Evidence

Weeks 3 thru 4

I. Unit 5: Competency (ct'd)
   a. Rules excluding incompetent witnesses, rules excluding incompetent testimony.
   b. Witnesses are competent if they have
      i. Perception
      ii. Memory
      iii. Narration
      iv. Sincerity
      v. adult witnesses were presumed to have these automatically
      vi. FRE 601 basically obliterates the competency requirements. (in trials under federal jurisdiction)
   c. Hypothetical: We have the Hill v. Skinner case in federal court (diversity jurisdiction and amount in controversy have been met). Is an objection to the 4 year old's competency going to be sustained?
      i. 601 seems to say no challenge to controversy…
      ii. But it goes on to say "In a civil case, state law governs the witness's competency regarding a claim or defense…."
      iii. This is a tort, a civil case governed by state law.
      iv. Therefore a challenge to competency will be sustained if the objector establishes that the four year old does not meet the 4 competencies above are not met, and state law requires those four testimonial competencies.
      v. Some states provide a statute whereby everyone younger than a certain age is incompetent.
   d. Why is the 2nd sentence of 601 in there? (it wasn't during the first proposal, it was added by congress).
      i. There are a number of state statutes that this rule would've struck down (when cases were brought in federal court but decided under state law) had the rule been passed as originally drafted. Examples:
      ii. Dead person statute: Plaintiff cannot testify about an oral contract with decedant, because they cannot now argue on his own behalf.
         1. In state court, plaintiff is screwed. They want to bring it in federal court.
         2. The gov't does not want to encourage plaintiff's from finding a way into federal court simply because they want to win. This redrafting prevents a little bit of forum shopping.
   e. Evidence is competent if:
      i. The person observed it. There is a need for personal knowledge under FRE 602.
      ii. "a witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter…May consist of the witness's own testimony." Doesn't apply to expert testimony.
      iii. Why this requirement? If there is no foundation of personal knowledge, witness could be relating something she
         1. Saw—that would be ok
         2. Heard—maybe ok. If she heard the accident, its ok, if she heard someone talk about the accident, not ok.

3. Read – ehh
4. Guessed—definitely bad.

iv. How do you lay foundation for personal knowledge? Ask whether they were there, could they see it, etc. The standard of proof is really low: evidence sufficient to support a finding.

v. It's a 104b question: judge must decide whether there is sufficient evidence to allow it on the record, and the jury can decide later how much weight that they will give the testimony later when they deliberate. No right to voir dire, later motion to strike possible after counter-evidence has come in.

vi. Note: this is not a relevance objection. The excluded evidence may be relevant, but this is evidence excluded for other reasons.

vii. Jury instructions: Jury will be told that they can consider whether the witness is credible/has personal knowledge. But there is not really any consensus on how this should be done....

viii. Judge Weinstein on conditional relevance: "Some instructions on conditional relevance should be avoided as insultingly childish."

ix. Hypothetical: Murder prosecution with 4 purported eyewitnesses, each who claims they were on the scene and saw the murder. The defendant claims that none of them were at the scene and puts on counter evidence from other witnesses/sources that they were not there.

1. There is evidence sufficient to support a finding that they were there, and each identifies the murdere.
2. The defense counsel puts on the following jury instructions: "you may not consider the testimony of eyewitness 1 unless you conclude that they had personal knowledge..." and so on. What is wrong with this instruction?
3. It is one sided. If you do find that they had personal knowledge...
4. It is repetition: Makes it sound like they must al have been there. The standard "conclude" is too high. You can also consider their own testimony in deciding whether they had personal knowledge...and "you": it is singular or plural. The defense counsel wants the jury to think the you is plural, and that the jury has to unanimously agree that the witnesses have personal knowledge. This is not true. Jurors do not have to use precisely the same bricks to build the wall. They only have to be unanimous that each element of the crime was met.

II. Unit 6: Best Evidence Rule

a. NOT a rule requiring you to put on the best evidence at your disposal, and there is no rule that bars you from putting on inferior evidence. Modern writers usually refer to this as the original writing or original document rule.
b. Rule 1001-1006: proving the content of a document requires introducing the document, unless there is a reason not to.
c. Rule 1001: the rule applies to writing, recordings, and photographs
d. Sirico v. Cotto, New York 1971
    i. A document within the meaning of the best evidence rule is any physical embodiment of information or ideas.

ii. This does include x-ray negatives and photographs, sadly for the plaintiff in this personal injuries.
iii. But it doesn't include the x-ray technology used by this particular doctor—no permanent recording of the x-ray. There is no 'storage.' He isn't testifying to the contents of a photograph. (unless one was stored? The facts seem contradictory from what is being said in class).
iv. The lawyer asked the doctor to describe what he found in the xray, basically asked to testify to the contents of the photograph. This is secondary evidence, and we exclude it under the best evidence rule.
v. Lawyer never explained why the document wasn't available—literally the only thing you have to do to get secondary evidence in.

e. Myers v. United States
   i. Myers is accused of having induced Lamarre to lie in front of the US senate (Lamarre plead guilty, but the court still has to prove what Lamarre said in order to charge Myers).
   ii. The gov't proved what Lamarre had testified to at the senate by having a person present at the senate committee meeting testify to what Lamarre said. There was also a transcript of the meeting.
   iii. Meyers argues that the witness's evidence should've been kept out as secondary evidence, and the transcript introduced instead. Appeal not successful.
   iv. Witness was not testifying to the contents of a writing or other document, he was testifying to what he personally observed. Not a violation of the "best evidence rule"
   v. The transcript may have been a more accurate recording of what Lamarre said, but that is not what the best evidence rule means. The witness did not read the transcript and he is testifying to something he observed rather than the content of the recording. If he had read the transcript, different result. He would either be refreshing his memory (ok) or parroting the transcript (not ok).
   vi. Is a transcript a duplicate? No, because there is no "original" document. The sound waves in the air are not a "writing, recording, or photograph." A carbon copy would be a better example of an original.
   vii. Holding: If you are testifying to an independent fact from your own knowledge, it does not matter that the fact is also conveniently recorded in a document, even if the document is likely to be more reliable than your recollection.
f. Herzig v. Swift & Co., 2d circ. 1945: there is no way you will know about the partner earnings independently (as in the above case). This guy was simply testifying to the contents of an original document.
g. Definition of original: the writing…itself, or any counterpart intending to have the same effect by the person who executed or issued it.
h. Definition of duplicate: any counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.
   i. A photocopy is a duplicate