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OBJECTION! IRRELEVANT AND UNREALISTIC: IT'S TIME FOR EVIDENCE EXAMS TO EVOLVE

FRED GALVES*

I. INTRODUCTION

This symposium has been dedicated to the investigation of teaching the law of evidence in the most effective ways possible. The authors have skillfully explored various traditionally sound and time-tested approaches,[1] and have adroitly considered many innovative and exciting new techniques,[2] in an effort to showcase particularly successful systems that maximize student learning. The goal has been to offer strategies to make the Evidence course a very challenging, rewarding, and powerful intellectual experience.

Although enhancing the learning experience inside and outside of class is of paramount importance, the ultimate *assessment* of our students' knowledge and skill, whatever interesting teaching methods we professors may attempt, is critical to our ultimate aim. Indeed, perhaps what matters most is what our students come to "know" about the law of evidence and how well they are able to apply that knowledge in the future. If we ignore the important role of assessment of our students' knowledge and understanding of Evidence, then how can we determine whether we actually are being successful with any of the thoughtful academic or pedagogical approaches set forth herein?[3] Therefore, a very important issue to consider in this Teaching Evidence issue is how we should provide a truly fair and meaningful mechanism for measuring the success of our Evidence students' actual legal knowledge and application skills.

By "measuring success" I mean both the goal of assessing the students' academic mastery of the substantive law of evidence, and the goal of assessing

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1. *See, e.g.*, Paul Rothstein, *Teaching Evidence*, 50 ST. LOUIS U. L.J. 999 (2006).

2. *See, e.g.*, Miguel A. Méndez, *Teaching Evidence: Using Casebooks, Problems, Transcripts, Simulations, Video Clips and Interactive DVDs*, 50 ST. LOUIS U. L.J. 1133 (2006).

3. Course evaluations at the end of the semester can provide the student's own self-assessment and perhaps reveal whether the class was, at least for them individually, an informative, entertaining, worthwhile, etc., class; but that overall impressionistic view of the course is certainly no objective way in which to determine how well the student actually has come to "know" the subject of Evidence.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

the students' ability to apply that legal knowledge in a strategic and professional way—the way a competent lawyer would in a realistic setting. Most Evidence exams tend to focus on the first assessment (mastery of substantive knowledge) but often ignore the second (realistic application), or at least tend to minimize it given the structural constraints and artificiality of a typical Evidence exam.[4]

This Article focuses on the significance of the second assessment goal (contextual relevancy in a realistic framework) in order to make the academic mastery assessment goal one that is conducted in a more genuine, less artificial context so that Evidence exams comport more with an authentic legal construct that students will likely encounter as attorneys. In this way, our Evidence exams can have more relevancy and realism and thereby can more fairly reflect and test actual attorney practice skills, genuine legal application abilities, and authentic professional mastery of the law of evidence.

Part II of this Article addresses the general strengths and weaknesses of the typical law school Evidence exam, which is often a closed book, closed note exam frequently based on a perhaps far-fetched hypothetical situation that the student reads and considers for the first time during the exam. The student is then required to quickly write out an extemporaneous analysis of the hypothetical in a feverish attempt to spot and analyze as many issues as possible. Although this type of exam can measure memorized academic knowledge of substantive law, it is an extremely artificial and false context, one in which a real judge or a lawyer would not likely encounter evidence law. In fact, there might even be ethical or professional responsibility violations if an attorney were to go to trial without even knowing their client, the witnesses and exhibits involved, or the factual background of the case.[5] The problem is that on such exams, the student is expected to make extemporaneous snap legal judgments without having time to research, prepare, anticipate or contemplate the applicable issues the way a real lawyer actually would.

Part III suggests a model for addressing this problem by making the Evidence exam approximate a much more real contextual framework. This is accomplished by distributing to the class, weeks before the exam, an actual case packet consisting of a complaint, answer, motions, discovery exhibits (such as photographs, documents, affidavits, deposition testimony, diagrams, etc.), jury instructions, and case law (using either a real or hypothetical case).[6]

4. *See infra* Part II.

5. *See generally* FED. R. CIV. P. 11 (discussing an attorney's professional duty to prepare and ensure the validity of a case through "inquiry reasonable under the circumstances" and the resulting sanctions for failure to comply).

6. The National Institute for Trial Advocacy (NITA) creates very realistic and balanced cases for purposes of mock trials in law school Trial Advocacy classes. For more information regarding NITA, please see http://www.nita.org. Such hypothetical cases can be used to provide the basic contextual framework, with the professor adding various exhibits or even witnesses for

This case-packet approach more accurately models how a real attorney would become familiar with the legal, factual, and evidentiary issues in an actual case before firing off legal opinions and judgments. The students receive this case packet six to eight weeks before the final exam so they can start to work up the case, get to know the factual background intimately, and anticipate potential admissibility issues. The students still would be required to react to the exam questions and apply their legal knowledge and skill on the spot in that the students would not know *exactly* what may happen during the hypothetical trial or hearing until they get into the exam and have to react to the new developments in the case using their knowledge of evidence and the underlying facts. Still, the exam would be done entirely in the factual context of a realistic case with which the students are already familiar and have been preparing (the way an actual attorney would) and therefore it would test how well they have anticipated the way in which evidentiary issues might actually arise.

Part IV discusses the pedagogical assessment advantages of this kind of exam. First, law students, like lawyers, learn how to piece a case together by reviewing various pieces of the evidentiary puzzle (the pleadings and exhibits), instead of simply reading a nicely encapsulated version of the facts as written by the professor. Second, they learn how to master the art of anticipating possible objections to each piece of documentary evidence and every exhibit posed. Third, there is not so much of a premium placed on fast assimilation and organization of complicated factual information (which is not a critical lawyer skill, unless it is in the context of a temporary restraining order or some other legal emergency,[7] which can be tested as such). Instead, the focus is placed on a student's careful consideration and creative preparation of the evidentiary issues raised by the facts in the case packet after weeks of thoughtful repose (which is a much more important analytical skill that lawyers actually employ everyday in their practice). Fourth, because students can consult the Federal Rules of Evidence (FRE), their casebooks, and any trial notebook they might wish to create, they learn that their memory is not the most important factor being tested, but it is instead their ability to effectively apply the law of evidence to the factual case they have been working with for almost two months.[8] Fifth, law professors can test more difficult and more

the trial, motion in limine hearing, or appellate argument, which could serve as the factual background and more realistic circumstances in which the exam would take place.

7. 43A C.J.S. *Injunctions* § 16 (2004) ("A temporary restraining order is an extraordinary or emergency remedy, issued ex parte in exceptional or urgent situations in order to prevent unnecessary or irreparable injury.") (citations omitted); *see also* FED. R. CIV. P. 65 (outlining requirements for obtaining a preliminary injunction or temporary restraining order).

8. No judge would ever prohibit attorneys, during trial or a hearing, from consulting the FRE, or applicable case precedents, or their own trial notebooks in which they have organized and prepared arguments and issues in anticipation of the various evidentiary issues that may come up given the case circumstances. In fact, many judges probably would actually welcome

nuanced aspects of evidence law because students already are charged with knowing the factual background intimately and thus can be expected to focus all of their mental capacity on a deeper evidentiary analysis on the known facts of the case instead of the pedestrian goal of simply organizing and quickly acclimating to a wholly new and complicated factual hypothetical in the first twenty minutes of the exam. Sixth, this kind of exam would provide a better benchmark of how well students will perform in a more realistic setting rather than a very artificial one and therefore it is more relevant and realistic to a student's future practice of law.

The Article concludes by noting that the traditional exam does a good job at testing (1) doctrinal knowledge committed to memory and (2) the ability to conduct immediate issue spotting in the context of a wholly new factual situation. However, such an exam fails to approximate the way in which lawyers and judges will actually confront evidentiary issues in the real-world practice of law. Although traditional exams follow the model of most essay bar exam questions, law students should view their Evidence courses as more than mere long and expensive bar prep courses,[9] and instead see their law courses as relevant preparation for their life in the Bar as attorneys encountering evidentiary issues in a way for which they will be more adequately prepared.

II. THE TRADITIONAL LAW SCHOOL EVIDENCE EXAM

A. *The Extemporaneous Nature of the Traditional Law School Exam*

Most law school essay exams[10] are extemporaneous in the sense that the student has no idea what the hypothetical factual context is about until the moment the student receives the exam, reads the hypothetical factual situation, and then has a short specified time period within which to react to that entire new set of circumstances. The essay question often involves a summary of

attorneys busily consulting the Rules and case law before objecting indiscriminately. Thus, it seems silly to make the artificial requirement that on the exam students cannot consult the FRE or key cases—the very things they are being asked to apply—or their own trial notebooks. Such an artificial requirement overemphasizes rote memorization of the Rules and cases and undervalues creative and thoughtful application of the law.

9. But note that this is partial preparation for bar exams that have "performance tests"—where examinees receive information packets they must read, assess, and respond to using the information, exhibits, and cases provided—such as the California Bar Exam. Moreover, professors can always still use the traditional essay exam method as a mid-term exam and use the more realistic method for the final exam.

10. Many Evidence professors use multiple-choice questions which are just as extemporaneous as essay exams and perhaps even more artificial in the sense that lawyers and judges do not encounter completely unknown factual circumstances and then make quick, process of elimination determinations based on four or five options with one definitely being the "correct" option, where no explanation for the reasoning involved is required.

critical facts raising many issues written by the professor wherein the professor attempts to create a comprehensive hypothetical that somehow covers the entire course, yet is still concise enough to run no longer than perhaps a page or two. It is difficult, however, to actually reflect all of the issues usually covered in the Evidence course,[11] especially in both a criminal and civil trial context,[12] in just a few pages.

Because it is difficult to write a short hypothetical that covers all of these widely varied issues, many professors elect to cover only of few of the areas in their exams but reason that the exam is still reflective of the student's overall knowledge of the entire subject of Evidence due to statistical random sampling.[13] For example, if the professor tests on hearsay, but ignores authentication in the exam because there is not enough time or room to cover it, the professor may reason that if the student knows hearsay well, then that same student probably would also know authentication just as well. Conversely, if a student does not know hearsay all that well, then that would be indicative of the fact that the student probably does not know authentication or other non-tested areas very well either. Because the student does not know what particular issue or sub-topic may or may not be an the exam, the student has to be prepared for *any and all* issues that may appear, even if they do not actually get tested. In this way, students are forced to study and learn *all* of evidence law so they are prepared for whatever areas might actually arise on the exam.

1. Testing Immediate Recall and Issue-Spotting

The justification for the extemporaneous nature of the exam is that the student should know the law of evidence so well that whatever the factual

11. *See, e.g.*, FED. R. EVID. (100 Series—General Issues; 200 Series—Judicial Notice; 300 Series—Burdens and Presumptions; 400 Series—Relevancy, Prejudice, Character, Habit, Remedial Measures, Settlement and Plea Negotiations, Liability Insurance, Character in Sexual Assault Cases; 500 Series—Privileges; 600 Series—Examination of Witnesses, Trial Testimony Issues; 700 Series—Lay and Expert Opinion Testimony, Science, and Other Fields of Expertise; 800 Series—Hearsay and Exceptions; 900 Series—Authentication of Writings; and 1000 Series—the "Best Evidence" Original Document Rule). These are wide and varied areas and it is difficult to write a short factual situation that concisely raises all of these issues for students to spot and analyze.

12. For example, Rule 404 deals with character in criminal cases, while Rule 407 deals with subsequent remedial measures, and Rule 411 with liability insurance, these last two being issues usually only in civil cases. Yet, Rule 403, like most of the Rules, applies in both criminal and civil cases.

13. When data collection entails selecting individuals or objects from a frame, the simplest method for ensuring a representative selection is to take a simple random sample. JAY L. DEVORE, PROBABILITY AND STATISTICS: FOR ENGINEERING AND THE SCIENCES 8 (5th ed. 2000). This is one for which any particular subset of the specified size has the same chance of being selected. *Id.*

context might be, the student can immediately apply the law thereto and provide a cogent, logical, and legally correct analysis of that situation. Although clearly artificial and time pressured, all students are "in the same boat" in that they have to spot and analyze issues in that same hurried context. It also can be argued that such an exam tests how well a student actually knows evidence because the time pressure means that students must know the law very well in order to quickly formulate a meaningful answer. If a student is unsure or cannot quickly formulate an answer, then it is probably because the student does not know the material very well and the exam will reveal that fact, hence fulfilling its purpose to help the professor determine how well a student knows the material and can apply it.

As a result, students are required to memorize the rules, cases, and doctrine and must be able to apply them quickly to the hypothetical. The exam clearly assesses how much legal information has been stored (committed to memory) by the student, how well that information can be quickly retrieved (recall and access of that information) by the student, and finally how well the student can best transfer that pertinent information in written form (organization and extemporaneous writing). It also assesses how well students can recognize certain fact patterns as raising the evidentiary issues that they have memorized. So this type of exam tests how well the student can store, retrieve, apply, and write that knowledge in response to a given hypothetical, and do so very quickly under time pressure. The exam tests the ability to immediately recognize evidentiary issues as they arise in a brand new hypothetical context, and the assumption is that this is the best or most effective way to determine if the student knows the law of evidence and can apply it in the future as a competent attorney or judge.

It is true that rote memorization of information is an important and helpful skill for an attorney to have. Most clients would certainly think it better if their attorney can retain and recall information very well instead of not so well, but such is probably not the most important attribute of an attorney, especially given the modern practice of law. There is an old adage that what makes an attorney so valuable is not so much the ability to "know" the law (have it committed to memory), but it is the ability to know where and how to find the law (how to access and apply the key cases, rules, statutes, etc.). With computers and digests to store and retrieve legal information, an attorney's ability to store and retrieve memorized legal information ceases to be such an important skill, as computers and digests are more efficient and reliable than human memory. Instead, what is important is an attorney's ability to engage in sound legal reasoning. The critical question for attorneys is how well they can apply the law to a given factual situation and how well they can dream up creative arguments once they have a chance to ingest and deeply contemplate a factual situation. These are things that a computer cannot do, but that human intelligence can, and if that is what is important in being a judge or attorney,

then that is probably more of what we should be testing: realistic application of the law to a known factual situation, instead of hurried impressionistic regurgitation of the law in response to an entirely new factual situation.

2. Testing in an Artificial and Professionally Irresponsible Context

Although the typical Evidence exam may be a good way to test rote memorization of the Rules and case law, and perhaps how well a student might *quickly* spot various evidentiary issues, such does not test many important authentic lawyering skills vis-à-vis the realistic application of evidence law. This involves a simple fairness concern in assessing what is most important for our students as future lawyers. The exams, as they are, may be "fair" in the sense that all students are faced with the same time pressure challenge, no matter how artificial. But they are still unfair in another sense. Students who can quickly ingest and organize an entirely new factual situation in the span of a few minutes have an unfair advantage over those that may be just as competent in eventually arriving at the correct legal analysis, but just may be a bit more deliberative in the process and/or write a bit more slowly than the first group. So the first group is rewarded with a higher grade not necessarily because they know and can apply the law of evidence any better than the second group, but simply because the first group can start applying their evidence knowledge faster and can start writing much more quickly and therefore will tend be able to write more and garner more "points" for spotting and analyzing more issues within a short specified time period. So certain students may tend to do better on the time-pressure extemporaneous exam simply because they can spot more issues quickly and can make rapid snap judgments faster than students who may be just as competent and can spot and analyze just as many issues in the long run, if they had sufficient time to analyze and compose with respect to a known factual context of a specific case.

This hurried testing is unfair to certain students because it assumes speed of analysis and even speed in writing, or typing, necessarily equates with evidentiary knowledge, competency, and skill. Of course, if a student does not know the law of evidence all that well, then no amount of time on an exam is going to somehow allow them to do better. However, the assessment should not be on how well students can analyze and write under time pressure—placing the premium on speed and quick assimilation—but simply on how well they can analyze and write under the more realistic time pressure that an attorney would face in an actual case. Such time periods are typically days or even weeks, rather than just a matter of hours. So the typical extemporaneous time pressure exam format completely ignores the way lawyers actually consider evidentiary issues when preparing and/or trying a case with which they are very familiar.

Although lawyers and judges have to respond to new situations all of the time, such is done in a factual context where they at least have taken some time to get to know the facts and exhibits involved and have adequately prepared and anticipated possible objections—and have at least thought about, hopefully, evidentiary issues that may arise. Accordingly, they simply do not walk into court cold and start opining on a case that they have just learned about minutes before making their appearance, unless it is a rare temporary restraining order or other emergency legal situation, and even then, attorneys often have more than a few hours or even a day or two to deliberate before taking legal action. Thus, the typical exam essentially asks students to respond on their exams in a way that would in most circumstances be professionally irresponsible if a lawyer were to respond in the same manner in actual practice.

Responsible and professionally conscientious attorneys take time in learning about their cases and working with them, doing factual investigations, conducting witness interviews, engaging in discovery, writing pretrial motions and briefs, considering motions in limine, researching applicable case law, etc. It is in that context of being intimately familiar with all the witnesses and exhibits in the case and all of the filed pleadings and motions that the attorney considers the law of evidence and how it may be used to exclude unhelpful evidence and admit helpful evidence. Attorneys simply do not make snap legal judgments on an entirely unfamiliar factual situation, and if they do, it would often be considered professionally irresponsible.

It really boils down to a very simple, but quite obvious observation: shouldn't our Evidence exams assess a student's actual knowledge and skill in applying the law of evidence in a way that reflects, as closely as possible, the way in which a real attorney or judge would apply evidence law in actual practice? Real judges and attorneys simply do not sit down with an entirely new set of facts thrown at them and then immediately start identifying as many legal issues as possible and simultaneously write an extemporaneous essay about what they are thinking at that moment. True, they have to "start somewhere," but the more meaningful process is for the attorney to make these legal decisions and evidentiary determinations in the context of a case with which the attorney is already very familiar and has had enough time (again, days or even weeks) to be sufficiently deliberative.

There is even a hypocritical aspect in testing the traditional way. In addition to Evidence, I teach Civil Procedure. An important issue in Civil Procedure is teaching first-year students the importance of strict compliance with Rule 11, which requires ethical and professional responsibility on the part of attorneys when filing papers with the court. One aspect of the rule is that an attorney, by signing and filing a pleading with the court, is certifying to the court that, among other things, "to the best of the [attorney's] knowledge, information, and belief, formed after a reasonable inquiry under the circumstances . . . the claims, defenses, and other legal contentions therein are

warranted by existing law . . . [and] the allegations and other factual contentions have evidentiary support."[14] This is a requirement for attorneys to conduct a reasonable inquiry into the facts of the case to see if there is evidentiary support for it.[15]

In teaching this requirement to students, but then testing in the traditional manner, it always seemed a bit hypocritical to me because I was expecting law students to do something on exams that I would never counsel them to do in actual practice—violate the spirit if not the letter of Rule 11. Lawyers cannot simply file first and ask questions later. But this is exactly what we expect when on our exams we ask students to *respond immediately* to an entirely brand new hypothetical situation without first having the time to think about the law and facts and consider if their immediate impressionistic conclusions are "warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law."[16]

In reality, we want lawyers to take their time in reasoned consideration of the legal issues and complexities before immediately responding to brand new facts and circumstances just put before them, and the law requires as much. A judge will rule on the correctness of the attorney's analysis, period. A judge will not rule nor be influenced by which litigant was able to arrive at the correct analysis the *fastest*, as if it were a race on a game show where the winner is the one who can buzz in quicker with the answer, especially when the lawyers knew absolutely nothing about the case beforehand and just learned of all the witnesses, exhibits, facts, and testimony on the spot.

Of course, trial attorneys have to make quick, even split-second, decisions in court all the time on whether or not to object to certain questions, answers, or proposed exhibits and then on how to support or overcome objections based on the law of evidence. Even though that is true, as trials are certainly full of surprises where lawyers can be shocked to learn that witnesses will sometimes "say the darndest things on the stand," those quick decisions of the ready attorney all still take place in a context where the attorneys are already thoroughly familiar with the underlying facts and law of their cases.

The professional responsibility obligation concern is not that attorneys simply make quick evidentiary decisions in court when making or responding to objections. Instead, the obligation is that when they make or respond to such objections in a trial or litigation context, they do so in a situation where they are already thoroughly familiar with the case and the witnesses and the exhibits involved. The professional responsibility violation would be if they

14. FED. R. CIV. P. 11(b).

15. Business Guides, Inc. v. Chromatic Comm. Enterprises, Inc., 498 U.S. 533, 541 (1991) (noting that "a party who signs a pleading or other paper without first conducting a reasonable inquiry shall be sanctioned").

16. FED. R. CIV. P. 11(b)(2).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

were trying to make or respond to objections on the spot in a case about which they knew nothing, only what they were told about it moments before they were expected to start objecting or responding thereto. Lawyers simply do not practice law that way, and if they do, it would be a professional responsibility violation. We therefore should not assess students' legal knowledge and abilities in a context in which we would not want or expect them to practice law.

III. HOW TO MAKE EVIDENCE EXAMS MORE CONTEXTUALLY RELEVANT AND LEGALLY REALISTIC

A. *Exam Creation: A New Way to Test Future Lawyers*

I suppose a logical extension of my argument would be to say that if realism is so important in testing, then perhaps we should test or assess students by having them actually serve as attorneys in real law offices or judicial chambers and then confront evidentiary issues in a truly realistic setting and see how they respond. Of course, such would be a great thing for students, but logistically it would be next to impossible and prohibitively expensive for Evidence professors to conduct classes and exams in such an administratively difficult, labor intensive, and complicated manner. However, there are ways to get at least somewhat closer to a realistic context than what we do now.

For the last few years, I have been testing on the final exam (of both Evidence and Civil Procedure) in a way that differs from the traditional method.[17] About six to eight weeks before the final exam, I distribute a factual packet to the students and tell them that the final exam will be based entirely on the factual packet they have received. I often use a NITA Trial Advocacy case or some such other hypothetical-adapted case as the factual packet background that I change and further adapt for the exam, given my course coverage. The factual packet usually includes the following types of information:

17. Evidence is a five-hour, two-semester course at Pacific McGeorge School of Law. Therefore, I have two opportunities to give exams: a mid-term exam at the end of the first semester and a final exam at the end of the year. I still use the traditional method for the mid-term exam because I believe it is important to give an exam that is similar to the essay-testing format on the California Bar Exam. Students should have the opportunity to take an exam that they will encounter when they take the bar exam. No matter how "artificial" the exam format may be as I have stated in this Article, passing the bar exam is a very "real" hurdle for students if they are ever going to practice law at all in their careers. As an aside, I give multiple choice "quizzes" throughout the year so that students get practice taking Multi-State bar examination-type questions for the bar exam, and it is a way to give students feedback during each semester as to how well they are doing. I give a total of six quizzes per year, three quizzes per semester, which cover the material we have addressed every five weeks or so.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

- ✓ A Civil Complaint, or Criminal Charge/Indictment
- ✓ An Answer (and Reply, if counterclaims), if in a civil case
- ✓ Deposition Testimony of four to six witnesses (or other witness statements)
- ✓ Various Documents, including such things as:
    - o Affidavits
    - o Letters
    - o Contracts
    - o Handwritten Notes
    - o Resumes
    - o Expert Reports
    - o Investigator Reports
    - o Police Reports
    - o Photographs, X-rays
    - o Diagrams, Maps
    - o E-Mails
    - o Interrogatory Responses or Other Discovery Responses
- ✓ Jury Instructions
- ✓ Pleadings, Denied Motions to Dismiss
- ✓ Stipulations
- ✓ Motions in limine
- ✓ Applicable Law, Cases
- ✓ Various Additional Materials to Cover Certain Issues

The page length of the packet has usually been fifty to eighty pages of materials. This is enough material to formulate a realistic case and provide a sufficiently complex hypothetical, but not so much that it is too daunting or overwhelming for the students to become experts on the case. It would be very difficult to create these materials from scratch, so it is best to look for case materials already created. The students receive the factual packet but no further explanation of the hypothetical case before the exam, and I answer no questions about the case other than to clarify any legibility issues. I do not comment in any way on the case materials because the students simply have to make sense out of what is presented, piece together the evidentiary puzzle,

formulate coherent stories, and spot inconsistencies, strengths, and weaknesses about the case on both sides.

The actual 2–3 hour exam consists of questions based on "new developments" in the case, such as whether certain trial testimony or an exhibit used a certain way would be admissible, or how a judge should rule on a motions in limine regarding exhibits in the packet, or whether a trial judge should be reversed for an admissibility ruling regarding the exhibits in the factual packet. The exam is not the equivalent of a "take home" exam because the students do not know the questions or the exact way the evidentiary issues will come up on the exam. However, they do know that the questions will definitely and only involve the case that they have prepared and with which they are familiar.

B. Before the Exam: Testing Preparation Skills

Before the exam, the students are informed that they will be allowed to consult their casebooks, any materials they may wish to bring with them, the Federal Rules of Evidence, and any outline or "trial notebook" they wish to create in anticipation of the exam. They also may write on the exhibits in the factual packet and highlight or tab it as they see fit. This way, students are tested in the similar context of lawyers and judges practicing law and preparing for trials or hearings. Often, the exam is a development that could hypothetically happen at trial in the case, as the law of evidence is often thought as the law of the trial governing what evidence can and cannot be used. I do not allow students to use laptops, as they may "instant message" each other during the exam if there is wireless access to the Internet in the exam room. If the students do type their exams, the "ExamSoft" program will shutdown if they try to access another program.

At trial, lawyers and judges are "allowed" to consult the Federal Rules of Evidence, applicable case law, other legal materials they may find, or materials they may have created in preparation for trial, such as their personal notes, trial notebooks, anticipated arguments regarding admissibility, possible objections regarding various exhibits, etc. Because lawyers and judges use such prepared materials and rely on them and on their abilities to prepare, anticipate, and record their ideas and thoughts, law students should be tested in a similar context that is more representative of how lawyers and judges actually practice law and prepare for trial.

Judges and attorneys also confer with one another about their cases and often will play "devil's advocate" with one another in preparation for trial. They work together in an effort to collectively anticipate arguments and objections; then, they think of creative ways to use and admit available evidence and ways to get unhelpful or damaging evidence excluded. They will think about all of the plausible objections they could make, and then whether they strategically should make them, given the special circumstances of the

case. Ideas will percolate and develop over time as they revisit ideas from various perspectives, and they will think about all of these things over a period of days or weeks, not in a two or three hour hurried context. I therefore allow students to confer with one another about all of these issues in order to approximate this most important attorney function regarding strategic, painstaking trial preparation.

C. During the Exam: Testing Legal Application Skills

1. But Has Too Much Information Already Been Revealed?

This exam format rewards those students who take the time to really learn the case record and work hard to anticipate all of the possible evidentiary issues and objections that may come up regarding all of the various testimony and exhibits provided in the case packet. Because lawyers and judges often confer with one another before trial or a hearing, students also should confer with one another about the case packet and try out various arguments on one another. They should get practice brainstorming with one another before a "trial"/exam about (1) how evidentiary issues may come up with respect to each document in the case packet; (2) what objections may be raised; and (3) what concerns a judge might have about various exhibits or testimony used in certain ways.

However, this may cause a couple of concerns on the part of Evidence professors. First, if students know they are in competition for grades, they might make a grade enhancement strategic decision *not* to share ideas with one another. Instead of meeting and conferring, they may hide or at least keep their thinking to themselves. Of course, this has always been a concern with the way in which students study for exams, so students remain free to weigh the advantages and disadvantages of studying together or on their own. Students simply have to calculate if the benefits of conferring and brainstorming are worth it and outweigh any potential "costs" such as giving ideas to a fellow student. I have found in using this testing format that most students divide up into study groups and attempt to share ideas more, rather than less, because they feel other students may see possible issues in the fact pattern that they may miss and it is worth it to put their heads together. Having an existing factual packet to think about before the exam puts pressure on students to study actively about the factual packet and bring ideas, insights, and creativity to the table. If a student has nothing to offer in terms of preparation because they are hiding or do not want to give away any of their ideas or insights, then that student will probably soon find himself studying alone anyway. Lawyers work differently in how they prepare for trial, and students should be given the same options to prepare for an exam, but in a more realistic context.

Another concern might be that the professor cannot really assess each individual student using this method because they will instead end up assessing the efforts of groups of students who have studied together and openly shared all of their ideas and therefore have the same, even identical, preliminary informational reaction to the fact packet. This would be a more valid concern if the exam question were simply to state: "Discuss each document in the fact packet and state whether and why it would be admissible." Of course, that should not be the exam question, just like an exam question should not be: "Tell me everything you know about Evidence." Instead, the "new developments" in the case and the events leading up to or occurring at trial such as attempted uses of testimony or exhibits in certain ways is what the questions should be.

It is important to note that each student responds individually on the exam at that point. I do not allow the students to confer and provide a group answer to the actual exam question given on the day of the exam because law students need to learn that at some point, no matter how much preparation and conferring that may have gone on before trial, individual attorneys have to take responsibility for the ultimate arguments and positions they take and the final analysis they put forward in their cases.

If students correctly anticipate an issue that is raised on the exam or at "trial," then they should be duly rewarded for that hard and thoughtful work just the way an attorney would be rewarded for good, professionally responsible preparation. But some professors may still balk at students being able to prepare this way and use materials and notebooks they create and can use during the exam. However, in actual practice, a judge would never act in such a manner. Just because an attorney had been thinking about how to respond to a certain objection to a certain exhibit if it were to come up, no judge would believe that the attorney's response is tainted. It would be silly to suggest that the attorney had somehow "cheated" because he or she was not just reacting extemporaneously without ever having thought about the legal issue as it related to exhibits or documents until the moment it comes up at trial.

By using this more realistic testing method of giving out a very involved factual packet nearly two months before the exam, I have found that students study for this applied-setting exam in a more active way, instead of simply committing rules and legal doctrines to memory. Although they have to study this way for a traditional exam, they have no factual context in which to apply the law until the moment they receive the exam, begin learning about the hypothetical, and are asked to respond on the spot. Without a factual packet context to prepare, students merely memorize the law but do not really have an inkling of how these issues may come up because they have no idea what the factual hypothetical will entail, who will be their clients or witnesses, what testimony or exhibits will be involved, or whether it will be in a civil or

criminal context. The benefit is that students will study more actively in an applied setting if they have been working with a factual background set of materials of a real or realistic mock case.

2. Legal Application Skills

When students receive the exam, they know exactly what the case is about and what the exhibits are. They are ready and prepared like a lawyer to apply the law to their case. They can apply the law like a lawyer because they will have been contemplating, over time, how evidentiary issues may come up in several aspects of a complicated factual case. It is in that realistic context that the exam questions are given. For example, the hypothetical questions on the exam will be that the trial has started and the plaintiff is testifying as to what happened, while certain questions are asked, certain exhibits are offered, etc., and the student will be asked to make any applicable objections and discuss how and why a judge likely would rule.

The student will focus on the application of the law without also having to remember the basic factual situation of a hypothetical they have just read for the first time. Also, deeper evidentiary issues can be covered because the facts are already laid out so the students can focus solely on the application of evidence law even in a factually complicated case because the student is already familiar with the complicated facts.[18]

Finally, if I wish to test an issue in a way that is completely new and could not have been reasonably anticipated by the students because I want to test their on-the-spot legal reasoning, I still have the flexibility to do that simply by changing an assumption on the exam. For example, the "new development" may be that a completely new witness is found and is allowed to testify or an existing witness says something completely inconsistent with their deposition testimony, etc. There are so many, almost infinite, ways to make creative changes or developments to a complicated hypothetical of fifty to eighty pages that the professor can still test extemporaneously if he or she wants to, but if so, it is still done within the realistic context of an existing actual case hypothetical for which the students have been allowed and have been expected to prepare thoroughly.

IV. THE BENEFITS OF TESTING IN A LEGALLY REALISTIC CONTEXT

A. *Learning to Piece Together a Real Case*

Most cases involve a lot of pieces of information that may or may not be relevant and that must be coupled with other pieces to reveal value and meaning, if any, to the case. One of the most important skills to develop as a lawyer is discretion in discerning which facts of a case present what issues of

18. *See infra* Part IV.E.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

the law of evidence and what the overall impressionistic competing storylines of the two sides of the case involve. Cases are won and lost not uncommonly because an attorney neglected to realize an evidentiary issue regarding one seemingly small fact, or because too much weight was given to another. Students should be tested on their discretion and ability to focus on what is important about the exhibits and underlying case themes and also on what may become important as the case develops for trial.

Reading a law professor's summary of case facts written in a relatively short, truncated narrative hypothetical is usually not how lawyers are exposed to their cases and certainly not how they come to learn about all the intricacies of these cases. By having to go through a factual packet that at first glance appears to be an unexplained puzzle of seemingly disjointed documents and exhibits that eventually come to make sense is a more rigorous and realistic way to test because it requires more of students. They have to piece it together for themselves instead of having the professor do it for them. In practice, they will need to be able to make sense of a case based on a myriad of exhibits, documents, and pleadings instead of having the issues nicely laid out for them in the professor's short hypothetical.

B. Learning to Anticipate Objections

The process of anticipating objections at trial takes weeks or even months to complete. The very nature of anticipation involves research, reflection, and the kind of analysis that does not occur in the fifteen minutes that students have during traditional exam periods to spot issues and scratch out an outline before beginning to write or type. When students are able to work with the facts of a full case before sitting for an exam based on that case, the exam can more accurately test those students' abilities to handle and make objections because they have had a more realistic time period to go through the process of anticipation. If they have done it well, then they will be rewarded for their hard work and strategic thinking, not to mention all of the independent learning that has taken place because students have been anticipating, and therefore have been thinking deeply about, all the possible objections that may be applicable or plausible given all of the documents and exhibits contained in the case packet.

Moreover, to the extent they prepare and anticipate with respect to each and every exhibit, this forces them to consider all possible issues deeply and over a longer period of time, certainly longer and deeper than the couple of hours they might have when they receive the test and encounter the case for the first time. As a result, they begin the application-of-the-law-to-the-facts process much sooner in the course—instead of at the very end.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

C. Learning to Be Thorough in Case Preparation

Every case is unique and each set of facts is different. Successful lawyers master a thorough approach to preparing cases so that they are always providing a quality of representation that does not ebb and flow based on the facts of a case or the level to which such facts are familiar to the lawyers. To be comprehensive and meticulous in preparing an outline for a traditional law school exam proves only that when faced with a one-page set of issues, usually more superficial than any real life case would present, a test taker can analyze them in short order. That skill may be somewhat useful in the practice of law during initial conversations with potential clients, but the major difference remains that lawyers can ask questions of the client during client interviews, while students can probe no further into the case facts before them on a traditional exam.

Thoroughness requires time, focus, and contemplation. It is a quality that is necessary to be a successful lawyer. To be thorough is to become extremely familiar with the case and begin to build a command of it. It is a personal endeavor and something a lawyer generally cannot "cheat" her way to by listening to someone else who may already have a good grasp of the case. Teaching and testing this essential component of the practice of law can only come from the testing in this realistic context of a factual packet handed out well before the actual exam.

D. Learning to Go Beyond Memorization

Like the memorization of vocabulary words will not make one fluent in a foreign language, neither will memorization of the laws of evidence create the ability to use them. Legal cases, especially those headed toward trial, involve the development of strategies. In the practice of law, strategies with respect to the laws of evidence can only be developed when (1) most of the laws are committed to memory at least in a general manner; (2) there is ample time to consider the facts of the case; and (3) the process of applying (the mostly memorized) laws to the (deeply considered) facts is the focus and is an exercise in which the lawyer has become skilled. Charging students with knowing a complicated factual packet before the exam teaches and tests the students on the application of the laws of evidence, a process in which memorization of the laws is just one part, along with understanding those laws and categorizing relevant facts.

The premium is not on how many rules and case doctrines can be committed to memory and then regurgitated according to the short hypothetical question; instead, the premium is placed on a more realistic application of the law to case facts the way an actual attorney would have to deal with them and under a more realistic time period, using prepared materials and anticipated arguments. Thus, thoughtful and reasoned application of the law to a realistic complicated factual case becomes more important than simply a quick recall of

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

the rules, cases, and doctrine and the ability to rapidly spot and check off legal issues in a fast-paced writing of extemporaneous analysis.

E. Learning to Focus on More Nuanced Evidentiary Issues

Small issues and the deeper levels of bigger issues can rarely be tested on the traditional law school exams given the short exam time. Also, the student, no matter how capable, cannot be expected to become very familiar with a complicated realistic case hypothetical using real documents and exhibits if there is not sufficient time to ingest it all. But it is often the nuanced evidentiary issues that determine the direction of a case, that necessitate or preclude certain strategies in case development. Oftentimes, layers of analysis must be conducted before certain evidence issues are even revealed. So examination using this new format tests not only the inclination to perform various levels of analysis, but the fruit of such study, because the only likely way a student will be able to aptly answer exam questions about nuanced evidentiary issues is if such issues surfaced from their scrutiny prior to exam day.

Students should be expected to be fully versed on the facts of the case when those facts are distributed well before the exam, even though the cases have very complicated and involved facts. But with students fully prepared and having that knowledge base, the professor can ask deep and penetrating questions of the law of evidence without having to worry that a student may be answering incorrectly simply because the student is still a bit confused on the facts and is not totally comfortable with them, therefore feeling too rushed to spend the necessary time to get a good handle on the factual subtleties before engaging in sophisticated evidentiary analysis.

I have found that exam answers are better and more thought out when the students are not simply in a hurried rush to spot issues and garner points for spotting those issues. I also feel it is fair to have higher expectations of a student's legal analysis because they all know the facts so well. So at that point, the only thing that really can be separating them is their knowledge of the law of evidence and their ability to apply it correctly, powerfully, and even creatively to the given hypothetical factual packet.

F. Learning to Perform in a More Realistic Setting

Lawyering, especially at trial, is a performance. All skills that involve performance must be honed in conditions that mimic those under which the performer will be when their abilities are judged. Medical students work on cadavers, not only just plastic replicas of humans; engineering students work with structures, not only just pictures; football players have actual live scrimmages, they do not simply run sprints and lift weights or just diagram plays. Thus, so too must law students work on complex cases that mimic what they will likely encounter in practice, not only just on succinct unrealistic

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

summary hypotheticals. In fact, when the most important performance of a student's stint in their Evidence class is the hurried handling of an unrealistic hypothetical, this does them disservice and fails to prepare them for the real practice of law.

V. CONCLUSION: LEGAL REALITY AND CONTEXTUAL AUTHENTICITY MATTERS

The format of the tests determines a lot in law school. Professors have in mind what and how they will test the students, which shapes how they teach their students. If the exams professors are planning to give will focus on lawyering skills thorough case preparation, analysis of anticipatory motions and arguments at trial, revelation of and response to nuanced evidentiary issues, etc., then such skills will more likely be emphasized in the professors' teaching. The test format also determines the way students approach studying the materials throughout the course and how they prepare for the exam. Knowing that they will be expected to perform in a situation where they must take weeks to ponder the facts of a case in light of the laws of evidence, and where they will subsequently be asked questions about those facts under traditional exam conditions, will lead most students to approach the study of the material throughout the course in the same manner as attorneys, i.e., by formulating strategies, applying laws to facts, anticipating issues, and becoming extremely familiar with the facts of the cases—through documents and exhibits too, not just legal opinions—as well as memorizing generally all laws of evidence.

But rather than teaching to the test, professors, with an exam format based on a more realistic applied setting, will be testing to the teachings of law. Law in its basic form is the series of rules that define, or teach us, how to live in our society. Specifically, evidentiary rules dictate a large part of how we conduct trials in the United States. Without lawyers, laws are mere written rules with no meaning. Lawyers breathe life into laws by using them to prove guilt, liability, or lack thereof.

All lawyers must become teachers of the laws to a certain extent, as educating clients, arguing to judges, and presenting to juries all involve strong elements of teaching. In order to leave law school at least on the path to developing the ability to advocate that certain laws do or do not teach that certain behavior is wrong or acceptable, students must have practiced and been tested on the law in its real life context of whole, complex cases.

This is not to say that the traditional exam is bad or wrong, for it most certainly tests certain important lawyer skills (basic substantive knowledge), but it is time for the exam to evolve so that exams begin to reflect more of the reality and relevancy of actual attorneys and judges in practice. In short, the Evidence exam can be adapted to serve its traditional function while evolving to reflect a more authentic legal framework and a more genuine legal context

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

for our students to exhibit what they really have come to know about the law of evidence and how well they can competently and professionally apply it.