that's true, why study Evidence law, or more, importantly, why have rules? Do you think it is true? Tell us why or why not.
3. Mitchell was convicted of selling drugs and was placed on probation for 10 years. One condition of his probation was

that he abstain from the use of alcohol or drugs not prescribed for him by a physician. One day a bartender at the Black Swan Lounge, who was a friend of Mitchell's probation officer, called the officer and reported that Mitchell had gotten so drunk in the bar the previous evening that another bartender refused to serve him and sent him home in a taxi. The probation officer called the cab company and confirmed that a driver had picked up a very intoxicated fare on the previous evening and had taken him to 8665 Knox Lane, Mitchell's home address. With that information, the probation officer filed a motion to revoke Mitchell's probation. At the hearing on the motion, only the probation officer testified, relating the statements of the bartender and the cab company representative. Mitchell's lawyer objected that the evidence violated the rule that provides that hearsay is inadmissible. The judge overruled the objection, allowed the testimony, and ultimately ordered the revocation of Mitchell's probation because he had not abstained from alcohol. Mitchell appealed, claiming that the judge violated the rules of evidence by allowing and considering inadmissible hearsay evidence.

*Assume* that the evidence was hearsay and arguably was inadmissible under the rules of evidence. Does Mitchell win or lose his appeal? Explain your answer and cite a rule (not in the hearsay section) to support your answer.

4. A local ordinance makes it illegal "to sell, distribute or barter any ticket of admission to a sporting contest without a license" in certain geographical areas of the city, including any "downtown streets." Widmer was cited for violating this law because he sold hockey playoff tickets on the corner of Flute and Piccolo. He admitted selling the tickets but claimed that the area where he sold the tickets is not "downtown." The trial judge, however, simply ruled that the corner in question is in fact "downtown." Can the judge do this?

5. In a criminal jury trial, the judge ruled that the defendant's prior felony conviction was admissible so that, when the defendant testified, the jury would learn of it. The judge also indicated that she was allowing the conviction only as it might bear on the defendant's believability and not to show that he committed the crime for which he was on trial. The defendant is concerned nevertheless that the jury might, in fact, use the conviction improperly. Is there anything the judge can do to try to confine the jury only to the purpose for which the judge allowed the conviction?
  
6. Direct examination in a trial occurs when a lawyer questions her own witnesses. A leading question is one in which the questioning lawyer suggests the desired answer to the witness. On direct examination, attorney Laura Vix asked this question of her witness: "So, on that day you were driving your car about 5 miles an hour under the speed limit?" Assume that the respective speeds of the two cars that crashed is a key issue in the lawsuit that resulted from the incident. Was this a leading question? Was this a proper question under the rules?
  
7. Dr. Oswald Nelson was called to be an expert witness for the plaintiff in a medical malpractice trial. He would testify that the surgical procedure used by the plaintiff's surgeon failed to measure up to the standard of care required for such operations. Before he could testify, defense counsel objected, stating that it had not been shown that the doctor had had any training or experience in such surgery and therefore could not testify about it. Whose call, judge or jury?

8. During a jury trial, attorney Phillips asked a witness on direct examination: "What was the first thing you saw after you heard the shot?" The judge sustained the opposing lawyer's objection to the question and would not permit the witness to answer. Phillips firmly believes that the judge's ruling was reversible error and he intends to appeal if he loses the case. What do you think Phillips has to do at the trial stage to make sure the appellate court will be able to review the judge's ruling?
  
9. Assume that in the trial noted in #8, above, the opposing lawyer stated his objection as follows: "I object. That testimony is totally inadmissible." Is this a proper objection?

