EVIDENCE MNEMONICS

1) The proof must be “highly probable” (clear and convincing) to prove CLAM GAP CAMP:
   C – A CONSTRUCTIVE trust (T CUP)
   L – A LOST will
   A – ACTUAL malice in a defamation case
   M – MUTUAL mistake, reformation, or fraud
   G – GIFT (AID)
   A – ADVERSE possession (EUNUCH)
   P – PROVISIONAL remedies (LIAR)
   C – A CRL (covenant running with the land)
   A – ADULTERY
   M – MOLINEAUX – “mimic” prior acts or convictions (N.Y.)
   P – Grounds to terminate PARENTAL rights (MA & PA)

2) Judicial notice is taken of indisputable facts when they are LMN:
   L – LEGISLATIVE facts
   M – MANIFEST facts that are easily and quickly verifiable by referring to an indisputably accurate source
   N – NOTORIOUS facts that are so commonly known within the court’s jurisdiction that it would waste the court’s time for a party to prove those facts

3) A judge doesn’t have to admit M-CUP evidence:
   M – Evidence MISLEADING or confusing to the jury
   C – CUMULATIVE evidence to prove facts already established
   U – Evidence that would cause UNDUE delay (too time consuming)
   P – It would have an “unfair” PREJUDICIAL effect on the jury (“SOUP”)

4) Relevant evidence can be excluded if its probative value is SOUP:
   S – SUBSTANTIALLY
   O – OUTWEIGHED by its
   U – UNFAIR
   P – PREJUDICIAL effect on the jury

5) Admit a RED habit in NY negligence cases where:
   R – It was the party’s repetitive, regular, ROUTINE response
   E – The party was in complete and EXCLUSIVE control of the circumstances; AND
   D – The routine act was DELIBERATE
6) **OPENS** is closed out, even though it’s relevant:
   - O – **OFFERS** of compromise (in civil cases)
   - P – Evidence protected by **PRIVILEGE**
   - E – Evidence pertaining to the **EXISTENCE** of liability insurance in a personal injury case
   - N – A criminal defendant’s admissions in unsuccessful plea bargain **NEGOTIATIONS**
   - S – Evidence of **SUBSEQUENT** remedial repairs after an accident (in civil cases)

7) A witness must **PURR** before she can testify:
   - P – **PERSONALLY** perceived the event; except for a witness’s expert testimony
   - U – **UNDERSTAND** and take the oath or affirmation
   - R – **REMEMBER** the event
   - R – Be able to **RECALL** the event on stand

8) A witness can be impeached with prior convictions, as well as prior **VIC** acts for which she was not convicted:
   - V – **VIOLENT** acts
   - I – **IMMORAL** acts
   - C – **CRIMINAL** acts

9) The 4 “**PRIORS**” aren’t hearsay provided the declarant testifies:
   - 1 – **PRIOR** recorded recollection
   - 2 – **PRIOR** out-of-court identification
   - 3 – **PRIOR** consistent statement
   - 4 – **PRIOR** inconsistent statement that was given under oath, subject to penalty of perjury, at a prior trial, hearing, or EBT

10) Diversity jurisdiction requires federal courts to use state rules for **PIPS**:
   - P – **PRIVILEGES**
   - I – **INCOMPETENCY** of witnesses
   - P – **PREEMPTION** and inferences
   - S – **SOL**

11) For **NOW**, the Dead Man’s Statute is set aside (NY exceptions):
   - N – In a **NEGLIGENCE** action involving a car, boat, or plane (for general facts and results of accident)
   - O – When estate offers evidence/“**OPENS** the door” or questions an interested W about transactions or conversations with a dead person
   - W – If an estate fails to timely object at trial, it **WAIVES** the right to object based on DMS

12) **NON FLIPS** are self-authenticating documents:
   - N – **NEWSPAPER** and periodicals
   - O – **OFFICIAL** publications issued by public authority
   - N – **NOTARIZED**/acknowledged documents (except wills), where the signer appeared before a notary, swore to truth of its content, and acknowledged execution
   - F – **FOREIGN** public records, if the custodian’s signature is certified by the U.S. Embassy
   - L – Products identifiable by **LABEL**, tag, or trademark affixed in the reg course of
business
I – Negotiable INSTRUMENTS and commercial paper
P – Copies of PUBLIC documents or records, certified by the clerk of the agency or
court that oversaw its custody
S – Documents with a government SEAL

13) An original document may be replaced by A DOPE when:
A – Its content was judicially ADMITTED by party against whom it’s being offered
D – The document has been DESTROYED or lost
O – The original is OUTSIDE the court’s subpoena jurisdiction
P – PUBLIC record
E – The original is under the EXCLUSIVE possession of the opposing party

14) The judge looks to see whether the expert wears a CRAPE when deciding whether to admit the
expert testimony:
C – CONFIRMED by testing
R – REVIEWED by peers
A – Widely ACCEPTED theory in the profession
P – PUBLISHED
E – Potential rate of ERROR

15) To rebut an inference, a party can show that a missing witness was UCC:
U – UNAVAILABLE
C – Not under the party’s CONTROL
C – The missing witness’s testimony would only be CUMULATIVE

16) The source for federal privileges are in the 3Cs:
C – The CONSTITUTION
C – Acts of CONGRESS
C – Federal COMMON LAW

17) Confidential privileges are CHIMP’S RAP:
C – CLERGY privilege
H – HUSBAND-WIFE privilege and spousal testimonial privilege
I – Privilege against self-INCRIMINATION (under the 5th & 14th Amendments)
M – M.D./PATIENT privilege
P – Ph.D./PSYCHOLOGIST privilege, which NY protects in the same manner as AC privilege
S – Certified SOCIAL worker privilege
R – RAPE crisis counselor’s privilege (NY, not in Federal Courts)
A – ATTORNEY-CLIENT privilege
P – PRESS privilege

18) No leading questions on direct, unless the witness is HAIRY:
H – HOSTILE, unwilling, or biased
A – An ADVERSE party
I – IDENTIFIED/associated with an adverse party
R – Unable to RECALL facts and so recollection needs refreshing
Y – Very YOUNG or old with a communication problem
19) Use a **CRIB PIC** to impeach a witness:
   - C – Impeachment by **CONTRADICTION**
   - R – W’s bad **REPUTATION** in the community for truthfulness
   - I – W’s prior **VIC** acts (vicious, **IMMORAL**, or criminal)
   - B – W’s **BIAS**
   - P – W’s **PRIOR** inconsistent statement
   - I – **INFLUENCE** of drugs or alcohol on W
   - C – Prior criminal **CONVICTIONS** of W

20) **RIP** character evidence is admissible when a W’s character or trait of character is an essential element in a crime, civil claim, or defense:
   - R – **REPUTATION**
   - I – Specific **INSTANCES** of prior conduct
   - P – W’s **PERSONAL** opinion

21) A **MIMIC** can introduce prior crimes, on direct exam:
   - M – To show D’s **MOTIVE** for committing crime
   - I – To show D’s specific **INTENT** or guilty knowledge
   - M – To show absence of **MISTAKE** or accident
   - I – To **IDENTIFY** D as perpetrator
   - C – To establish a **COMMON PLAN** or scheme

22) A witness’s truthful character is admissible when attacked by a **VCR**:
   - V – Prior **VIC** acts
   - C – Prior criminal **CONVICTIONS**, or
   - R – Bad **REPUTATION** for truthfulness in community

23) Hearsay is admissible for **ARIES DWARFS**:
   - A – **ADMISSIONS** of an opposing party
   - R – Business or public **RECORDS**
   - I – Present sense **IMPRESSION**
   - E – **EXCITED** utterance
   - S – Declarant’s existing **STATE** of mind
   - D – **DYING** declaration
   - W – **WITNESS** tampering (Intimidated Witness Rule)
   - A – Declaration **AGAINST** interest
   - R – **RESIDUAL** hearsay exception
   - F – **FORMER** testimony
   - S – Pedigree **STATEMENTS** of personal history

24) The six **DWARFS** can only be let into court by an unavailable **MR. POD**:
   - M – A party who lacks **MEMORY** of the incident in question
   - R – A party who **REFUSES** to testify, even when ordered to do so by the court
   - P – A party who invokes a **PRIVILEGE**
   - O – A party **OUTSIDE** the court’s subpoena power
   - D – A party who is **DEAD** or too sick to come to court
25) **BRIBE K**, and admit the listener’s state of mind:

- **B** – BELIEF
- **R** – REASON
- **I** – INTENT
- **B** – BIAS
- **E** – EMOTION
- **K** – KNOWLEDGE

26) Offer the Business Records of Mr. **TRUMP**:

- **T** – Record must have been **TIMELY** made “at or near” the time of the matter recorded
- **R** – It must have been the habitual, **ROUTINE**, regular practice of that business to systematically make and keep such a record
- **U** – Out-of-court declarant must have been **UNDER** a duty to supply information for the record, unless the statement falls into another hearsay exception, in which case the statement would be admitted, provided the other 4 **TRUMP** elements are satisfied (“hearsay w/in hearsay”)
- **M** – The record was **MADE** and the info was kept as part of the regular practice of that business; **AND**
- **P** – Business records must identify the source of the info, and the person supplying info for the record must have had **PERSONAL** knowledge of the matter recorded

27) Declarations against interest require **PUMP**:

- **P** – that the OOC declarant knowingly made statement against declarant’s own
  
  - **3P** interest:
    - **P** – **PENAL** interest
    - **P** – **PENUNCIARY** interest ($)
    - **P** – **PROPRIETARY** interest
  - **U** – that the OOC declaration was made by person who is **MR. POD UNAVAILABLE** at trial
  - **M** – that when the declaration was made, the declarant had no **MOTIVE** to misrepresent the facts; **AND**
  - **P** – that the declarant had **PERSONAL** knowledge of facts asserted

28) Non-testimonial **BEAD** hearsay is admissible against the criminal defendant:

- **B** – **BUSINESS** records
- **E** – **EXCITED** utterance
- **A** – **ADMISSION** by co-conspirator made during and in furtherance of the conspiracy
- **D** – **DYING** declaration
In-Class Multistate Questions:
Evidence

Breakdown of Evidence on the MBE

Presentation of Evidence (33%)
What Concepts Do They Expect You to Know?

Presentation of Evidence

A. Introduction of evidence
   1. Requirement of personal knowledge
   2. Refreshing recollection
   3. Objections and offers of proof
   4. Lay opinions
   5. Competency of witnesses
   6. Judicial notice
   7. Roles of judge and jury
   8. Limited admissibility

B. Presumptions

C. Mode and order
   1. Control by court
   2. Scope of examination
   3. Form of questions
   4. Exclusion of witnesses

D. Impeachment, contradiction, and rehabilitation
   1. Inconsistent statements and conduct
   2. Bias and interest
   3. Conviction of crime
   4. Specific instances of conduct
   5. Character for truthfulness
   6. Ability to observe, remember, or relate accurately
   7. Impeachment of hearsay declarants
   8. Rehabilitation of impeached witnesses
   9. Contradiction

E. Proceedings to which evidence rules apply
Relevancy, Privileges, Writings, Recordings, and Photographs (33%)

What Concepts Do They Expect You to Know?

I. Relevancy and Reasons for Excluding Relevant Evidence
   A. Probative value
      1. Relevancy
      2. Exclusion for unfair prejudice, confusion, or waste of time
   B. Authentication and identification
   C. Character and related concepts
      1. Admissibility of character
      2. Methods of proving character
      3. Habit and routine practice
      4. Other crimes, acts, transactions, and events
      5. Prior sexual misconduct of a defendant
   D. Expert testimony
      1. Qualifications of witnesses
      2. Bases of testimony
      3. Ultimate issue rule
      4. Reliability and relevancy
      5. Proper subject matter for expert testimony

II. Privileges and Other Policy Exclusions
   A. Spousal immunity and marital communications
   B. Attorney-client and work product
   C. Physician/psychotherapist-patient
   D. Other privileges
   E. Insurance coverage
   F. Remedial measures
   G. Compromise, payment of medical expenses, and plea negotiations
   H. Past sexual conduct of a victim

III. Writings, Recordings, and Photographs
   A. Requirement of original
   B. Summaries
   C. Completeness rule

Hearsay and the Circumstances of its Admissibility (33%)

What Concepts Do They Expect You to Know?

A. Definition of hearsay
   1. What is hearsay
   2. Prior statements by witness
   3. Statements attributable to party-opponent
   4. Multiple hearsay
   E. Real, demonstrative, and experimental Evidence
   B. Present sense impressions and excited utterances
   C. Statements of mental, emotional, or physical condition
   D. Statements for purposes of medical diagnosis and treatment
   E. Past recollection recorded
   F. Business records
   G. Public records and reports
   H. Learned treatises
   I. Former testimony; depositions
   J. Statements against interest
   K. Other exceptions to the hearsay rule
   L. Right to confront witnesses
1. Which of the following preliminary issues would the jury, rather than the judge, decide?

(A) Whether evidence is relevant.
(B) Whether a witness is unavailable so as to permit the introduction of hearsay evidence.
(C) Whether a witness can invoke the husband-wife privilege.
(D) Whether the chain of police custody in a criminal drug possession case is adequately established.

1. Ordinarily, authentication problems are allocated to the jury under Fed. R. Evid. § 104(B), e.g., voice identification and identification of real evidence. Thus, the jury decides the adequacy of the chain of custody for real evidence. Thus, the best choice is (D).

Under Fed. R. Evid. 104(A), preliminary issues concerning the qualifications of a witness, the existence of a privilege (choice (C)) or the admissibility of evidence (relevancy, hearsay, dead person’s statute, and the original document rule) are issues for the judge and not the jury. Thus, choices (A), (B), and (C) are not correct.
2. A trial judge sitting in a federal district court may not take judicial notice of which of the following?

(A) Excerpts contained in a book offering a novel and unique theory on personal injuries arising out of automobile accidents.
(B) That certain combinations of blood types of a mother, child, and putative father exclude paternity.
(C) The location of the United States Attorney’s office in the district where the court is sitting.
(D) That hydrogen is a lighter gas than nitrogen.

2. There are two standards by which courts will take judicial notice of facts. The facts must be either notorious and generally known by all reasonable people within the court’s territorial jurisdiction, or the facts are not generally known but are easily and readily verifiable by an authoritative source whose accuracy is inherently reliable. Fed. R. Evid. 201.

(D) is incorrect because the second standard applies, i.e., it is a readily verifiable fact.

(C) is incorrect because the first standard applies, i.e., the location of the local United States Attorney’s office is a notorious fact.

(B) is incorrect because DNA blood tests to exclude a particular male from paternity have become so well accepted that the accuracy of the scientific theory can no longer be questioned.

(A) is the correct answer because a book excerpt containing a novel and unique theory does not meet either standard. This evidence certainly is not generally known within the jurisdiction, and is not from a source inherently reliable (e.g., a phonebook).

However, if the text or book at issue is a well-known treatise or reference (e.g., Gray’s Anatomy), the judge may take judicial notice of established principles contained therein. “Given the requirement for judicial notice, FRE 201, and the nature and importance of the item to be authenticated, the likelihood of judicial notice being taken that a particular published authority other than the most commonly used treatises is reliable is not great. See, e.g., Hemingway v. Ochsner Clinic, 608 F.2d 1040 (5th Cir. 1979).” Graham, Handbook of Federal Evidence § 803.18 at 458 n.6 (5th ed. 2001).
3. A plaintiff’s intestinal wall collapsed during surgery, a result which occurred in approximately twenty percent of such procedures and was not caused by the surgeon’s negligence.

The plaintiff sued the doctor who performed the operation on the theory that the doctor failed to inform him of the substantial possibility that the surgery could be unsuccessful. In pre-trial depositions, the doctor testified that he had fully explained the risks to the plaintiff.

At trial, the plaintiff called a former patient of the doctor who had successfully undergone identical surgery three months prior to the plaintiff. The former patient testified that the doctor never explained to him the risks of the surgery, and the doctor’s attorney objected.

Is the former patient’s testimony admissible?

(A) Yes, as evidence of the doctor’s routine practice.
(B) Yes, as an admission by silence.
(C) No, because character cannot be proved by specific instances of conduct.
(D) No, because evidence of similar events cannot be used to prove conduct at a different time.

3. The general rule is that evidence of similar happenings is not admissible to prove that the events at the time in issue occurred in the same manner. No exception to the general rule applies in this case, and therefore (D) is the correct answer. See Rivera v. Aniles, 8 N.Y.3d 627 (2007), NYAA p. 508 (2014).

(A) is incorrect because one prior instance of conduct, unless accompanied by an offer to prove additional instances, does not constitute evidence of routine practice or habit.

(B) is incorrect because the doctor’s silence at the time the plaintiff met with the doctor is the issue which must be proven by the plaintiff in this case. Any silence at the time the doctor met with another patient would not constitute an admission.

(C) is incorrect for the following reasons:

- character evidence is not admissible to raise an inference that a party acted in conformity therewith.
- character evidence is admissible in a civil case when relevant to establish a claim or a defense (negligent retention of an unfit servant or defamation).
- character can be introduced in a civil case to impeach a witness’s credibility.
- The former patient is not testifying about character but about a specific prior event.
4. The police charged a defendant with sexual abuse, alleging that he had inappropriate contact with a patient in the psychiatric hospital at which he worked.

At trial, the prosecutor called another psychiatric patient to testify about what he observed the defendant do to the first patient. The court had previously declared the observing patient to be of unsound mind.

The defendant’s attorney objected to the observing patient’s competency to testify.

How should the court proceed?

(A) Deny the observing patient’s testimony, assuming the defendant can prove that the observer is of unsound mind.

(B) Allow the observer to testify, assuming the prosecutor can show by a preponderance of the evidence that the observer is currently of sound mind.

(C) Allow the observer to testify, and allow the jury to decide what weight and credibility to give his testimony.

(D) Deny the observer’s testimony because it has been judicially determined that he is of unsound mind.

4. Fed. R. Evid. 601 states that “[e]very person is competent to be a witness except as otherwise provided in these rules.” “The only explicit basis for a finding of incompetency, therefore, would appear to be lack of personal knowledge (Fed. R. Evid. § 602), refusal to take an oath (Fed. R. Evid § 603) and [a witness’s] status as a judge or juror, i.e., a judge or juror cannot be a witness in a case in which the judge or juror is sitting (they are incompetent). [Fed. R. Evid. §§ 605 and 606]. Neither mental nor moral qualifications for testifying are specified in Rule 601.” Barker & Alexander, Evidence in New York State and Federal Courts § 6:17 at 475 (2d ed. 2011). “[T]he Advisory Committee’s Note states that any mental infirmities of the witness bear only on weight and credibility, and the moral obligation of truth-telling can be regulated in connection with administration of the oath.” Id. Thus, the best choice is (C).
5. A high school principal was charged with sexually molesting one of the students at his school. After the jury returned a guilty verdict, one of the jurors submitted an affidavit to the presiding judge.

Which of the following would most likely be a basis for the judge to set aside the verdict?

(A) The juror was sick and wanted to go home and thus voted to convict.
(B) The jurors were confused with the judge’s instruction.
(C) The jurors disregarded the judge’s instructions to not consider certain evidence.
(D) The jurors were told by a court officer that the defendant previously had been convicted of child molestation.

5. Ordinarily a juror is incompetent to impeach the verdict. Fed. R. Evid. 606(B) broadly insulates verdicts from challenge based on internal influence on the deliberations of jurors. Fed. R. Evid. 606(B) permits, however, juror testimony concerning whether “extraneous prejudicial information was improperly brought to the jury’s attention” or “whether any outside influence was improperly brought to bear upon any juror.” “Extraneous information” means facts that the jurors themselves seek and obtain outside of court proceedings and consider in their deliberations. Site visits are an example. “Outside influence” involves attempts by third parties to affect jurors by intimidating or bribing them, for instance. Note that alcohol and drug abuse by a juror was held not to be an extraneous outside influence. *Tanner v. United States*, 483 U.S. 107, 122-25 (1987).

Where the jurors’ affidavits asserted that they had awarded attorneys fees as part of the aggregate award contrary to the judge’s instructions, a court held that no extraneous outside influence had occurred sufficient to disturb the jury’s verdict. *Munoz v. State Farm Ins. Co.*, 968 P.2d 126 (Colo. App. 1998).

Since (D) provides the jury with extraneous prejudicial information, (D) is the correct answer. *Tanner v. United States*, 483 U.S. 107, 117 (1987); *People v. Martagh*, 94 N.Y.2d 569 (2000).
6. A testator’s son and sole heir-at-law contested the validity of a document offered as his father’s last will.

The testator’s nurse, who was not one of the official witnesses to the will, was called to the witness stand at trial, sworn in, and shown the signature on the purported will. The first question counsel asked the nurse was whether the signature was the testator’s.

Should the court allow counsel to ask the nurse about whether the signature was the testator’s?

(A) No, because the nurse is not a handwriting expert.
(B) No, because the question calls for a conclusion.
(C) No, because only an official witnesses to a will can testify as to the authenticity of a testator’s signature.
(D) No, because counsel failed to lay a proper foundation for the nurse’s testimony.

6. This question requires knowledge of the rules regarding a lay witness’s opinion as to the authenticity of a signature.

(A) is incorrect because the nurse does not need to be a handwriting expert in order to testify about the testator’s signature. A lay witness is permitted to testify to her opinions or references drawn from her perceptions if they are:

(a) rationally based upon the perception of the witness, and

(b) helpful to a clear understanding of her testimony or to the determination of a fact in issue (Fed. R. Evid. 701).

Thus, if the nurse is familiar with the testator’s signature (that is, if her testimony is based upon her perception), such handwriting testimony is admissible.

(B) is incorrect because a lay person is allowed to testify as to this type of conclusion.

(C) is incorrect because people other than the witnesses to the will can give an opinion as to the authenticity of the testator’s signature, if such people are familiar with the testator’s signature.

(D) is correct because nothing has been presented to show that the nurse is familiar with the testator’s signature. Without such familiarity, she cannot testify as to its authenticity.
7. A member of a racial minority sued her employer for racial discrimination and racial harassment, alleging that she received an e-mail from her employer making spiteful and disparaging racial comments. Under oath, in her pleadings and depositions, the employer denied making such statements.

Prior to commencement of the lawsuit, the alleged e-mail was deleted in the regular course of business.

At trial, the plaintiff, in an effort to establish the content of the e-mail, proposed to: testify as to the content of the e-mail, have a co-worker testify as to the e-mail that he saw on the plaintiff’s computer just after the plaintiff read it, and offer a copy of the plaintiff’s letter to her union complaining of her employer’s racial harassment and containing the content of the e-mail word-for-word.

Should the court admit this evidence?

(A) The court should admit the copy of the plaintiff’s letter only.
(B) The court should admit the plaintiff’s testimony and the copy of the plaintiff’s letter only.
(C) The court should admit all of the plaintiff’s evidence.
(D) The court should not admit any of the plaintiff’s evidence.

7. The policy behind the “original document” rule is to let the document speak for itself whenever its contents are in issue, regardless of the medium on which the words are written.

If a satisfactory explanation is given to the court for not being able to produce the original document and the document’s proponent has made reasonable efforts to produce it, then any secondary evidence that is reliable and accurate is admissible to prove its content. Fed. R. Evid. § 1004. Thus, choice (C) is the best answer.
8. Prior to testifying about the plaintiff’s injuries in a personal injury action, the plaintiff’s treating doctor reviewed his notes in the plaintiff’s hospital record. On the stand, the plaintiff’s lawyer questioned the doctor about the plaintiff’s injuries, and the doctor testified without referring to the hospital report.

The defendant moved to strike the doctor’s testimony.

How should the trial judge proceed?

(A) Deny the motion, because the doctor’s testimony is admissible as a past recollection recorded.

(B) Deny the motion, because the doctor is testifying from present memory which has been refreshed.

(C) Grant the motion, because the hospital record is the best evidence of the plaintiff’s injuries.

(D) Grant the motion, because the plaintiff did not offer the notes themselves into evidence.

8. This question tests one’s ability to differentiate between present memory refreshed and past recollection recorded. Since the doctor is testifying without using the record and is not attempting to put the record into evidence, reliance on the hearsay exception for past recollection is unnecessary. Thus, (A) is incorrect.

(B) is correct because a witness may use anything to refresh recollection.

(C) is incorrect because the plaintiff is not trying to prove the contents of the record. The best evidence rule only applies in such a case.

(D) is incorrect because only the adverse party (the defendant here) has the right to have the notes themselves entered as evidence and, even then, only if the court determines that it is necessary in the interests of justice. Fed. R. Evid. 612.
9. A plaintiff sued a defendant for damages, including a ruptured disc, which occurred when the defendant’s car struck the plaintiff as he was crossing a street. The plaintiff called his treating doctor to testify as to the existence of the ruptured disc and that this injury was caused by the accident.

Should the trial judge permit the doctor to testify concerning these two matters?

(A) Yes, if the doctor has personal knowledge and the judge deems her qualified as an expert.
(B) Yes, if the doctor has personal knowledge and the jury deems her qualified as an expert.
(C) Yes, even if the doctor does not have personal knowledge, if the judge deems her qualified as an expert, and some substitute for personal knowledge is offered.
(D) Yes, even assuming the jury finds that the doctor is not qualified as an expert, since she does in fact have personal knowledge.

9. It is within the discretion of the trial judge to determine whether a witness is qualified as an expert, based on her knowledge, skill, training, or experience and familiarity with the particular problem in issue. The jury, as the finder of fact, weighs the evidence presented; it does not determine the qualification of an expert witness. Thus, (B) and (D) are incorrect.

An expert witness is not restricted to testifying based on personal knowledge. She may base her opinion on evidence reasonably relied upon by others in her field or upon the opinion of another expert. Therefore, (A) is incorrect and (C) is correct.

“[I]t is well settled that a nonexamining physician is competent to testify as a medical expert in a civil or criminal trial as to the cause of a particular medical condition based upon, for example, inspection of the patient’s medical records or the expert’s interpretation of diagnostic tools such as x-rays and MRI films [or] facts in evidence....” Meyer v. Board of Trustees of the New York City Fire Dept., 90 N.Y.2d 139 (1997).
10. In a breach of contract action commenced in the federal district court based on diversity jurisdiction, the trial judge was asked to rule on the doctor-patient privilege.

Which of the following should the court follow?

(A) Federal common law.
(B) Federal statutes.
(C) State law where the federal court sits.
(D) There is no such privilege in the Federal Rules of Evidence.

10. Since this is a diversity jurisdiction case, the federal court will apply state substantive law, e.g., contract law, but will apply the Federal Rules of Civil Procedure and the Federal Rules of Evidence except for issues involving “PIPS”.

(i) Privileges;
(ii) Incompetency of witnesses, e.g., dead person’s statute, incompetents, etc.;
(iii) Presumptions and inferences; and
(iv) Statutes of limitations.

Thus, choice (C) is correct in diversity cases, since the issue involved concerns a privilege.
11. The attorney-client privilege protects communications between attorney and client made for the purpose of obtaining legal advice or services. Other statements not related to the legal advice or services sought, even if made while consulting an attorney in her professional capacity, are not privileged. In this case, the statement was not made for the purpose of obtaining legal advice or services and is therefore not privileged. For this reason, (A) is correct and (B) is incorrect. See Giannicos v. Bellevue Med. Ctr., 7 Misc. 3d 403 (Sup. Ct. N.Y. Co. 2005) on whether an attorney can be compelled to testify at a hearing about his observations regarding his client’s demeanor and mental capacity. Since any member of the public could make observations of the plaintiff, the privilege would not prevent the attorney from testifying, but the court nevertheless, citing Shelton v. Am. Motors Corp., 805 F.2d 1323 (8th Cir. 1986), held that issuing subpoenas on attorneys should be discouraged, especially when the information can be obtained by other means.

The attorney-client privilege does not ordinarily terminate upon the death of the client and may be claimed by his personal representative after his death. Therefore, (C) is incorrect.

Since the statement relates to the client’s present mental state, it comes within an exception to the hearsay rule under Fed. R. Evid. 803(3). Thus, (D) is incorrect. This should be distinguished from declarations of memory, pointing backwards to the past which are hearsay. Shepard v. United States, 290 U.S. 96 (1933).
12. A sister, the beneficiary of her brother’s life insurance policy, sued the life insurance company for those proceeds of the policy payable in the event of accidental death. The insurance policy provided that the insurance company would pay double benefits in the event of the insured’s accidental death, but would not pay anything in the event of the insured’s suicide. Pursuant to the policy, the sister had the burden of proving that her brother did not commit suicide.

A state law provided for a presumption that death by violent means was not a suicide. The insurance company claimed that the brother committed suicide and that his violent death was not accidental.

At trial, the plaintiff conclusively proved death by violent means, and the defendant produced no evidence to show the insured committed suicide. The only possible causes of death were accidental death and suicide.

How should the trial judge proceed?

(A) Direct a verdict for the defendant.
(B) Direct a verdict for the plaintiff.
(C) Let the jury decide the question of suicide, instructing them that the burden of persuasion is on the sister.
(D) Let the jury decide the question of suicide, instructing them that the burden of persuasion is on the life insurance company.

12. A presumption will arise when a fact can be presumed to exist because of the existence of another proven fact. Most presumptions are rooted in the probability that the presumed fact is true if the basic fact is true. Once a basic fact is conclusively proven and no evidence is offered to meet or rebut the presumption which arises from the basic fact, a directed verdict is required on the issue. In this case, the sister’s conclusive proof of death by violent means raises the presumption that her brother’s death was not suicide. Since the life insurance company has produced no evidence at all to rebut the issue, the judge must direct the verdict. Thus, (B) is correct.

A presumption is brought into effect by the introduction of some evidence on the basic fact by the party seeking the benefit of the presumption. Here, the sister has met her burden by producing evidence of the basic fact, i.e., the violent death. (A) is incorrect.

Again, once the sister has conclusively shown the basic fact and the life insurance company produces no evidence on the issue, the jury must find the presumed fact. (C) is incorrect.

Fed. R. Evid. 301 imposes upon the party against whom the presumption is directed the burden of producing evidence to meet or rebut the presumption. It does not shift the burden of persuasion on the issue, which remains with the party seeking the benefit of the presumption. (D) is therefore incorrect, as is any choice that shifts the burden of persuasion in a presumption question.
13. A defendant was charged with armed robbery. After informing him of his constitutional rights, the police asked him to take a lie detector test, and he agreed. When the test was arranged, however, the defendant refused to take it.

At trial, the defendant denied his guilt. The prosecution, without objection, introduced evidence that the defendant first agreed to a lie detector test and then refused to submit to it. The defendant was convicted, and the case was appealed.

The defendant’s brief on appeal requested a new trial because the evidence of the refusal to take the lie detector test was improperly admitted.

How should the appellate court proceed?

(A) Affirm the conviction, because the admission of the defendant’s refusal to take the lie detector test was proper impeachment.

(B) Reverse the conviction, if it was plain error to admit the evidence.

(C) Affirm the conviction, because the evidence concerning the lie detector test was not objected to by counsel at trial.

(D) Reverse the conviction, because the admission of his refusal is a denial of his constitutional right to remain silent.

13. To preserve an evidentiary issue for appeal, counsel must usually object to the introduction of the evidence or the matter is waived. Fed. R. Evid. 103(A)(1). In this case, defense counsel failed to object to the evidence of the defendant’s refusal to take a lie detector test after he had first agreed to take one. However, an appellate court may consider an evidentiary objection not raised at trial if it constitutes plain error affecting substantial rights. Fed. R. Evid. 103(D). “Plain error is obvious and clear,” rendering the defendant’s trial fundamentally unfair. United States v. Cotton, 535 U.S. 625, 631-32 (2002); United States v. Olano, 507 U.S. 725, 734 (1993); United States v. Norman T., 129 F.3d 1099, 1106 (10th Cir. 1997). Since (B) asks you to assume that the admission of this evidence was plain error, it is the correct answer.

Although (C) states the general rule, it is incorrect in this case because of the exception stated in (B).

(A) is incorrect because a defendant is not required to submit to a lie detector test, the results of which are probably inadmissible. Proof of that refusal is, therefore, improper impeachment.

(D) is incorrect because the police informed the defendant of his constitutional rights and he waived them.
14. A defense attorney is least likely to be permitted to use leading questions in which of the following circumstances?

(A) On direct examination of the plaintiff.
(B) On direct examination of the plaintiff’s spouse.
(C) On cross-examination of a surprise witness called by the plaintiff.
(D) On cross-examination of the plaintiff’s witness on matters outside and beyond the scope of direct examination.

14. Fed. R. Evid. 611(C) restricts the use of leading questions (which are questions that suggest the answer) on the direct examination of a witness except when a party calls an adverse party (choice (A)), or calls a witness identified with an adverse party (choice (B)).

“[W]hen a party in a civil action calls an adverse party as a witness, or an agent or employee closely aligned with an adverse party, the usual modes of questioning are reversed. The direct proceeds by leading questions ... and the cross proceeds by non leading questions ....” Mueller, Evidence § 6.64 at 584 (3d ed. 2003).

“Where the witness is biased in favor of the cross-examiner, the same danger of leading questions arises as on direct and the court may, in its discretion, prohibit their use. The Advisory Committee notes ... the prohibition may be applied ... where a party is cross-examined by his counsel after having been called by his opponent....” Weinstein’s Federal Evidence § 611.06[4] at 611-64 (2d ed. 2011).

Leading questions are permitted on cross-examination (choice (C)). However, as soon as the cross-examination goes beyond the scope of direct examination, the witness must be questioned as if on direct examination. Fed. R. Evid. 611(B). Thus, choice (D) is the best choice.

For example, if the defendant’s lawyer had three days of questioning prepared to ask the defendant, the attorney could not do so on cross of the defendant who had been called to testify by the plaintiff. The defendant’s attorney is limited to cross-examining his own client on only those matters that the defendant testified to on direct examination. The three days of questioning would have to wait until the plaintiff rested, and the defendant had an opportunity to present a defense by direct questioning of the defendant concerning the matter.
15. A criminal defendant is entitled to introduce evidence of pertinent character traits to prove that he or she did not commit the crime charged. Fed. R. Evid. 404(A)(1). The man’s good character with respect to truth and veracity is not pertinent to a charge of aggravated assault and is therefore inadmissible. Thus, (D) is correct.

(C) is incorrect because, in a criminal case, the defendant may use character evidence to prove conduct, but that evidence must relate to a pertinent character trait.

(B) is incorrect because credibility is only in issue when the defendant’s testimony has been introduced. It has not been introduced here.

(A) is incorrect because a defendant is only entitled to introduce evidence of good character on traits which are relevant to the crime with which he or she is charged.
16. An emotionally disturbed man gave a deed to his friend. The man’s guardian subsequently brought an action against the friend to set aside the deed. At trial, the friend’s counsel called a psychiatrist to offer his opinion that the man was competent at the time he gave the deed.

On cross-examination, the guardian’s counsel asked the psychiatrist if the amount of his fee was contingent upon the result in the case, to which the psychiatrist replied, “No.” The guardian’s counsel then called the psychiatrist’s secretary and asked if she heard a conversation in which the friend’s lawyer offered the psychiatrist 10% of the value of the property if the deed was held valid. She answered, “Yes.”

The friend’s counsel moved to strike the secretary’s answer.

Should the statement be stricken?

(A) Yes, because it calls for inadmissible hearsay.

(B) Yes, because extrinsic evidence cannot be introduced to prove bias.

(C) Yes, because it calls for privileged information.

(D) No, because the cross-examiner does not need to accept the answer of a witness concerning bias.

16. (A) is incorrect because the testimony is not hearsay. The conversation between the psychiatrist and the friend’s lawyer has legal significance irrespective of the truth of the words contained in it. The testimony is not being offered for its truth, but solely for the fact that the words were said; therefore, it is not hearsay.

It also can be cogently argued that it is not hearsay because it is being offered to show the bribe statement’s effect on the listener (BRIBE-K), [#25], i.e., to show the listener’s bias or intent after hearing the out-of-court statement.

(B) is incorrect, because extrinsic evidence can be introduced to prove bias of a witness.

(C) is incorrect because conversations regarding fee arrangements are not within the attorney-client privilege. Also, the conversation is not privileged because the friend’s lawyer has engaged in unethical conduct by hiring a witness on a contingency fee basis.

(D) is correct because bias is never a collateral matter. In that regard, a cross-examiner is not required to accept the answer of a witness concerning that witness’s bias and can disprove the answer with extrinsic evidence.
17. A client sued his divorce attorney for legal malpractice.

At trial, after the attorney finished testifying, the client called the attorney’s former employer. The employer testified that she was aware of the attorney’s untruthful reputation within the legal community, and that, based on that bad reputation, she would not believe the attorney’s testimony even if given under oath. After this brief direct testimony, the attorney’s counsel cross-examined the former employer.

Which of the following would be outside the scope of the cross-examination?

(A) A question regarding the employer’s recently-commenced suit against the attorney over sharing a legal fee.
(B) A question concerning the employer’s opinion about the reasonableness and extent of the damages claimed by the client in the legal malpractice claim.
(C) A question regarding the letters of recommendation the employer wrote on the attorney’s behalf.
(D) A good faith question on whether the employer had fraudulently prepared her income tax returns for the prior three years.

17. The scope of cross examination of a witness is limited to (a) areas of “CRIP PIC” cross-examination, and (b) matters explored on direct examination.

Asking the employer about the client’s damages was improper and objectionable because such question deals with substantive matters that were not discussed in the employer’s direct examination. Thus, choice (B) is the best answer. Choices (A) (bias), (C) (prior inconsistent statements), and (D) (prior immoral or criminal acts probative of truthfulness), are all proper questions for impeaching a testifying witness.
18. A plaintiff sued a defendant for breach of an oral contract, which the defendant denied making. A witness for the plaintiff testified that he heard the defendant make the contract on July 7. The defendant discredited the witness on cross-examination, and the plaintiff offered evidence of the witness’s good reputation for truthfulness.

The rehabilitation will most likely be allowed if the defendant’s discrediting evidence concerned which of the following testimony?

(A) The witness was expelled from college for cheating.
(B) The witness was the plaintiff’s college roommate.
(C) The witness had a serious hearing defect.
(D) The witness told a friend on August 10 that he couldn’t remember if the plaintiff and the defendant made a deal on July 7.

18. The evidence principle which controls the answer to this question is that rehabilitation evidence demonstrating a witness’s good reputation for truthfulness will be permitted only when the impeachment attacks his character. The correct choice therefore is the discrediting evidence which goes to the witness’s character.

Evidence that the witness was expelled from college for cheating is an attack on his character. Therefore, (A) is the correct answer.

(B) is an attack on the witness for bias, not his reputation for honesty. Therefore, character evidence would not be permitted in response to such an attack, and (B) is incorrect.

(C) is an attack on the witness’s testimonial faculties, i.e., his ability to hear the words of the contract. However, there is no implication that a person who has difficulty hearing is untruthful.

(D) is a prior inconsistent statement, not an attack on the witness’s character.
19. A defendant was charged with larceny by false pretenses for selling heating system attachments that he claimed would reduce fuel bills by 40%, but which, in fact, had no effect on fuel consumption.

At trial, the defendant took the stand and testified that, prior to his selling any attachments, he was told by an eminent heating engineer that the attachment would cut fuel bills by 40%.

Is the defendant’s testimony admissible?

(A) No, because it is hearsay.
(B) No, because it is self-serving.
(C) Yes, on the issue of the defendant’s state of mind.
(D) Yes, to prove that the attachment was effective.

19. An out-of-court statement of a witness may not ordinarily be offered on behalf of the party because the statement is hearsay. In this case, however, the statement is offered to show the effect it had upon the defendant, that he did not knowingly make a false statement as to the capacity of the heating system. (C) is correct.

Since the evidence is not offered to prove the truth of the matter stated (i.e., that the attachment would reduce fuel bills), it is not offered for a hearsay purpose. Thus, (A) is an incorrect answer.

The fact that evidence is self-serving is never grounds for its exclusion. Therefore, (B) is an incorrect answer.

(D) is incorrect because, if the statement were offered to prove its truth, it would be hearsay and inadmissible.
20. A widow sued the driver of a delivery truck that struck and killed her husband, but did not sue the driver’s employer.

The day after the accident, the president of the company that employed the driver visited the widow and said to her: “This accident is my driver’s fault. We will take care of your husband’s hospital bills.”

At trial, the widow, the president and the driver were all available to testify. The widow was called to the stand and questioned about the president’s statement to her concerning the fault of the driver. The driver’s attorney objected.

Is the widow’s statement admissible?

(A) Yes, as a vicarious admission.
(B) Yes, because a statement made in conjunction with an offer to pay medical expenses is not excluded on grounds of public policy.
(C) No, because it is hearsay.
(D) No, even though an admission, because it is a statement made in conjunction with an offer of compromise.

20. In this case, although the driver has an employer, the widow has sued only the driver. Any statements by the employer are not exempt from the definition of hearsay by Fed. R. Evid. 801(D)(2) as an admission by a party-opponent, because the employer is not a party. (A) is therefore incorrect.

A statement in conjunction with an offer to pay medical expenses is ordinarily admissible under the applicable rule regarding relevancy, but that does not overcome the hearsay objection. Usually, an offer to pay medical expenses is also an admission and therefore not hearsay. In this case, the statement is not an admission and so is inadmissible hearsay. Thus, (B) is incorrect.

The statement by the president is an out-of-court statement offered to prove the truth of the matter asserted. Choice (C), which excludes the statement as hearsay, is correct.

(D) is incorrect because this is a statement in conjunction with an offer to pay medical expenses, not in conjunction with an offer of compromise. Also, it is not an admission.
21. At trial last week, a plaintiff’s witness took the stand and testified. The defense, in an attempt to impeach the witness’s credibility, offered the following documents: a certified copy of the witness’s perjury conviction on June 1, 2002, for which a suspended sentence was imposed; and, a certified copy of the witness’s conviction for robbery on June 1, 2005.

Which, if any, of the defense’s documents are admissible without any preliminary finding by the trial judge?

(A) The certified copy of the witness’s perjury conviction only.
(B) The certified copy of the witness’s robbery conviction only.
(C) Both of the documents are admissible.
(D) Neither of the documents is admissible.

21. Before admitting any evidence of a conviction which is more than ten years old, or a conviction for any felony not involving dishonesty, the trial judge must first determine that its probative value outweighs its prejudicial effect. The only convictions which are admissible as of right, without this initial determination by the judge, are those involving crimes of dishonesty involving deceit, fraud, or falsification which are less than 10 years old. As the perjury conviction is greater than 10 years old (barely) and the robbery conviction is not one involving deceit, fraud, or falsification, (D) is the correct choice.
22. A plaintiff sued a defendant for injuries he incurred when a badly rotted limb fell from a curbside tree in front of the defendant’s home and hit the plaintiff. The defendant claimed that the tree was on city property, and thus was the responsibility of the city.

At trial, the plaintiff offered testimony that, a week after the accident, the defendant cut the tree down with a chain saw.

Should the court admit the evidence?

(A) No, on public policy grounds to encourage the implementation of safety precautions.
(B) No, because it is irrelevant to the condition of the tree at the time of the accident.
(C) Yes, to show the tree was on the defendant’s property.
(D) Yes, to show the tree was in a rotted condition.

22. Although evidence of subsequent safety measures is not admissible to prove negligence for policy reasons under Fed. R. Evid. 407, subsequent safety measures are admissible when offered to prove a relevant issue other than negligence, such as the fact that the defendant is in control of the premises involved. The fact that the defendant cut the tree down tends to show that he owned the property in question. Therefore, (C) is correct and (A) is incorrect.

(B) and (D) are not the best choices because the condition of the tree goes to the issue of negligence, which cannot be shown by proof of subsequent safety precautions.
23. A defendant was charged with larceny. The prosecution alleged that the defendant siphoned 12,000 gallons of home heating oil, valued at $1 per gallon, from a truck while the driver was parked at a truck stop.

On the issue of the value of the oil, the prosecution proposed to introduce a photocopy of a claim filed by the shipper of the oil with its insurance carrier asking for compensation and fixing the loss at $12,000.

Is this document admissible?

(A) Yes, as the record of a regularly conducted business activity.
(B) Yes, as the statement of a person with knowledge of value.
(C) No, because it is hearsay.
(D) No, because it is not the original writing.

23. It is probable that the claim filed by the shipper against the carrier is a record of a regularly conducted business activity. However, the record is of a claim under circumstances where litigation is likely. Business records prepared in anticipation of litigation generally are inadmissible unless unfavorable to the party preparing the record. Therefore, under the rationale of Palmer v. Hoffman, 318 U.S. 109 (1943), the claim should not be admitted under the business records exception to the hearsay rule. (A) is therefore incorrect.

(B) is incorrect because there is not a person on the witness stand who has first-hand knowledge. This statement is therefore hearsay. Since it does not come within an exception, the evidence is inadmissible.

(C) is correct because the document is offered for the truth of its contents and does not come within an exception to the hearsay rule.

(D) is incorrect because the photocopy is a duplicate made from the same matrix as the original and is not inadmissible as a result of the original document rule.
24. A prosecution witness testified before the grand jury that goods allegedly stolen by the defendant were worth $8,000.

At trial, the witness testified that the same goods were worth $12,000.

On cross-examination, defense counsel asked the witness about his grand jury testimony and offered into evidence a certified copy of the transcript of the grand jury proceedings.

Is the transcript admissible?

(A) Yes, to impeach and for its substantive value.
(B) Yes, only to impeach the dispatcher’s credibility.
(C) No, because it is hearsay.
(D) No, because the court reporter who transcribed the grand jury testimony is not present.

24. Under the definition of hearsay in Fed. R. Evid. 801(D)(1)(A), an out-of-court statement of a person who is on the witness stand is not hearsay if that out-of-court statement was made under oath. Since the grand jury testimony was given under oath, it is admissible substantively; and since he was asked about the statement on cross-examination, it is also admissible to impeach credibility. Therefore, (A) is correct.

(B) is incorrect because the statement is admissible substantively as well as for impeachment purposes.

(C) is incorrect because the prior inconsistent statement of a witness given under oath is not hearsay under the Federal Rules of Evidence.

(D) is incorrect because a certified copy of a transcript is an official record and admissible to show what happened at the grand jury proceeding without the testimony of the court reporter.
25. A defendant was on trial for the murder of a store clerk during an armed robbery. The defendant denied that he was the person who committed the crime. The prosecution offered the testimony of a witness who was engaged in a telephone conversation with the clerk at the time the robbery commenced. The witness sought to testify that the clerk identified the defendant by name and said the defendant “is coming through the front door.”

Is the witness’s testimony admissible?

(A) Yes, as the prior identification of an eye witness.
(B) Yes, as a present sense impression.
(C) Yes, because the statement was made with knowledge of impending death.
(D) No, because it is hearsay.

25. Under common law, the present sense impression exception to the hearsay rule required that the person to whom the statement was made be in a position to observe the matter commented upon. Fed. R. Evid. 803(1) does not have such a requirement. The victim’s statement to the witness will be admissible as a present sense impression, even though the witness was not in a position to see what the victim saw. Therefore (B) is the correct answer.

In order for the prior identification of a person to be considered nonhearsay under Fed. R. Evid. 801(D)(1)(C), the witness must be available at trial. The victim is dead, the ultimate in unavailability, and he therefore cannot testify. (A) is incorrect.

(C) is incorrect because at the time the statement was made, the victim did not have knowledge of his impending death.

(D) is incorrect because the statement is admissible as a present sense impression.
26. A pedestrian brought an action against a defendant for injuries she incurred when she was struck by the defendant’s car in a hit and run accident where the driver failed to stop after the car struck the pedestrian.

At trial, the pedestrian’s attorney called a police officer to testify that, two hours after the accident, a driver stopped him and calmly said, “officer, two hours ago I saw a hit-and-run accident involving a blue convertible, which I followed to the town’s drive-in restaurant.” A few minutes later, the officer saw the defendant sitting alone in a blue convertible in the drive-in restaurant’s parking lot.

Should the officer’s testimony about the driver’s statement be admitted?

(A) Yes, as an excited utterance.
(B) Yes, as a present sense impression.
(C) No, because it is hearsay not within any exception.
(D) No, because it is more prejudicial than probative.

26. For the officer’s testimony to be relevant on the key issue of the identity of the hit and run driver, two facts must be shown: (1) that the driver who hit the pedestrian was the person in the blue convertible at the town’s drive-in restaurant, and (2) that the defendant was the driver of the blue convertible. The officer is competent to testify to issue (2). However, (2) is not relevant without (1). The testimony on issue (1) by the officer is hearsay because it offers the statement of an unknown person (the driver), who is not in court, for its truth, and it comes within no exception to the hearsay rule. (C) is therefore correct.

(A) is incorrect because the facts say that the out-of-court declarant “calmly” addressed the officer “two hours” after the accident.

(B) is incorrect because the time between the driver’s observation and his statement to the police officer is too long to allow the statement to qualify as a present sense impression. *Hiley v. Howat Concrete Co., Inc.*, 578 F.2d 422, 426 n.7 (D.C. Cir. 1978).

“[W]hile the time within which an excited utterance may be made is measured by the duration of the stress caused by an exciting event, the present sense impression statement may be made only while the declarant was actually ‘perceiving’ the event or ‘immediately thereafter.’ This shortened period is also consistent with the theory of the present sense impression exception. While principle might seem to call for a limitation to exact contemporaneity, some allowance must be made for the time needed for translating observation into speech. The appropriate inquiry is whether sufficient time elapsed to have permitted reflective thought.” *McCormick, Evidence* § 272 at 214 (Strong, 4th ed. 1992).

(D) is incorrect because the evidence is highly relevant and not “unfairly” prejudicial.
27. A screaming man was found on fire, badly beaten. When the police put out the fire, they asked the man if he saw who did it. He said, “No, but I am dying.” Before the man died, he uttered one last sentence.

Which of the following statements is least likely to be admissible as a dying declaration?

(A) “I should not have been sleeping with my friend’s wife.”
(B) “My friend is the only one I told that I would be here this morning.”
(C) “My friend is the only one who could have done this.”
(D) “My friend threatened to torch me last week.”

27. To fit within the hearsay exception of a dying declaration, the actual statement must relate to the cause or circumstances of the impending death. It goes further than the immediate criminal acts and encompasses prior threats [choice (D)], a prior quarrel, or the predicament that brought him to death’s door [choice (A) or choice (B)]. Mueller, Evidence § 8.71 at 1039 (2002).

What clearly does not constitute a dying declaration is a statement where the declarant had no personal knowledge of the matter asserted; that is, the statement is only his guess or surmise about who caused his injury. Thus, (C) is correct.
28. A pedestrian brought an action against a cab company after he was struck by a cab driven by one of the company’s drivers. Two days after the accident, the company terminated the driver’s employment. One week after the accident, the driver pleaded guilty when charged with failing to stop at an intersection controlled by a stop sign at the time of the accident. He was fined twenty-five dollars, the maximum penalty provided by statute.

At trial, the driver was present and prepared to testify on behalf of the cab company. The plaintiff’s counsel sought to introduce, as part of its affirmative case and without calling the driver, a certified copy of the driver’s guilty plea and conviction.

Is the document admissible?

(A) Yes, as a judgment of previous conviction.
(B) Yes, as a statement by an employee concerning his employment.
(C) Yes, as a declaration against interest.
(D) No, because it is hearsay.

28. The plea of guilty in this case is an out-of-court statement offered for its truth, namely the inference that the cab driver was negligent. It is inadmissible because it comes within no exception to the hearsay rule and (D) is the correct answer.

(A) is incorrect. For a judgment of previous conviction to be admissible to prove that the person found guilty committed the acts alleged, the crime must carry a penalty of at least one year in prison. The crime in this case does not.

(B) is incorrect. For a statement to be an admission of an employee concerning a matter within the scope of his employment, he must be employed at the time he made the statement. In this case, the employee was discharged at the time he pleaded guilty.

(C) is incorrect because the employee is available. Unavailability is required for the declaration against interest exception to be applicable.
29. A farmer brought an action against a defendant, alleging that the defendant’s horse illegally crossed his farm and trampled his crops. The defendant denied ownership of the horse. At the trial, the farmer called a local veterinarian to testify about his familiarity with the defendant’s signature, and that he saw the defendant’s signature on an owner’s application for inoculation of the horse in question at the place on the form where the owner’s signature is required.

Is the veterinarian’s testimony admissible?

(A) Yes, as a declaration against interest.
(B) Yes, as an admission.
(C) No, because it is hearsay and comes within no exception to the hearsay rule.
(D) No, because it violates the original document rule.

29. When the contents of a writing are in issue, the original document (or a duly authenticated copy) must be offered as evidence. The veterinarian’s testimony violates the original document rule because it is describing the contents of a document which is not offered in evidence. (D) is therefore correct.

(B) is incorrect because, even though the document is an admission, the failure to produce the document itself makes the testimony inadmissible under the original document rule.

The document, if available, would not violate the hearsay rule because it would be an admission. Thus, (C) is incorrect.

(A) is incorrect because the document would be admissible as an admission. Also, it is not a declaration against interest because the facts do not indicate that the defendant is “unavailable.”
30. In a civil suit where the plaintiff’s age was relevant, the plaintiff took the stand and testified that, his mother, who was alive and well, told him he was born on July 4, 1981. The defendant’s attorney objected.

Should the statement be admitted?

(A) Yes, as a statement of personal history.
(B) No, because it is hearsay.
(C) No, because the plaintiff lacks first-hand knowledge.
(D) No, because his birth certificate is the best evidence of the date of his birth.

30. There are two hearsay exceptions for statements of personal history. Fed. R. Evid. 803(B)(19) involves reputation concerning personal or family history and does not apply. Fed. R. Evid. 804(B)(4)(B) pedigree would apply only if the mother were unavailable. However, since she is alive and presumably available, the statement is inadmissible hearsay. (B) is the correct answer.

(A) is incorrect because neither personal history exception applies.

(C) is incorrect because plaintiff is not claiming that he knows his date of birth. If he had said, “I was born on July 4, 1981,” then (C) would be appropriate.

(D) is incorrect because the best evidence rule (a.k.a. the original document rule) does not apply in this situation. The contents of the birth certificate are not necessarily at issue here. The birth certificate is merely a record of the event and the fact of birth has an existence independent of any writing.
31. Two women were embroiled in a series of lawsuits relating to the sale of a business. A lawyer called to the stand the court reporter from a prior trial, and asked him what a broker, who was observing the present trial, said at a prior hearing. The court reporter vividly remembered the broker’s brief testimony, and possessed a full transcript of the entire prior court proceeding.

Is the court reporter’s testimony concerning that statement admissible?

(A) No, because of the hearsay rule.
(B) No, because of the original document rule.
(C) No, because of the original document rule and the hearsay rule.
(D) Yes.

31. The evidence of a witness at a former trial is hearsay and must come within an exception to the hearsay rule to be admissible. The obvious exception involved is the prior testimony exception. However, to be applicable, this exception requires that the declarant be unavailable (Fed. R. Evid. 804). Here the declarant is present in the courtroom, and therefore is not unavailable. Thus, the evidence is inadmissible because it is hearsay and (A) is the correct answer.

The evidence is not inadmissible because of the original document rule, because there is no attempt to prove the contents of a document. The stenographer actually heard the testimony and can therefore testify from memory if he actually remembers the testimony, despite the fact that there may be a transcript. Therefore (B) and (C) are incorrect.

(D) is incorrect because the hearsay rule makes the statement inadmissible.
32. A man was charged with criminal battery for allegedly using a baseball bat to beat a demonstrator who was burning a flag.

At trial, the prosecutor sought to introduce a newspaper account in which the man allegedly told the newspaper reporter, “I hit that sucker as hard as I could. I’ll bet he never touches another flag as long as he lives.”

After having the newspaper marked, the prosecutor asked the court to enter it into evidence by taking judicial notice of the article.

Is the article admissible?

(A) Yes, as the admission of a party opponent.
(B) Yes, since newspapers are self-authenticating.
(C) No, because its prejudicial effect substantially outweighs its probative value.
(D) No, because the newspaper’s account is not indisputably accurate.

32. (C) is incorrect since the evidence offered, although prejudicial, is not unfairly prejudicial, i.e., evidence that would cause the jury to reach a verdict on an improper basis.

Even though it is an admission, it is not admissible because the person who heard it is not testifying. In order for the man’s statement to be admitted, the reporter who heard it would have to take the stand and testify. Thus, (A) is incorrect.

Even though newspapers are self-authenticating, the document must fit within a hearsay exception to be admissible, e.g., stock quotes. Thus, choice (B) is incorrect.

(D) is the best choice since judicial notice requires either notorious facts commonly known to the community or facts capable of verification by an unquestionable authority; a newspaper account is not a source of information where accuracy cannot be reasonably questioned.
33. A defendant was charged with criminal battery for spraying paint on a woman’s fur coat.

At trial, the prosecutor presented a witness who testified that the defendant told him, “I spray painted that lady in the name of animal rights!”

After the witness testified, the defendant silently mouthed to the witness, “you’re dead.”

Can the witness testify about the defendant’s threat?

(A) No, because it is hearsay.
(B) No, because the defendant’s statement was not audible.
(C) Yes, as a present sense impression.
(D) Yes, because it is relevant as to the defendant’s guilt.

33. (A) is incorrect since it is not being offered for the truth of its content. Threatening words are “paradigmatic nonhearsay.” United States v. Jones, 663 F.2d 567 (5th Cir. 1981). It is “not hearsay because the statement is admitted merely to show that it was actually made, not to prove the truth of what was asserted in it.” McLaughlin, Weinstein’s, Federal Evidence § 801.11 (3) at 801-18 and 801-21 n.13 (2d ed. 2009).

The threat is relevant to show the defendant’s consciousness of guilt, therefore, (D) is correct. A court officer was allowed to testify concerning a defendant’s threatening hand gestures toward a witness during the trial. Evidence of threats made by a party to witnesses is probative of a party’s consciousness of guilt, and is admissible on that ground. People v. Williams, 56 A.D.3d 1250, 1252 (4th Dep’t 2008); People v. Sherk, 217 A.D.2d 958 (4th Dep’t 1995).

(B) is incorrect since a communication does not have to be spoken out loud. Like a letter or e-mail, the statement was effectively communicated without the assistance of speech.

(C) is incorrect because the testimony is not describing an event while the out-of-court declarant was observing it.
34. A man was charged with armed robbery of a jewelry store. The prosecutor was unable to locate one of the store’s former employees, the only eye witness to the case, so she never testified at the criminal trial.

The man was ultimately acquitted in the criminal trial, but the owner of the jewelry store subsequently commenced a civil suit against him.

The former employee saw the local newspaper’s article announcing the civil suit. She drew up a two page account of the incident, had it witnessed by two neighbors, and then had her affidavit notarized by a notary public. She mailed copies of it to the attorneys of both parties to the civil suit. The week before the civil trial, the employee died unexpectedly.

Which of the following is best basis for the jewelry store owner to offer the employee’s out-of-court affidavit into evidence?

(A) A prior recorded recollection.
(B) A statement under oath subject to the penalty of perjury.
(C) A present sense impression.
(D) Residual hearsay.

34. (A) is incorrect because in order to introduce a prior recorded recollection as nonhearsay, the out-of-court declarant must be on the stand to be cross-examined, and must testify that it was accurate when made while the event was fresh in her memory. The facts stated the former employee was dead.

(B) is incorrect because the former testimony hearsay exception is not a simple affidavit, but rather is prior testimony from an earlier trial, an examination before trial, or a grand jury proceeding in which the party against whom it is being offered had an opportunity to “develop” that testimony by direct, cross, or redirect examination.

(C) is incorrect simply because the statement was not made contemporaneously with the observation or immediately thereafter.

Thus, through a process of elimination, you are left with (D) as the best choice: highly reliable and necessary hearsay that has comparable circumstantial guarantees of trustworthiness.
Dead Person’s Statute/Collateral Estoppel
Example Problem

PROBLEM: A mother and daughter were “seriously injured” when X, a drunk driver, collided with their car. X died (18 months added to the Statute of Limitations) and the daughter sued X’s estate.

QUERY: Can the mother testify that just after the accident X said to the mother, “I am sorry, I am dead drunk”?

ANSWER: No. Although the mother is not disqualified because she is related to the daughter/defendant (bias) and even though X’s out-of-court statement would be admissible as an “admission of a party” (it is not hearsay), the mother is disqualified from testifying because she is an “interested person” talking about a conversation with a dead person.

If the daughter recovers a judgment from X and the mother later sues X’s estate for her “serious injuries,” then the mother can invoke the doctrine of collateral estoppel on the issues of X’s intoxication and negligence per se, because the issues in both cases are identical, and the party against whom the doctrine is being invoked (X’s estate) had a full and fair opportunity and similar motivation to contest that issue at the daughter’s trial.

QUERY: In the daughter’s suit, if X’s estate had prevailed by establishing that X was neither intoxicated nor negligent, could X’s estate invoke collateral estoppel on these issues against the mother if she subsequently sued X?

ANSWER: No, because although the issues were the same, the mother did not have a full and fair opportunity to litigate the issue of X’s intoxication.

QUERY: If the mother settled her cause of action with X’s estate prior to the daughter’s trial, then she no longer would be interested in the outcome and she could testify at the daughter’s trial as to what X said. However, X’s estate could show through cross examination (CRIB PIC) that the mother was biased on behalf of her daughter.