CALIFORNIA BAR PAST EXAMS

カリフォルニア州司法試験過去問

⑧ EVIDENCE

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Evidence

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2001 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2001 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

QUESTION 3

Walker sued Truck Co. for personal injuries. Walker alleged that Dan, Truck Co.'s driver, negligently ran a red light and struck him as he was crossing the street in the crosswalk with the "Walk" signal. Truck Co. claimed that Dan had the green light and that Walker was outside the crosswalk. At trial, Walker called George Clerk and the following questions were asked and answers given:

17. Would you tell the jury your name and spell your last name for the record, please?

A. George Clerk. C-l-e-r-k.

[1] Q: Where were you when you saw the truck hit Walker?

A: I was standing behind the counter in the pharmacy where I work.

[2] Q: What were the weather conditions just before the accident?

[3] A: Well, some people had their umbrellas up, so I'm pretty sure it must have been raining.

[4] Q: Tell me everything that happened.

[5] A: This guy rushed into my store and shouted, "Call an ambulance! A truck just ran a red light and hit someone."

Q: What happened next?

[6] A: I walked over to the window and looked out. I said, "That truck must have been going way over the speed limit." Then I called an ambulance.

Q: Then what happened?

[7] A: I walked out to where this guy was lying in the street. Dan, the driver for Truck Co., was kneeling over him. A woman was kneeling there too. She spoke calmly to Dan and said, "It's all your fault," and Dan said nothing in response.

At each of the seven indicated points, what objection or objections, if any, should have been made, and how should the court have ruled on each objection? Discuss.

ANSWER A TO QUESTION 3

For ease of reference, D will be Truck Co., C will be Clerk, and W will be Walker.

"Where were you when you saw the truck hit Walker?"
The objections that can be raised to the question include: Argumentative, assumes facts not in evidence, and lack of foundation.

Assumes facts not in evidence.
A lawyer may not use his/her questions on direct examination to argue the facts or issues of a case. The lawyer must ask questions and allow the witness to testify. Although we have no background evidence, we know Clerk (C) has not yet testified that he saw the truck hit Walker. Thus, the question assumes facts not in evidence, and an objection should be sustained.

Lack of personal knowledge/foundation
A witness may only testify based upon his/her personal knowledge, and the lawyer must present the basis for the witness's knowledge before a witness may testify as to facts in the trial relating thereto. Here, all we know is the name of this witness. We do not know where he was, who he was, or even whether he observed any accident. This assumes not only that he saw the accident, but that the truck hit Walker -- which has not yet been established. Thus an objection for lack of personal knowledge is sustainable.

Argumentative
A lawyer may not use his/her questions on direct examination to argue the facts or issues in a case. The lawyer must ask questions and allow the witness to testify. An argumentative question is one which argues the facts or issues of the case rather than just eliciting a direct response. This question is argumentative in that it assumes as the truck "hit" Walker rather than Walker "walking out in front of" the truck. Any objection should be sustained.

"What were the weather conditions like just before the accident?"
The statement could be objected to based on lack of personal knowledge. The attorney has not laid a foundation that C had an opportunity to observe the weather conditions on that day. However, it could also be argued that it is within a witness's personal knowledge to remember what the weather conditions were like that day, so it is arguable that the statement did not need a foundation to be laid. Thus, an objection may be proper here, but it is not likely to be sustained unless the witness actually does not have personal knowledge (see below).

The statement could also be objected to on the basis of relevance. A statement is relevant if it makes some fact more or less likely. Although the weather conditions do not appear to make a difference in the accident claims (red light/green light issue), it could be relevant to show the ability of each party to see one another. Thus, the weather conditions are probably relevant, and the objection should be overruled.

"Well, some people had their umbrellas up . . ."
Here, a motion to strike should be made because the answer is speculation. A motion to strike must be made immediately after a witness's response, and can only be made when the original question did not obviously contemplate an objectionable response. If granted, the jury will be instructed not to consider that portion of the witness's answer. A witness must base his testimony on personal knowledge, and cannot speculate as to the conditions surrounding his/her answer. As discussed above, the weather conditions may be within C's personal knowledge. However, upon his answer, it becomes obvious that the questions actually led him to speculate and base his answer on something other than personal knowledge -- he made an inference that it was raining because of the umbrellas. W's attorney may argue that this is not speculation but rather based on personal knowledge because he remembers the umbrellas, and as such if anything only the portion about the "must have been raining" must be stricken. The court will probably agree, and only strike the parts based solely on speculation. Thus, the failure to object in the first place is excusable, the motion to strike is proper, and it should be sustained in part.

"Tell me everything that happened."
An objection should be made that the question calls for the witness to give a narrative account. The lawyer interrogating the witness on direct examination must ask specific questions and lead the witness through his or her testimony. This question calls for a narrative by the witness, and as such it is an improper question. The objection should be sustained.

The "call an ambulance" statement
An objection should be made based on hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. A statement can be words or conduct. If a statement is found to be hearsay and does not fit into a hearsay exception, it must be excluded from evidence. Here, the statement is hearsay because it was made out of court by a "guy" -- a declarant who is not testifying at trial and it is being offered for its truth -- that a truck ran a red light and hit someone. It could be argued that the statement is being offered for the nonhearsay purpose of showing its effect on the listener, C, in which case it would not be hearsay, because it would not be offered to show the truth that the truck ran the light but to show the effect the statement had on C. However, this argument will fail because what C did is not relevant in this case.

Likely, W's counsel will argue that the statement is a present sense impression or an excited utterance. A present sense impression is a statement that is made contemporaneous with an observation or a physical condition that is so trustworthy because there is not much time for contemplation to lie. It must be very contemporaneous, and very little time can lapse. Here, this statement would be admissible if it were made while the accident was happening, but the lapse of time between the declarant's coming in and the accident is not established as short and we do not know what he was doing at that time. Thus, it may not be contemporaneous enough to come in a present sense impression.

However, it will likely come in as an excited utterance. An excited utterance is a statement made under the stress of excitement of some event. Here, the time period can be longer than in a present sense impression so long as the stress of excitement remains. It seems apparent that the declarant was still under the stress of excitement when he made the statement, as he was exclamatory in doing so. Also, a short period of time passed -- as no ambulance had yet been called, so this makes it more likely that he was under the stress of excitement. Watching a car accident is definitely stressful and exciting. Thus, it is likely that the statement is trustworthy enough to come in under the excited utterance exception, and the objection should be overruled.

"That truck must have been going way over the speed limit."
Hearsay. D's counsel will object based on hearsay. This is an out-of-court statement made to prove the truth of the matter asserted. Even though the statement was made by the witness, the statement was made out of court, and as such it still is classified as hearsay. C can testify on the stand as to what he or she recalls of the events, but C cannot testify as to what he/she said about them then unless they fall into a valid hearsay exception. This statement could probably not be classified as an excited utterance because C did not observe the events and there is no indication that he was particularly excited about what occurred. Further, it cannot be classified as a present sense impression unless there would be some foundation laid as to why he thought that (e.g., what did you observe, etc.) and then it could be argued that the statement was made as a present sense impression of what it was that he saw. (However, this may still be an impermissible opinion; see below.) It could not be argued that it is an effect of hearsay scenario (see above) because it does not demonstrate why he called the ambulance, his action, but rather is being offered to show that the truck was speeding -- the truth. Thus, the objection should be sustained based on hearsay grounds.

Calls for an opinion.
The statement itself is an opinion statement, and lay witnesses may not testify as to their opinions unless they have personal knowledge, the information in the opinion cannot be derived from a better source and will be helpful to the trier of fact, and it is not scientific or technical in nature. Here, the statement is not based upon personal knowledge (at least not from the foundation we have here), and as such it is an impermissible opinion. Not only could the hearsay statement not come in, but the statement made by the witness on the stand himself [sic] could not come in either. C did not observe the events; rather, C only observed the aftermath. Thus, he did not know that the truck was speeding and was basing this information on evidence not offered forth as a foundation. Thus, although his statement would be permissible if he actually saw the truck speeding, because he did not he has no basis for knowledge of this fact and his opinion is inadmissible. The objection should be sustained.

Woman's statement to Dan: "It's all your fault."
Hearsay!
D's counsel is likely to claim that this is a hearsay statement. Woman's statement is an out-of-court statement offered to prove the truth of the matter asserted. As such, her statement itself

is hearsay unless it can fall into one of the exceptions. Here, the statement is not offered for a non-hearsay purpose, so it must fall into an exception. Because of the time lapse, present sense impressions and existed utterance exceptions are probably not viable. However, C's counsel can argue that D's response to the statement, his failure to respond, is an adoptive admission. An admission is deemed to be "not hearsay" by the Federal Rules of Evidence, and as such they are not subject to hearsay objections even though they go to the truth of the matter asserted. An admission is a statement made by a party offered by his/her opponent in a case. Here, it must first be determined whether Dan is a party opponent in the case against Truck Co. Dan may be a party due to the doctrine of vicarious admissions. If an employee is acting within the scope and course of his or her employment, then all admissions made by that employee are imputed to the employer. Here, we do not have definite facts as to the activity that D was engaged in at the time of the accident; however, if it is found that D was acting in the scope and course of his employment then any statement he made concerning the accident can be considered an admission and be vicariously imputed to his employer, Truck Co.

However, it must also be shown that D's failure to respond was an adoptive admission. An adoptive admission is an admission by silence, and it is only allowed when relating to an accusatory type statement that is made that would likely invoke a denial or response by the party, when the party does not deny it, and when the party is physically and mentally capable of denying it. D's counsel will argue that it is not necessarily true that a person would deny liability in this case. D will claim that Dan was stunned and was unable to mentally grasp what was going on. Thus, he would lack the mental capacity to deny the statement. Further, D's counsel will argue that many people know that it is not in their best interest to deny or admit liability at the scene of the accident, and that they should just keep quiet. Thus, the average person would not be expected to deny the statement, but silence would in fact be appropriate. Thus, although D is probably liable for anything he did say as a vicarious admission, this statement does not qualify as an adoptive admission and the objection should be sustained.

Improper Opinion
Counsel may claim that this is an improper opinion because no foundation was laid as to whether W saw the accident or not. This would be sustainable.

ANSWER B TO QUESTION 3

1) Where were you . . .
Assumes facts not in evidence.
The question asks where George was when he saw the truck. This assumes that George did in fact see the truck. There is no foundation for this assertion in the testimony at this point.

A judge would find that the question was improper and would probably ask to rephrase the question. Such question would be relevant because it would indicate facts about George's ability to perceive the action.

2) What were the weather conditions . . .
Relevance
In order to be admitted, the testimony must be relevant. Relevant testimony is usually admitted. Relevant evidence is evidence that tends to make a fact more or less likely.

Truck would say that the statement was irrelevant because the issue is not loss of control of the vehicle but running the red light or not. Therefore, driving conditions were irrelevant. W would respond that the information was relevant to determining if Dan could see the red light and whether George could see the incident. It seems that George did not see the incident.

A court would find that the question would be relevant because it would shed light on Dan and W's ability to see the signals.

3) Umbrellas up
Speculation
Truck would say that George was speculating whether it was raining or not. He lacked personal knowledge of whether it was raining but speculated that it was raining from open umbrellas. W would say that George may have had personal knowledge about the umbrellas and that would be sufficient.

A court would find that the fact was not established by his personal knowledge and hence the raining part would not be allowed.

Relevance
There would be the same objection as for question 2.

4) Tell me everything
Calls for a narrative.
Truck would say that the question was too open-ended. The point of direct exam is to ask specific questions and not allow ramblings that may lead to inadmissible evidence. Here, there are no bounds to the way that George could answer.

A court would find that there was a call for a narrative and would ask for a more specific question.

5) Guy's shouted statements

Hearsay

Hearsay is an out-of-court statement that is being offered to establish the truth of the matter asserted. Here, Truck would say the statement of the guy would be an out-of-court statement offered to prove that indeed the truck ran the red light. In fact, it was being offered for the truth, so if there is no exception, then it would be struck as hearsay.

Excited utterance

W would say that it was an excited utterance. An excited utterance is a statement made about a startling event that was made under the excitement of that event. W would say that seeing the accident would be sufficient excitement and that it was indeed made under the influence of that excitement. Here, there is an urgent call for an ambulance -- this would indicate that the statement about the red light was also made under the excitement.

A court would find that there was an excited utterance.

Present sense impression

W would say that there was a PSI. There must be a statement about what someone currently is sensing. Here, the guy is making a statement about a past sensation -- seeing the accident.

A court would not find PSI.

A court would allow the testimony as an excited utterance.

6) Truck over the speed limit

Personal Knowledge -- speculation

Truck would say that George lacks personal knowledge. He did not see the accident and therefore cannot make an assessment of its speed.

Here, a court would say that he did not have personal knowledge and would disallow the statement.

Lay opinion.

Truck would say that it was an improper opinion. Lay opinions are allowed if they are helpful, do not require expertise, and can be made on the facts.

Here, it would be helpful to know the speed. However, he did not have the fact because of lack of personal knowledge. Generally, there is lay opinion allowed for estimations of speed.

Here a court would find that it was an inappropriate opinion because there was no personal knowledge.

Hearsay
Truck would say that it is hearsay because it was offered to prove that it was speeding. This was an out-of-court statement even by the guy testifying.

A court would find that it was offered to prove the truth and not admit it because there was no exception.

7) Woman's statement; Dan's silence
Hearsay.
Truck would say that it was offered to prove that it was Dan's fault.

There would be no exception because it was not under excitement (she said it calmly) and it was an opinion based on a recollection that would not allow a PSI.

A court would not allow it to be admitted.

Admission by silence and vicarious liability
W would say that it is not hearsay at all because it is an admission by a party opponent. Dan's silence would be a hearsay statement as an admission of his guilt. He would be subject to the rule about admissions of party opponents because he was working for Truck and the comment was in the scope of his employment.

It would be an admission if: 1) a reasonable person would respond and 2) he had an opportunity to respond. Here, he could say something but did not. Also, with an accusation like that, he should have denied it. He would say he did not have to.

A court would allow the admission by silence because it was not hearsay -- as an omission by a party opponent. His statement would be inadmissible because he was in the scope of employment.

California Bar Examination

Essay Questions and Selected Answers

February 2002

Question 6

Phil sued Dirk, a barber, seeking damages for personal injuries resulting from a hair treatment Dirk performed on Phil. The complaint alleged that most of Phil's hair fell out as a result of the treatment. At a jury trial, the following occurred:

A. Phil's attorney called Wit to testify that the type of hair loss suffered by Phil was abnormal. Before Wit could testify, the judge stated that he had been a trained barber prior to going to law school. He took judicial notice that this type of hair loss was not normal and instructed the jury accordingly.

B. Phil testified that, right after he discovered his hair loss, he called Dirk and told Dirk what had happened. Phil testified that Dirk then said: (1) "I knew I put too many chemicals in the solution I used on you, so won't you take $1,000 in settlement?" (2) "I fixed the solution and now have it corrected." (3) "Don't worry because Insco, my insurance company, told me that it will take care of everything."

C. Phil produced a letter at trial addressed to him bearing the signature "Dirk." The letter states that Dirk used an improper solution containing too many chemicals on Phil for his hair treatment. Phil testified that he received this letter through the mail about a week after the incident at the barbershop. The court admitted the letter into evidence.

D. In his defense, Dirk called Chemist, who testified as an expert witness that he applied to his own hair the same solution that had been used on Phil and that he suffered no loss of hair.

Assume that, in each instance, all appropriate objections were made. Did the court err in:

1. Taking judicial notice and instructing the jury on hair loss? Discuss.

2. Admitting Phil's testimony regarding Dirk's statements? Discuss.

3. Admitting the letter produced by Phil? Discuss.

4. Admitting Chemist's testimony? Discuss.

ANSWER A TO ESSAY QUESTION 6

Phil v. Dirk

This question raises issues under the Federal Rules of Evidence. (FRE)

1. Judicial Notice.

Under the FRE, judges may take Ajudicial notice@ of certain types of facts. To take judicial notice, the fact must be of the type that (sic) well-established and commonly known , including certain scientific facts B for example, that water freezes at 32°. In a civil case, if a fact is judicially notice (sic) and the judge so instructs the jury that fact is conclusively established.

Here, the judicial notice was improper. It is not commonly known or well-established that the type of hair loss suffered by Phil (P) was abnormal. Proving that P's hair loss was abnormal was part of P's case-in-chief to establish negligence. The judge cannot use his personal experience to judicially notice a material fact. The instruction was error.

The court erred in taking judicial notice.

2. Phil's Testimony Regarding Dirk's Statements.

Presentation. Witnesses are Acompetent@ to testify only if they have personal knowledge of the subject matter of their testimony. Here, Phil called Dirk and heard Dirk's statements himself, so Phil has personal knowledge.

Relevance. Only relevant evidence is admissible. Evidence is relevant if it has a tendency to prove a fact in issue. Here, Dirk's testimony tends to prove his negligence, so it is relevant.

Exceptions to Relevance: Substantial Risk of Prejudice

However, not all relevant evidence is admissible. A court may exclude relevant evidence if Aits probative value is substantially outweighed by the risk of prejudice.@ This rule is within the court's discretion. It would not apply here though because several Public Policy Exceptions apply: (1) Offers of settlement. Offers to settle claims will be excluded due to the public policy of encouraging settlements. The rule only applies if there is an actual claim however: that is there is a dispute as to (1) liability or (2) amount.

Here, D will argue that his statement regarding paying $1000 was clearly an offer of settlement and should have been excluded. Although D admitted he Aknew he put too many chemicals in@ the amount was still in dispute. Also, Phil had called him to complain about the hair loss, suggesting that Phil was threatening suit. This testimony should have been excluded.

(2) Remedial Measures. Evidence of remedial measures taken after the incident are not admissible for public policy reasons of encouraging remedial actions. Here, D's statement clearly shows the taking of remedial action and may be excluded. Evidence of remedial measures may be, however, admissible to prove ownership and control, or to rebut proof that greater care could not be taken. If D presented evidence that the chemicals he used were proper and could not be changed, then D's statement that he Afixed the solution@ could be admitted to rebut, for that purpose only. The courts should have allowed the testimony but given a limiting instruction in purpose.

(3) Liability Insurance.

Evidence of liability insurance is also excluded for the public policy to encourage the purchase of insurance. It generally is inadmissible, except to show ownership and control. D's statement is only about liability insurance, and ownership and control is not at issue.

The court should have excluded this testimony.

Hearsay. Hearsay is an out of court statement offered to prove the truth of the matter amended. D may argue that the testimony should have been excluded as hearsay.

However, all three of D's statements are admissible because they are non-hearsay as an admission of a party opponent. The court erred in allowing the testimony only on the public policy grounds discussed above.

3. Admitting Phil's Letter.

Form: P's testimony about the letter is proper since he has personal knowledge. He did not testify about whether the handwriting and signature were actually D's. He could only do this if he had personal knowledge of D's writing, or if the letter was a response letter to something he had written.

Presentation: Foundation, Authentication, Best Evidence Rule.

Foundation: P's testimony about receiving the letter a week after the incident at D's barbershop laid a proper foundation for the document.

Authentication: Documents must be authenticated before they can be admitted into evidence. They can be authenticated by testimony of a witness with personal knowledge about the document. P's testimony is sufficient.

Best Evidence Rule: This Rule requires that where the party is trying to prove the contents of the document, the Aoriginal@ document must be submitted, or if it is not the original document, an explanation that is satisfactory must be given as to why the original document is not submitted. Here, P is trying to prove the contents of the letter. P is not testifying about what the letter

said, but is actually introducing the letter into evidence. Since he is submitting the original, the rule is satisfied.

Relevance: The letter is relevant because it tends to prove that D was negligent, the issue in the case.

Hearsay: D may object that the letter is hearsay. However the statement in the letter is an admission by a party - opponent and is non-hearsay. The court did not err in admitting the letter.

4. Chemist's Testimony.

Form: D can produce Aexpert witnesses@ to testify in aid of his case.

Presentation: Expert witnesses must meet several requirements before they can testify. The testimony must be helpful to the factfinder and based on scientific evidence. The expert himself must be qualified, may rely on treatises or other scientific, well-established bases of information, and must have personal knowledge of the facts of the case being discussed (must make himself or herself aware of the facts).

Here, Chemist does not meet these requirements.

Chemist's testimony is not based on sufficiently scientific evidence. Conducting one experiment upon himself does not qualify as scientific and is not helpful to the fact-finder.

It is unclear whether Chemist is qualified to testify to this matter, whether he knows about chemical effects on hair loss for example. He did not mention relying on scientific evidence or treatises to conduct his experiment. He seems to have personal knowledge of the facts of the case if he knows the chemical solution used on Phil, but this is insufficient to qualify as an expert witness.

The court erred in admitting Chemist's testimony.

ANSWER B TO ESSAY QUESTION 6

I. Judicial Notice and Jury Instruction

A. Judicial Notice

A judge may take judicial notice on his own initiative. However, a judge may only take judicial notice of things of common knowledge, or that may be ascertained by reference to sources of undisputed accuracy.

Here, the judge took notice of the fact that the type of hair loss was not normal. He based this, not on common knowledge, or on reference to a source of undisputed accuracy, but on his own personal knowledge. This was not a proper basis for judicial notice. Therefore the court erred.

B. Jury Instruction.

The instruction itself, other than the error in the judicial notice, would not have been in error. The judge may instruct the jury that something has been judicially noticed. In a civil case such as this one, it would be conclusive. However, because the judicial notice was in error, so was the instruction.

C. Misconduct

A judge may not offer expert testimony in a trial over which he presides. His actions should subject him to discipline.

II. Phil's Testimony re: Dirk's Statements

A. Statement One

1. Logical relevance

The statement is relevant because it has Aany tendency@ to show that D was negligent and liable.

2. Legal relevance

Offers of settlement and negotiations are inadmissible to prove negligence or liability, due to a public policy of encouraging such measures. Here, D's first statement was a negotiation and an offer. However, spontaneous offers made when no case is pending are admissible. Here, all we know is that P called D to tell him what had happened. It appears no claim was pending, so admissible.

D may also argue it was an offer to pay medical expenses, inadmissible because of a policy encouraging such measures. However, it is doubtful that P was going to seek medical care **B** there is no mention of physical injury. Further, the exception only applies to the offer, and not surrounding statements, so the statement about too many chemicals would come in.

3. Hearsay

D's statement was made out of court, and is offered for its truth, so it may be hearsay.

However, under the FRE, admissions of a party opponent are admissible. Here, D is a party, and the statement is offered by P, his opponent. It is an admission because it is an acknowledgment of a fact in issue, namely D's liability. Thus, it is not hearsay.

If D testifies that he didn't use too much, the statement will also come in to impeach him as a prior inconsistent statement, so long as D's given a chance to explain or deny it.

Finally, it might also be a state of mind statement of D's intent to pay P $1000, which is an exception to hearsay.

Thus, the statement was admissible and in error.

B. Statement Two

1. Logical relevance

If he Afixed@ it, it must have been Abroken@ **B** negligence.

2. Legal relevance

Evidence of subsequent remedial measures are inadmissible to show liability or negligence due to a policy of encouraging such measures. Here, D said he fixed the solution after P's harm. Thus, it was a subsequent remedial measure.

However, if D denies the solution was his, or that a fix was possible, it will be admissible. Further, if there are no longer any samples of the solution used on P, the statement can come in to explain why D's new solution isn't defective, or that D destroyed evidence.

3. Hearsay

See above.

Party admission, so not hearsay. May be inconsistent, depending on D's testimony, Also could be present sense impression, if D made it while fixing the solution.

Therefore, the statement was admissible only if an exception to the bar on subsequent remedial measures applies. Probably an error to admit.

C. Statement Three

1. Logical relevance

Saying that the insurance company would cover it shows that D was liable.

2. Legal Relevance

Evidence of liability insurance is inadmissible to show liability or liability to pay, due to a policy encouraging insurance.

Here, D said his insurers would cover it. Therefore it is inadmissible unless used to prove ownership and control, which appears to be undisputed.

3. Hearsay.

Even if not barred by public policy, there are two levels of hearsay. The statement from D to P is an admission, as discussed above. However, the statement from the insurance company to D (Athey told me@) is also an out of court statement offered for its truth, and not under any exception, unless there are circumstantial guarantees of trustworthiness, necessity, and notice, none of which are present here. Thus, the court erred in admitting the statement.

III. The letter

A. Logical Relevance

It goes to show D was negligent.

B. Legal relevance

It may be more prejudicial than probative, if D's statement, above, came in. It might be unnecessary cumulative evidence that would not add much and would waste the jury's time.

C. Authentication

A document must be properly authentic. Here, it is a letter allegedly from D. P needed to authenticate.

P could have authenticated by having someone familiar with D's handwriting or signature testify it was his, or by having an expert or the jury compare it to a sample of D's handwriting or signature.

Or, if P had written a letter to D, and received this one in response, it could be authenticated. A response to their phone call was not sufficient. Since P did none of this, not authenticated, and error to admit.

D. Hearsay

Party admission **B** see above.

IV. Expert

An expert may give testimony on any subject beyond common experience that is helpful to the trier of fact.

The expert must be qualified, express reasonable certainty about their opinion, and have a proper factual basis, such as hypotheticals, things generally relied on by such experts, or personal knowledge. An expert may testify to ultimate issues.

The hair chemicals and effects appear to be beyond common experience. It would be helpful to the trier of fact to see if the expert found the chemicals to make him lose hair (that's why it's relevant).

However, it's unclear that Chemist was qualified as an expert in the subject of chemicals and hair loss. If he was, an opinion based on his experiment would be admissible. However, here, the expert gave no opinion as to any issue in this case, but merely testified about what he did to himself. The jury may not know enough to tell whether the experiment shows that P's claim has no merit. They needed an expert opinion to show them the two were comparable. Because he gave no opinion, he did not express any certainty.

Finally, if the Aexperiment@ is not let in as expert testimony, it must be authenticated. To have proper foundation for an experiment, there must be evidence that the experiment was conducted with the same materials, under the same conditions as the events at issue. No foundation was laid here.

Thus, admission as expert opinion or as evidence in its own right was in error.

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2003 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2003 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

QUESTION 3

Don was a passenger in Vic's car. While driving in a desolate mountain area, Vic stopped and offered Don an hallucinogenic drug. Don refused, but Vic said if Don wished to stay in the car, he would have to join Vic in using the drug. Fearing that he would be abandoned in freezing temperatures many miles from the nearest town, Don ingested the drug.

While under the influence of the drug, Don killed Vic, left the body beside the road, and drove Vic's car to town. Later he was arrested by police officers who had discovered Vic's body. Don has no recall of the events between the time he ingested the drug and his arrest.

After Don was arraigned on a charge of first degree murder, the police learned that Wes had witnessed the killing. Aware that Don had been arraigned and was scheduled for a preliminary hearing at the courthouse on that day, police officers took Wes to the courthouse for the express purpose of having him attempt to identify the killer from photographs of several suspects. As Wes walked into the courthouse with one of the officers, he encountered Don and his lawyer. Without any request by the officer, Wes told the officer he recognized Don as the killer. Don's attorney was advised of Wes's statement to the officer, of the circumstances in which it was made, and of the officer's expected testimony at trial that Wes had identified Don in this manner.

Don moved to exclude evidence of the courthouse identification by Wes on grounds that the identification procedure violated Don's federal constitutional rights to counsel and due process of law and that the officer's testimony about the identification would be inadmissible hearsay. The court denied the motion.

At trial, Don testified about the events preceding Vic's death and his total lack of recall of the killing.

1. Did the court err in denying Don's motion? Discuss.

2. If the jury believes Don's testimony, can it properly convict Don of:
   (a) First degree murder? Discuss.
   (b) Second degree murder? Discuss.

Answer A to Question 3

1. Did the court err in denying Don's motion?

The issue here is whether the court properly denied Don's motion to exclude evidence of the courthouse identification.

Right to Counsel:

Don's first ground for having the identification evidence excluded is that the procedure violated his federal constitutional rights to counsel.

Sixth Amendment: The Sixth Amendment of the US Constitution, which is applicable to the states through the Due Process Clause of the Fourteenth Amendment, affords citizens the right to counsel during all post-charge proceedings. The Sixth Amendment right to counsel only applies after a Defendant has been formerly charged. Here, Don was arraigned and therefore the Sixth Amendment right to counsel for his post-charge proceedings applies.

Don is arguing that the identification should be excluded on the grounds that it violated his federal constitutional grounds that the identification procedure violated Don's federal constitutional rights to counsel. However, Don's attorney was present with him during the identification. Don is going to argue that they were not made aware of the identification and given an opportunity to object to it. His lawyer was told of the identification and its methods, however, it is unclear as to when the attorney was advised of this information. It seems more likely that he was told after the identification had already been made.

However, the Sixth Amendment right to counsel does not apply to identifications of the suspect, since it's not a proceedings for purposes of the Sixth Amendment right to counsel.

Fifth Amendment: Miranda warning: Miranda warnings also afford the defendant of right to counsel. This right is to have an attorney present during all interrogation or questioning by the police. Miranda warnings are given to someone upon arrest. They include the right to remain silent and that everything said can be used in court against him, the right to have an attorney present and the right to have an attorney appointed by the court if the arrestee cannot afford one. [In] this case the right to counsel issue did not arise as a Miranda violation, since there was no questioning or interrogation of the police, and the Defendant has already been arraigned.

This case involves the Sixth Amendment right to counsel in all post charge proceedings. There are certain occasions where there is no right to counsel, for example, a photo identification of a suspect, taking of handwriting or voice samples, etc.

Because the identification of a suspect by a witness does not afford the Si[x]th Amendment right to counsel, and because Don's lawyer was actually present with him during the identification, the court was probably correct in denying Don's motion to exclude the evidence on this ground.

Due Process:

Don's second ground for having the identification evidence excluded is violation of due process of law.

Identification

The police may use different methods wherein witnesses can identify suspects as the crime doer. These methods include photo identification, lineups and in-court identifications. The identification process must be fair to the suspect and not involve prejudice and therefore not violate his due process rights. For example, the lineup must include others of similar build and appearance as the suspect.

The police in this case were going to have the Wes [sic] identify Don (or the murderer) through photo identification. However, they took him to the courthouse knowing that Don was having his preliminary hearing that day. The photo lineup did not have to be at the courthouse, in fact it is usually at the police station. This questions the officers' conduct and intent. Don is going to argue that this was done with the express purpose of having Wes see him at the hearing and associate him to the crime. This is prejudicial to Don and a possible due process violation.

The police will argue that it was mere coincidence that they ran into Don in the courthouse and that their intent was to have Wes identify the murderer [sic] through a photo identification. They will further argue that Wes told the officer he recognized Don as the killer without any request by the officer. Therefore his identification was spontaneous and not prompted. Therefore it did not violate Don's due process rights.

However it is very suggestive to a witness to see a defendant charged with the crime and make the identification that way. If Wes had identified Don independent of that situation then the identification would have been valid and there would be no due

process violation. However, that was Wes' first and only identification of Don, and Don is going to argue that it was prejudicial and violated due process of law.

Officer's testimony

Don is further claiming in his motion to exclude that the officer testifying to the identification would be inadmissible hearsay.

Relevance:

For any testimony or evidence to be admitted it must first be relevant. Here the officer's testimony will be established as relevant since it involves a witness' identification of the defendant as the murderer.

Hearsay:

Hearsay is an out-of-court statement made by a declarant that goes to the truth of the matter asserted. Hearsay is inadmissible generally because of the Defendant's right to confront and cross-examine witnesses. The officer is going to testify that he heard Wes tell him that he recognized Don as the killer. The statement was made out of court and goes directly to prove that Don is the killer. Therefore officer's testimony is hearsay. The question then is, is it admissible hearsay? There are exceptions to the hearsay rule depending on whether the declarant is available or unavailable to testify. There is no indication whether Wes is available or unavailable so we must look at the possible exceptions to the hearsay rule.

Present Sense Impression: Present sense impression is an exception to hearsay. This is when a declarant is expressing a present impression at that moment without an opportunity to reflect. The State will argue that Wes, upon seeing Don, merely expressed that he recognized him as the murderer. It was an impression at the present he was expressing. However this exception will probably not apply in this case since [sic].

State of Mind: The state of mind exception is a statement by the declarant that reflects the declarant's state of mind. For example, if the declarant said he was going to Las Vegas this weekend, that statement would be admissible to show that defendant intended on going to Las Vegas for the weekend. This is an exception to hearsay and would be admissible. The state of mind exception does not apply to this case.

Excited Utterance: A statement made when the declarant is an excited state caused by

an event and has not had a chance to cool down. Nothing in the facts here indicate that Wes' identification of Don was an excited utterance and therefore this exception does not apply.

Admission by Party Opponent: Statements made by the opposing party are usually admissible as an exception to hearsay. Here, since the statement the officer is going to testify to is not that of Don's but rather Wes, the exception does not apply here [sic].

Declaration Against Interest: When a declarant makes a statement that goes against his own interests, that statement is admissible as an exception to the hearsay rule. Again, Wes' statement was not against his own interest but against Don's interest and therefore this exception is not applicable here.

None of the other exceptions, including dying declaration, business record, are applicable here. It appears as though the officer's testimony is inadmissible hearsay. Therefore the court erred in denying Don's motion on this ground.

2. (a) First Degree Murder

Under common law, murder was homicide with malice aforethought. There were three types: murder, voluntary manslaughter and involuntary manslaughter. Statutes have categorized murder into de [sic].

The issue here is that if the jury believes Don's testimony, can Don be convicted of first degree murder[?]

Murder is the killing of another human being. It requires an actus reus (physical act) and a mentus rea (state of mind). The defendant must have the requisite state of mind in conjunction with a physical act to be guilty of murder. The state of mind does not have to be the specific intent to kill; it could be a reckless disregard or an intent to seriously injure or harm.

First degree murder is murder with premeditation or murder during the commission of violent felony (felony murder).

Premeditation: Premeditation and thus first degree murder, is a specific intent crime. Premeditation involves the prior deliberation and planning to carry out the crime in a cold, methodical manner.

In this case there are no facts to indicate that Don planned or premeditated Vic's murder. In fact, according to the facts, Don was intoxicated and has no recollection of the killing.

Intoxication: There are two states of intoxication, voluntary and involuntary. Voluntary intoxication involves the voluntary ingestion of an intoxicating substance. It is not usually a defense to murder. Voluntary intoxication can be a defense to specific intent crimes, if it was not possible for the defendant to have the state of mind to form intent.

Involuntary intoxication is the involuntary ingestion of an intoxicating substance, such as with duress, without knowing of its nature, prescribed by a medical professional, etc.

In this case, Don was intoxicated since he ingested the hallucinogenic drug. Although Don was aware of what he was taking when he took it, he will argue that he was forced to take it under duress. Since Vic threatened Don that he would abandon him in freezing temperatures far from any town, Don was forced to take the drug. Although involuntary intoxication is not a defense to murder, it is a proper defense to the specific intent required for premeditation and thus first degree murder.

Since Don did not premeditate the murder nor have the specific intent for premeditated murder, he cannot be convicted of first degree murder.

Felony Murder: Felony murder is murder committed during the commission of an inherently dangerous felony. There are no facts to indicate that Don was committing an inherently dangerous felony, independent of the murder itself. Therefore felony murder probably does not apply in this case and Don cannot be convicted of First degree murder.

2. (b) Second Degree Murder

Second degree murder is all murder that is not first degree and is not made with adequate provocation to qualify for Voluntary Manslaughter. Second degree murder does not require specific intent.

The issue here is if the Jury believes Don's testimony, can Don be properly convicted of Second degree murder?

Don is going to use the defense of intoxication. Although intoxication is not a defense to murder, involuntary intoxication can negate a required state of mind. Since it will

probably be determined that Don's intoxication was involuntary due to duress (see discussion above), Don will argue that he did not have the state of mind required to commit second degree murder. He will be compared to a person who is unconscious. An unconscious person cannot be guilty of murder. Don will argue that he was so heavily intoxicated that he has no recollection of the occurrences and therefore could not have had even the general intent to kill or seriously injure.

Voluntary manslaughter: in order for a murder charge to be reduced to voluntary manslaughter there must be adequate provocation judged by a reasonable standard and no opportunity to cool down and the defendant did not in fact cool down. Nothing in these facts suggests that Don acted under the heat of passion or was provoked in any way. In fact Don does not remember the killing and therefore there is no evidence of provocation.

Since was [sic] involuntarily intoxicated, he could not have the requisite state of mind for murder. Therefore he cannot be convicted of either first degree or second degree murder.

Answer B to Question 3

I. Court's Denial of Don's (D's) Motion

A. Violation of D's right to counsel

The Sixth Amendment guarantees defendants the presence of counsel at all critical stages of a criminal proceeding which results in imprisonment, as well as providing that the police may not elicit information from a defendant in the absence of counsel once criminal proceedings have been initiated against the defendant, usually in the form of an arraignment. Among those stages of a criminal proceeding which are considered critical are a preliminary hearing, at trial, when making a plea, at sentencing, and at any lineup or show-up conducted following the filing of charges against the defendant.

In this instance, the identification of D occurred after he was arraigned, and thus D did have a right to have counsel present during any lineup or show-up. However, this right to counsel does not extend to photographic identifications, which are not considered adversarial proceedings, but instead only to in-person lineups or show-ups. Thus, the police in this instance will claim that they simply took Wes (W) to the courthouse for the express purpose of having him attempt to identify the killer from photographs of several suspects, something for which D was not entitled to the presence of counsel, and the fact that W witnessed D emerging from the courthouse was not part of their plan, and something for which they should not be held responsible. Further, the police will refer to the fact that when D emerged from the courthouse they made no request that W identify D, but rather W made such an identification completely of his own volition.

D's counsel will most likely argue that the police were well aware that D would be at the courthouse at that particu[la]r time, and that bringing W to the courthouse ostensibly to view photographs was in reality simply a veiled effort to conduct a one-on-one show-up in which W could identify D, and that D thus had the right to counsel at such a proceeding.

In this instance, the court did not err in denying D's motion based on grounds that the identification procedure violated D's Sixth Amendment right to counsel. The Sixth Amendment guarantees the right to counsel at any post-charge lineup or show-up in part to ensure that the defendant's attorney will be aware of any potentially unfair methods utilized in the identification process, and can refer to these inequities in court. Because D's counsel was in fact present when W saw and identified D, D's attorney would be able to raise any objections he had to the identification, and thus D was not ultimately denied his right to counsel. Thus, even if the court were to find that the police bring[ing]

W to the courthouse amounted to a show-up in which D was entitled to the presence of counsel, D was with his attorney when the identification was made, and therefore his right to counsel was satisfied.

B. The identification as violative of due process of law

The Due Process Clause of the 14th Amendment, made applicable to the federal government by the Fifth Amendment, ensures that the prosecution bears the burden of proving each element of a criminal case against defendant beyond a reasonable doubt, and also guarantees that a defendant will be free from any identification which is unnecessarily suggestive or provides a substantial likelihood of misidentification.

In this instance, D's attorney would probably contend that the police bringing W to the courthouse on the date of D's prelimi[na]ry hearing to view photographs of suspects in fact raised a substantial probability that W would in fact observe D emerging from the courthouse, which is exactly what occurred. D's attorney would contend that any identification made in this context is extremely suggestive, as the fact that D is emerging from a court of law and was in the presence of an attorney places D in a situation in which he appears to be of a criminal nature, and is likely to lead an eyewitnesses to mistakenly identify D based solely on these circumstantial factors. Further, D's attorney would argue that the situation was unnecessarily suggestive because the witness could believe the fact that criminal proceedings had already been initiated against D, thus warranting his appearance in court, sufficient evidence, perhaps even in the form of testimony by other eyewitnesses, exists which incriminates D, and may make W more likely to believe that D was the man he had seen commit the killing.

The court probably did not err in denying D's motion based on the fac[t] that W's identification was violative of due process of law. The 14th Amendment guarantees against unnecessarily suggestive identifications, or identifications posing a substantial likelihood of misidentification, are intended primarily to remedy lineups in which a criminal defendant is placed in a lineup with other individuals to whom he bears no physical similarities whatsoever. It is unlikely that a court would find that a witness seeing an individual emerging from a courthouse would be so prejudicial as to lead to an unnecessarily suggestive identification.

C. Hearsay

Hearsay is an out-of-court statement being offered to prove the truth of the matter asserted. In this instance, the officer's planned testimony that W had identified D at the courthouse would qualify as hearsay, as the officer would be testifying to a statement made by W ou[t] of court in order to prove that W identified D.

However, instances in which a witness has previously identified a suspect are admissible as exceptions to the hearsay rule even if the defense is not attacking the identification. Such statements of prior identification are considered to possess sufficient guarantees of trustworthiness that the party against whom they are offered is not denied his Sixth Amendment right to confront witnesses against him. Therefore, the court did not err in denying D's motion to exclude the evidence of the courthouse identification because the officer's testimony would in fact not be inadmissible hearsay.

II. Crimes for which D may be properly convicted

A. First degree murder

In order to convict a defendant of first degree murder, the prosecution must prove beyond a reasonable doubt that the defendant unlawfully killed a human being with malice aforethought, and that the killing was either premeditated and deliberate or was committed during the commission or attempted commission of an inherently dangerous felony (felony murder). In order to prove malice aforethought, the prosecution must show that defendant acted with an intent to kill, an intent to inflict serious bodily harm, acted with a depraved and malignant heart, or was guilty of felony murder.

In this instance, D's acts appear to be both the actual and proximate cause of Vic's (V's) death, as the facts indicate that D killed V and dumped his body beside the road. However, D would probably be found not to possess the requisite intent to kill or to inflict serious bodily harm by way of his raising the excuse of involuntary intoxication. Intoxication, whether voluntary or involuntary, may be raised to negate the presence of an essential element of a crime, generally intent. In this instance, D's intoxication would be involuntary, as he did not wish to take the hallucinogenic drug V offered, but was forced to when he feared that if he did not, he would be abandoned in freezing temperatures and his life would be in jeopardy. Ingesting a drug under such circumstances is the virtual equivalent of being unknowingly slipped the drug, or being forced to ingest the drug upon threats of death. As such, D was involuntarily intoxicated, and his intoxication resulted in his having no recall of the events between the time he ingested the drug and his arrest. D thus will be found not to have posssessed the requisite intent to kill or intent to inflict serious bodily harm necessary for a finding of first

degree murder. Further, even if D were not able to rely on the excuse of intoxication in order to negate a requisite mental state, there is no evidence that the killing was premeditated or deliberate, and because it did not occur during the commission or attempted commission of an inherently dangerous felony, there is no basis for finding D guilty of first degree murder.

2. Second degree murder

The jury most likely could not properly convict D of second degree murder, either. Second degree murder also requires the prosecution to prove beyond a reasonable doubt that the defendant intentionally killed a human being with malice aforethought, though it relieves the prosecution of proving the additional elements of premeditation and deliberation or felony murder.

In this instance, D's involuntary intoxication resulting from his unwillingly ingesting a[n] hallucinogenic drug should sufficiently relieve him from being found guilty of second degree murder, as it negates the requisite mental states of intent to kill or intent to inflict serious bodily harm as discussed above. Further, D should not be convicted under a theory of depraved or malignant heart, as such a finding requires proof of reckless conduct which created a substantial and unjustifiable risk of death or serious bodily harm. A defendant must be consciously aware of the risk he is creating to be guilty of a depraved heart killing, and D's involuntary intoxication would most likely relieve him of guilt, since he had no recall of the events between the time he ingested the drug and his arrest, and would most likely not be considered to have appreciated the risk of his conduct.

If D were found to have been intoxicated voluntarily, rather than involuntarily, he could be properly convicted of second degree murder for V's killing. However, if the jury believes D's testimony that he only ingested the hallucinogenic drug because he feared if he did not he would be left out in the cold and could potentially die, they must find that D was involuntarily intoxicated, which would relieve him of guilt for second degree murder.

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2003 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2003 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

Question 3

Dan was charged with aggravated assault on Paul, an off-duty police officer, in a tavern. The prosecutor called Paul as the first witness at the criminal trial. Paul testified that he and Dan were at the tavern and that the incident arose when Dan became irate over their discussion about Dan's ex-girlfriend. Then the following questions were asked and answers given:

17. What happened then?

[1] A: I went over to Dan and said to him, "Your ex-girlfriend Gina is living with me now."

Q: Did Dan say anything?

[2] A: He said, "Yeah, and my buddies tell me you're treating her like dirt."

[3] Q: Is that when he pulled the club out of his pocket?

A: He sure did. Then he just sat there tapping it against the bar.

[4] Q: Tell the jury everything that happened after that.

[5] A: I said that he was a fine one to be talking. I told him I'd read several police reports where Gina had called the police after he'd beaten her.

Q: Do you believe the substance of those reports?

[6] A: You bet I do. I know Gina to be a truthful person.

Q: How did Dan react to this statement about the police reports?

A: He hit me on the head with the club.

Q: What happened next?

[7] A: I heard somebody yell, "Watch out– he's gonna hit you again!" I ducked, but the club hit me on the top of my head. The last thing I remember, I saw a foot kicking at my face.

Q: What happened then?

[8] A: Dan must have kicked and hit me more after I passed out, because when I came to in the hospital, I had bruises all over my body.

At each of the eight points indicated by numbers, on what grounds could an objection or a motion to strike have properly been made, and how should the trial judge have ruled on each? Discuss.

Answer A to Question 3

1. The evidence is relevant. Logical relevance consists of a tendency in reason to support or contend a fact or issue of consequence in the case. Here, the statement is offered to show Dan's motive for attacking Paul. The statement is also legally relevant, meaning that it is not excluded on any extrinsic policy grounds and its probative value is not substantially outweighed by its prejudicial impact, confusion of the issues, misleading the jury, waste of time, etc.

The defense will likely object to hearsay. Hearsay consists of an out-of-court statement offered for the truth of the matter asserted. The statement is not an admission. An admission occurs when a party to the action admits a fact of relevance to the action. Here, Paul is not a party to the action. He is merely a witness for the prosecution. The prosecutor will argue that the statement is not offered for the truth of the matter asserted, but to show its affect[sic] on the recipient's state of mind. In other words, we don't care if the exact words themselves are true (whether Gina is in fact living with Paul), we are trying to explain why Dan would have become incensed enough to attack Paul.

The trial court should rule that the statement is not hearsay because it is not being offered for the truth of the matter asserted.

2. The evidence is relevant. It is logically relevant because it is being offered to show Dan's angry state of mind. It is legally relevant because there are no policy reasons for excluding it, and its probative value is not outweighed by its prejudicial impact.

The defense will object on hearsay grounds. The prosecutor will argue that Dan's statement is an admission. It is a statement by a party, and it tends to admit that Dan was in fact angry with Paul, a fact of consequence in this action. Admissions are not hearsay under the federal rules. However, contained within Dan's statement is another hearsay statement, a statement by Dan's buddies.

Thus, the defense would object to hearsay within hearsay. The prosecutor should respond that the statement by the buddies is not being offered for the truth of the matter asserted, but to show Dan's state of mind. In other words, it is immaterial whether Paul was in fact treating Gina like dirt, what matters is that Dan was told he was, and this made Dan angry.

Because the prosecutor has an adequate response to both hearsay objections, the statement should be admitted.

3. The defense will object to this question as leading. Leading questions are not allowed on direct examination. Because Paul is being directly examined by the prosecutor, the prosecutor may not lead Paul, subject to certain exceptions inapplicable here, such as Paul being declared a hostile witness, foundational questions, etc. This is a question of consequence in the matter, and the prosecutor's question suggests the answer sought by the prosecution. As such, it is leading, and should have been objected to and sustained

by the judge.

The question did call for relevant evidence. The evidence called for was both logically relevant (whether Dan had a club with him and brandished it) and legal relevance (no policy reasons and it is very probative).

4. The defense could object to this question on a variety of grounds, but would probably object to the question as vague and calling for a narrative response. Under the federal rules, direct questioning of witnesses is to proceed by question-and-answer. The attorney is supposed to give some structure to the question-and-response process. He may not simply ask an open-ended question a broad [sic] answer and allow the witness to answer as he sees fit. He also may not ask a question that has no degree of specificity with respect to the information sought. Here, "Tell the jury everything" provides no guidance to the witness as to the information sought.

5. "I said that he was a fine one to be talking."

This statement is relevant. It is logically relevant because it tends to show further Dan's anger towards Paul and it is legally relevant, because it is probative and there are no policy reasons for excluding it.

The defense will object that the statement is hearsay. It is not an admission, because Paul is not a party to this action. The prosecutor will again argue that it is not being offered for its truth, but simply to show its effect on Dan. In other words, it is not offered to show whether Dan has a right to be talking or not, but to show further its effect on Dan's state of mind and why Dan became angry enough to attack Paul. This is a close call, but the judge should probably admit the statement because it is not offered for its truth.

"I told him I'd read several police reports where Gina had called the police after he'd beaten her."

The defense will object to relevance. The statement is logically relevant (it tends to show Dan's violent nature). However, it is not legally relevant. Its probative value is substantially outweighed by the danger of prejudice. Here, there is no evidence that Dan was convicted of abusing Gina. This would be admissible. Here, the jury may be misled into thinking that Gina's calls are sufficient proof of Dan's guilt, and this is improper prejudice. The judge should exclude the evidence on legal relevance grounds.

The defense will also object on the grounds of the best evidenced rule. This rule requires that the contents of a writing be introduced where: (1) the writing is of consequence in the matter; or (2) a witness's knowledge comes from the writing and the witness testifies as to the actual contents of the writing. Here, Paul is testifying to the contents of the police reports. He's testifying that the reports stated that Gina called the police and told them that Dan beat her. The prosecutor must introduce an original or accurate copy (unless he establishes they were unavailable) of the reports into evidence to show this evidence. The

best evidence rule objection should be sustained.

The defense may also object on the grounds of hearsay within hearsay. The entire second sentence is an out-of-court statement by Paul, and is thus hearsay (not an admission because Paul is not a party). Unlike previous statements by Paul, this statement is arguably being offered for the truth of the matter asserted. It is being offered to show that Dan beat Gina. The prosecutor might argue that this is untrue, we don't care whether Dan beat Gina, we only care that Dan was upset about being accused in public. The judge might accept this as justification or it might not (even if it accepted the prosecutor's motivation, the jury might still take it to show that Dan is a "girlfriend beater", and this further supports exclusion of the evidence as more prejudicial than probative).

The police reports and the statements within the police reports also constitute hearsay. While the police report is admissible as an official record, because the statements are written by individuals with a duty to accurately convey the information in them, Gina's statements are still hearsay. They do not fit within the official record or business record exception, because Gina is not under a duty to convey the information. She had no obligation to make the calls to the police. Thus, Gina's statements are hearsay and must be excluded. (Note: the federal catch-all exception would also not allow introduction of Gina's statements.)

Finally, the defense might object that this is character evidence. Character evidence is evidence of one's proclivity to act in conformity with a specific character trait on the occasion in question. Here, the defense will argue that the evidence is being introduced to show that Dan has a character trait of violence, and that he acted in conformity with that trait here. This argument should be sustained. The prosecution may not introduce affirmative evidence of specific acts until the defendant has opened the door to such evidence, by either supporting his own character, or attacking the victim's character. Here, there is no evidence that either has occurred, and the evidence should be excluded as improper character evidence.

6. This evidence is relevant. It is logically relevant, because, if admitted, it would bolster any statements by Gina in the case. There are no policy grounds for its inclusion, and it is probative.

However, the defense will object that this is improper character evidence. A party may not bolster or support the credibility of its own witness (a hearsay declarant is a witness, and may be impeached or have her character attacked as any other witness) until the witness's credibility has been attacked. Here, the prosecutor has offered opinion evidence by Paul to support Gina's credibility and character trait for truthfulness. The prosecutor may not do this until and unless the defense attacks Gina's credibility.

The defense should object on character grounds and the judge should sustain the objection.

7. “Watch out–he’s gonna hit you again!”

The statement is relevant. It is logically relevant because it tends to show that Dan hit Paul, and more than once. It is legally relevant because its probative value outweighs its prejudicial impact and there are no policy grounds for its exclusion.

The defense will object to this statement as hearsay. It is an out-of-court statement, and it is being offered for the truth of the matter asserted. However, the federal rules allow the admission of certain out-of-court statements that are admittedly hearsay when the circumstances surrounding the statement inherently support the reliability of the statement made. This applies to excited utterances, present sense impressions, statements of physical condition, and present state of mind. Here, the prosecutor will argue that the statement is an excited utterance. The statement was made spontaneously while under the stress of excitement, so there was little chance to fabricate the substance of the statement. Even though we do not even know the identity of the declarant, the statement is admissible. (Note: The statement would also qualify as a present sense impression, as it was made concurrently with one’s sensory (visual) inputs and thus is inherently reliable because there was no time to consider what one was saying).

“The last thing I remember, I saw a foot kicking at my face.”

The defense might object to this statement as not based on personal knowledge and lacking foundation, meaning that the statement is made under circumstances that indicate that Paul may not have the best recollection of the events. However, this is not a valid objection. The defense should cross-examine Paul about his ability to accurately recall these occurrences, however.

8. This statement, if admitted, is relevant. It is logically relevant because it indicates further malicious attacks by Dan and damages. It is legally relevant because it is probative and no policy grounds exist for its exclusion.

The defense will object that the testimony is not based on personal knowledge, is speculative, and there is a lack of foundation to support the statements. Paul has not indicated he personally observed the kicking, he is merely speculating that that is what occurred. Without more foundation, this objection should be sustained. Paul’s statement about the bruises all over his body, however, are based on personal knowledge and admissible.

Answer B to Question 3

① "Your ex-girlfriend is living with me now."

Relevance - to show that D became angry because P was living with D's ex-girlfriend.

Hearsay - Hearsay is an out-of-court statement offered at trial to prove the truth of the matter asserted.

D could object on hearsay grounds because the statement was made by P, outside of the court.

However, the prosecution could successfully argue that the statement is not being offered for its truth. The prosecution is offering the statement to show that it provoked a reaction in D which led to his assault on P. It is offered for its effects on the listener, not for its truth.

Admission– The prosecutor may also argue that if the statement were considered hearsay it would still be admissible under the exception for admissions of a party-opponent. This argument would lose, however, because P is not a party. He is a complaining witness but the government is the party.

② "Yeah, and my buddies tell me you're treating her like dirt."

Relevance - to show D's anger over P's treatment of the ex-girlfriend.

Hearsay - An objection could be made because this is an out-of-court statement offered for its truth.

Not for its truth - However, the prosecution could successfully argue that the statement is not offered for its truth but rather to show D's state of mind, or motive for the alleged assault.

Exceptions

Admission - Even if considered hearsay, the statement is admissible because it is being offered against a party (D) by his opponent (the prosecution).

State of Mind - In addition, the statement would be admissible to prove D's state of mind when the statement was made. The statement tends to show that D was feeling ill will towards P and that this motivated the assault.

③ "Is that when he pulled the club out of his pocket?"

Relevance - to show that D assaulted P with a club.
Leading Question - A leading question is one that suggests the correct answer to the

witness. Leading questions are permissible where questioning a hostile witness, clarifying background information, or where a witness has a difficulty remembering.

Here, P is not a hostile witness, he was called by the prosecution as their first witness. As none of the other circumstances are present, the leading question here (it suggested the right answer was yes) was impermissible and should have been disallowed.

Assumes Fact Not in Evidence - The question is also objectionable because it assumes facts not in evidence, namely, that D had a club, and that D the club [sic] from his pocket.

④ "Tell the jury everything that happened after that."

Narrative - This question is objectionable because it calls for a narrative. The lawyer must interrogate the witness, not merely call him to the stand and let him tell a story.

Compound - The question could be construed as compound because it calls for the witness to answer what should have been multiple questions all at once.

⑤ a. "I said he was a fine one to be talking." b. "I told him I'd read several police reports where Gina had called the police after he'd beaten her."

a. Is hearsay because it is an out-of-court statement offered for its truth and no exceptions apply.

a. Is also objectionable because it is irrelevant–it has no tendency in reason to make a material fact more or less probable.

403 - Undue Prejudice - Even where evidence is relevant, it may be excluded by the court due to its probative value being outweighed by its danger of unfair prejudice, confusing the issues, misleading the jury, or delay.

Here the evidence should be excluded under 403. The probative value is slight if existent and the danger of confusing the issues (D assaulting P versus D assaulting Gina) is great.

b. The Police Reports

Relevance - to show that D is a violent person or to show the effect this statement had on D.

Hearsay - The statement was double hearsay: ① It is the statement by P at the bar ② relaying the content of police reports. In order for double hearsay to be admissible there must be an exception or exclusion for each level of hearsay.

① P's Statement - The prosecutor could argue it is non-hearsay because it is offered to show its effect on D, not for its truth.

② The Police Reports - Police reports may be admissible as business records if made by someone in the course of their employment with a duty to make such recordings. However, police reports are not admissible as a business record in a criminal case, as we have here. Further the reports contain a hearsay statement by Gina, who was under no duty to make accurate statements.

Therefore the statement should be stricken.

Best Evidence Rule (BER) - Where the contents of a document are at issue or a witness testifies to something known only from reading a document, the BER requires production of the original document or a valid explanation for its absence.

Here, P testified to contents of police reports. His only knowledge appears to derive from reading the reports. Thus the BER requires their production or an explanation.

Character Evidence - Evidence to show conduct in conformity therewith is inadmissible unless the defendant first opens the door by bolstering his own credibility.

Here, the defendant D has put on no evidence. Also, the prosecution could only rebut by opinion or reputation evidence, not by extrinsic evidence of specific acts, as P testified to.

Relevance - To show Gina told the truth and that therefore D is a violent person.

Personal Knowledge - P lives with Gina and is thus familiar with her character for truthfulness.

⑥ "I know Gina to be a truthful person."

Improper Bolstering of a Witness/Declarant

P improperly testified to Gina's character for truthfulness. A party may bolster the credibility on a witness/declarant with reputation/opinion evidence of truthfulness only after the credibility of the witness has been attacked.

Here, Gina has not testified, nor did D attack her credibility as a declarant, thus the testimony should be stricken.

⑦ "Watch out–he's gonna hit you again!"

Relevance - to show D attacked P

Hearsay - out-of-court, and offered for its truth, therefore it is hearsay.

Exceptions

Excited Utterance - A statement made concerning a startling event while under the stress of the exciting event is admissible as a hearsay exception.

Here, the statement concerned a startling event, an assault with a club, while the declarant was under the stress of the event. The statement appears to have been made in between blows and under great excitement.

Present Sense Impression - A statement made describing an event while the event is occurring or immediately thereafter is admissible as an exception to the hearsay rule.

Here the out-of-court statement was made while the declarant was observing the attack on P. Therefore the statement is admissible.

⑧ "D must have kicked me more after I passed out . . . "

Relevance - to show D assaulted P.

Lack of Personal Knowledge - A witness may only testify to things they have personal knowledge of.

Here, P testified to what happened after he had passed out. A person obviously has no personal knowledge of events taking place while they were unconscious. Thus the testimony should have been stricken.

ESSAY QUESTION AND SELECTED ANSWERS

JULY 2004 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from July 2004 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 4

Victor had been dating Daniel's estranged wife, Wilma. Several days after seeing Victor and Wilma together, Daniel asked Victor to help him work on his pickup truck at a nearby garage. While working under the truck, Victor saw Daniel nearby. Then Victor felt gasoline splash onto his upper body. He saw a flash and the gasoline ignited. He suffered second- and third-degree burns. At the hospital, he talked to a police detective, who immediately thereafter searched the garage and found a cigarette lighter. Daniel was charged with attempted murder. At a jury trial, the following occurred:

a. Tom, an acquaintance of Daniel, testified for the prosecution that Daniel had complained to Tom that Victor had "burned" him several times and stated that he (Daniel) would "burn him one of these days."

b. Victor testified for the prosecution that, while Victor was trying to douse the flames, Daniel laughed at him and ran out of the garage.

c. At the request of the prosecutor, the judge took judicial notice of the properties of gasoline and its potential to cause serious bodily injury or death when placed on the body and ignited.

In his defense, Daniel testified that he was carrying a gasoline container, tripped, and spilled its contents. He denied possessing the lighter, and said that the fire must have started by accident. He said that he ran out of the garage because the flames frightened him.

d. On cross-examination, the prosecutor asked Daniel, "Isn't it true that the lighter found at the garage had your initials on it?"
The prosecutor urged the jury to consider the improbability of Daniel's claim that he had accidentally spilled the gasoline.

e. During a break in deliberations, one juror commented to the other jurors on the low clearance under a pickup truck parked down the street from the courthouse. The juror measured the clearance with a piece of paper. Back in the jury room, the jurors tried to see whether Daniel could have spilled the gasoline in the way he claimed. One juror crouched under a table and another held a cup of water while simulating a fall. After the experiment, five jurors changed their votes and the jury returned a verdict of guilty.

Assume that, in each instance, all appropriate objections were made.

1. Should the court have admitted the evidence in item a? Discuss.
2. Should the court have admitted the evidence in item b? Discuss.
3. Should the court have taken judicial notice as requested in item c? Discuss.

4. Should the court have allowed the question asked in item d? Discuss.
5. Was the jury's conduct described in item e proper? Discuss.

Answer A to Question 4

4)

A. Tom's (T) Testimony Re Daniel's (D) Statement

The issue is whether T's testimony regarding Daniel's prior statement that D would "burn him (Victor- V) one of these days" is admissible against D.

Logical Relevance

Evidence is logically relevant if it has the tendency to make any fact of consequence in the case more probable or less probable than it would be without the evidence. Here, the main issue of the case is whether D tried to murder V. The statement that D would burn V at some point is relevant to prove that D acted intentionally, rather than accidentally, as claimed.

Legal Relevance

Evidence must be discretionarily relevant and there must not be any extrinsic public policy reasons against its admission. The judge has the discretion under FRE 403 to exclude relevant evidence if the probative value is substantially outweighed by the danger of unfair prejudice, jury confusion, misleading or waste of time, among other reasons.

Here, the statement that D would "burn" V is probative of D's motive for acting and for rebutting D's claim that it was an accident, however it is also highly prejudicial to D. All evidence is prejudicial to one party, however, and 403 will only exclude it if the prejudice substantially outweighs probativeness, which is the not the [sic] case here.

As there are not public grounds for excluding the evidence, it would be logically and legally relevant.

Presentation

T testified apparently in the prosecution's case-in-chief. Because T was the person spoken to, he has personal knowledge of the statement and, so long as he could communicate it and appreciate his oath to tell the truth, would be competent to testify.

Hearsay

Hearsay is a statement made by the declarant other than at trial that is introduced for the purpose of proving the truth of the matter asserted in the statement. Hearsay is inadmissible unless it falls within one of the hearsay exceptions within the federal rules. Here, the statement was made out[-]of[-]court by D in a conversation with T.

Truth/Non-Hearsay

The prosecution will argue that it is not introducing the statement for it's [sic] truth, but rather as circumstantial evidence of D's state of mind, which is not hearsay under the rules. The prosecution will claim that the statement indicates that D had a grudge against T and his state of mind was one of hatred or disdain. Because attempt is a specific intent crime, this non-truth assertion could be relevant to show that D had the intent to harm T. This argument has merit, however, it would be better for the prosecution's case if it can get the statement in for the truth.

Admission by a Party Opponent

A statement by a party opponent is not hearsay under the federal rules and comes in for the truth. It need not be against interest when made and may be based on hearsay. In this case, D made the statement to T and it could come in against him as non-hearsay under the FRE.

Hearsay Exceptions
Present Intent

A statement made by a person showing an intent to do something is an exception to the hearsay rule and may be admissible to show that the declarant actually followed through with the act in question. Though more commonly associated with statements like "I'm meeting Joe at 10 on Tuesday" to show that the meeting with Joe happened, here it could be admissible to show that D followed though with what he said he was going to do and actually burned V.

B. V's Testimony that D Laughed While V was Trying to Douse Flames
Relevance

V's testimony is logically relevant because it tends to prove that D acted with an intent to harm V in that, if he hadn't meant for V to catch on fire he would not have been laughing and he would try to help V. Also, it contradicts D's claim that he ran out of the garage frightened.

V's testimony is prejudicial against D, as it tends to paint him as quite the villain, however it is not unduly so and it does not substantially outweigh the probative value. No public policy considerations apply. Accordingly the evidence is relevant.

Presentation

V is testifying in the prosecution's case[-]in[-]chief. As the victim, V was present at the accident and has personal knowledge of the events, although V could be subject to impeachment regarding his ability to really perceive what was happening (he was on fire, after all). However, V has personal knowledge and is competent to testify so long as he has memory, can communicate and can appreciate the requirement of telling the truth.

Hearsay

As mentioned, hearsay is an out[-]of[-]court statement made by the declarant for the purpose of proving the truth of the matter asserted in the statement.

Statement

The issue here is whether D's laughing was a statement. Assertive conduct is treated like a statement and subject to all the hearsay rules. Generally, assertive is that which tends to substitute for a statement, such as nod of the head instead of "yes" or pointing in a direction instead of "turn left." Because it has the effect of a statement, assertive conduct is treated like a statement.

D will argue that the laughing is assertive conduct and thus inadmissible to prove the truth, that D laughed, unless it fits within a hearsay exception or may be non-hearsay. He will argue that it is the equivalent of a statement such as "this is great" or "I said I would burn you."

The prosecution will counter with the argument that it was merely laughing and, unlike assertive conduct such as pointing or nodding, there is no way to determine what was meant by it so it cannot be assertive. It is more likely that a judge would overrule an objection by the defense and that V's testimony comes in and is not hearsay.

Exceptions/Non-hearsay

Even if the judge were to reject the prosecution's argument, the statement could come in as an admission by a party opponent, as discussed earlier. Alternately[sic], it could be admissible as an excited utterance because the laughter was made while D was under the stress of the excited event and arguably related to the startling event.

C. Judicial Notice of the Properties of Gasoline

It is proper for a court to take judicial notice of things that are easily proven or of common knowledge in the community. If evidence is required to demonstrate the fact in question, judicial notice may not be proper. The effect of judicial notice in a criminal case

is to satisfy the prosecution's burden of proof, but the jury may elect to disregard the judicially noticed fact and decide otherwise.

The issue is thus whether the properties of gas and its potential to cause serious bodily injury or death when placed on the body and ignited was proper. On the one hand, most adults drive and are familiar with gas stations and the warnings that are all over the station regarding no flames. One the other hand, most people have not played around with gasoline and matches and are not likely familiar with the effects it can have on the body- how long it will burn, how much gas needs to be on the person, when it will explode, etc. This is important because if there is a certain amount of gas required, D could argue the amount spilled on V was insufficient.

While it may have been proper to take judicial notice of the flammable quality of gasoline, the effects of its ignition are not so likely common knowledge. Accordingly, the judge erred in taking judicial notice of this fact and should have required the prosecution to present expert testimony regarding the specific potential of gas to cause serious injury or death when placed on the body and ignited.

D. Cross-Examination of D re Lighter

Relevance

The question tends to prove ownership of the lighter and refute D's claim that he did not own it/impeach him on that issue. It is highly probative and, while somewhat prejudicial, the prejudice does not substantially outweigh the probative value. There are no policy[-]based reasons for exclusions and, accordingly, the evidence is properly admissible.

Form

Leading

A question that suggests the answer is a leading question and is generally not allowed. Here, the prosecutor's question suggests that the lighter had D's initials on it, and is thus leading. Leading questions are allowed, however, on cross-examination, preliminary matters, hostile witnesses and witnesses who are having trouble remembering. Accordingly, because this was cross[-]exam, the leading question was proper.

Assumes Facts in Evidence

The question assumes that, one, there was lighter [sic] found that has been introduced, which on these facts has not been introduced into evidence. The lighter could be an exhibit and would have to be introduced by someone with knowledge[,] who could authenticate the lighter and indicate the chain of custody. After this a proper foundation would be laid and the prosecution could ask the question.

The lighter may self-authenticate, however, as sort of a label, but that is generally

reserved for commercial items.

Best Evidence

The initials on the lighter could be considered a writing and the question is aimed at oral testimony to prove its contents. The best evidence rule requires that, before testimony regarding contents may be given, the original, in this case the lighter[,] must be produced or a decent reason for its absence must be given. Here, there is no indication that the lighter has been introduced and thus the content of it, the initials, could not be testified to by D if his only knowledge of the content came from the lighter.

E. Jury's Conduct

Juries are prohibited from conducting independent investigations of the case, and such conduct may result in a mistrial for the defendant. Here, one juror when [sic] and measured the clearance on a pickup and the jury tried to re-enact the "accident" in the jury room. Jurors are not restricted to what they can do in the jury room and may use any means to explore and discuss the facts. The only real issue is whether the measuring of a, not D's, pickup truck was independent investigation, plus it was done while the jury was in recess and should not have been discussing the case.

It is likely that the act by the juror was impermissible independent investigation, because he went outside the evidence presented in court. Accordingly, the case should be declared a mistrial unless it can be shown that it was harmless error.

Harmless Error

An error is harmless if, even without the error, there is no reasonable doubt that the case would have come out differently. Here, the independent investigation resulted in a demonstration that changed the minds of 5 jurors, which would have resulted in a hung jury. On the other hand, the jurors, in their deliberations may have eventually decided to act out the event and could have guessed at the clearance of the truck and come to the same conclusion. Although a jury is not allowed to testify regarding what happens in the jury room, unless 3 or more of the 5 would not have eventually changed their minds the error would be harmless. Because it is likely that the jury would have eventually acted out the incident, the error is likely harmless and the juror misconduct, though improper, will not have an effect on the outcome of the case.

Answer B to Question 4

1) The issue is whether the ct should have admitted T's testimony that D complained of being "burned" by V & that he would "burn" V one day.

Relevance

Evidence is relevant if it tends to make any fact of consequence in a proceeding more or less probable. Here this evidence is relevant b[e]c[ause] it tends to make it more likely that D was the one who caused the fire that burned V & more likely that it was not an accident as D claims it was, but deliberate.

However, even evidence that is logically relevant may be excluded if the court finds that its probative value is substantially outweighed by its unfair prejudicial effect to the party ag[ains]t whom it is offered. Here, T's st[ate]m[an]t is offered ag[ains]t D to show the fire wasn't an accident. It's [sic] probative value is great b[e]c[ause] it is a st[ate]m[en]t that D himself said he wanted to "burn" V & V was in fact literally burned in a fire D claims he started by accident. It is very prejudicial to D b[e]c[ause] it tends to completely negate D's accident defense. However, it is not unfavorably prejudicial - it doesn't increase the chances that the jury will convict just b[e]c[ause] D is a bad guy, rather it goes right to the central issue in the case of whether the fire was deliberate or accidental. Thus, the court shouldn't exclude it on this basis.

Character Evidence in Crim Case

The prosecution cannot present evidence of bad character of a △ in a criminal case unless character is directly at issue or unless the △ initiates by putting a pertinent trait of his own or the victim's character substantively at issue. In addition, the prosecution can't use evidence of specific instances, only reputation or opinion evidence to establish character.

Here, this testimony about D is being offered in our attempted murder case where character is not an element of the crime. It is being offered in the prosecution's case[-]in[-]chief, it is arguably character evidence b[e]c[ause] the statement about D casts D in a bad light b[e]c[ause] it makes him look like a vindictive person out to get V b[e]c[ause] he feels V has "burned" him by dating his estranged wife. In addition, it is evidence of a specific instance where D told T something, not evidence of D's reputation for vindictiveness or violence or T's opinion to that effect. Thus, it seems at first glance that it is barred by the rules against character evidence in criminal cases offered by the prosecution.

However, the prosecution is entitled to offer evidence of specific instances by the△even if it reflects negatively on the △'s character if offered for a non-character if offered for a non-character purpose such as sharing motive or intent to commit a crime.

Here, D's st[ate]m[en]t about feeling burned by V is relevant to show he had a motive to

harm V deliberately. This is especially true in light of the fact V was seeing D's estranged wife b[e]c[ause] that gives meaning to what D meant when he said he felt burned. In addition, his saying he was going to burn V someday is evidence of intent to do the instant crime. Thus, T's st[ate]m[en]t is admissible even if it is specific instance that reflects badly on D's character offered in the state's case[-]in[-]chief.

Personal Knowledge

Witnesses can only testify as to matters of which they have personal knowledge. Here T has personal knowledge of D's st[ate]m[en]t because it was made directly to him.

Hearsay (HS)

HS is an out[-]of[-]court st[ate]m[en]t offered for the truth of the matter asserted therein.

D's st[ate]m[en]t was made to T out of court before the burning incident took place. It is being offered to show that D wanted to burn V & had motive to do so. Thus, it is hearsay & should be excluded unless an exclusion or exception applies.

Party Admission

St[ate[m[en]ts by a party, offered against a party[,] are deemed non-HS under the criminal law & the FRE.

Here the statement is by D - the △ in this case & it is being offered ag[ains]t him. Thus it is non-HS and can come in.

St[ate]m[en]t ag[ains]t Interest

Statements by any person that are against their penal, property, or civil liability interest at the time made are admissible even if HS as long as the declarant is unavailable at trial.

Here D's st[ate]m[en]t was arguably ag[ains]t his penal interest when made b[e]c[ause] it clearly showed he had intent to do harm to V. However, D is not unavailable b[e]c[ause] he has taken the stand in this case & has waived his privilege against self[-]incrimination w[ith] respect to his motive using an accident defense. Thus this exception doesn't apply.

State of Mind of Declarant

St[ate]m[en]ts offered as direct evidence of a declarant's state of mind are admissible HS. Here, this st[ate]m[en]t is being offered to show that D had a motive & intent to hurt V & the st[ate]m[en]t is precisely about D having had that state of mind. Thus it is admissible under this exception.

The court didn't err in admitting T's st[ate]m[en]t.

2) V's Testimony
Relevance

V's st[ate]m[en]t about D laughing and running out while V was burning is relevant b[e]c[ause] it tends to show D wanted V to burn & again makes his accident defense less likely.

However, the probative value of this is low, the mere fact that D didn't help V & may have laughed doesn't necessarily mean D deliberately set the fire, although his general animosity towards V may have led him to laugh at V's misfortune & leave instead of helping him. On the other hand, the potential the jury will convict D b[e]c[ause] he was coldhearted & callous & not just b[e]c[ause] he actually deliberately set the fire is great. Thus the court should use its discretion to exclude this testimony.

Character Evidence

This was evidence of a specific instance where D laughed & declined to help V, & it reflects very poorly on his character. It was offered by the prosecution in its case[-]in[-]chief. Thus it should be excluded as impermissible character evidence b[e]c[ause] it doesn't seem relevant to any noncharacter purpose & will only inflame the jury against D b[e]c[ause] he acted in a morally reprehensible way by laughing & turning his back on V.

Hearsay

A nonverbal act can be a st[ate]m[en]t for the purposes of the HS rule if it is intended as an assertion. Here D laughed & walked out on V. This may arguably be intended as an assertion by D to V of his hatred for V & his delight that V was burning. Thus, it might be subject to exclusion as an out[-]of[-]court st[ate]m[en]t.

However, even if this argument were accepted[,] it would come in under the party admission exclusion b[e]c[ause] it was conduct by D, and is being offered ag[ains]t him.

3) Judicial Notice

Judicial notice of adjudicative facts (facts that have to be proven in a case) is proper when the facts noticed are either ① notorious facts commonly known to the public or ② facts capable of ready & accurate verification.

Here the prosecution formally requested the court notice the fact that gasoline has certain chemical properties & has potential to cause serious injury or death when placed on the body & lit.

These facts will probably qualify under both categories. It is common knowledge that gasoline is highly flammable & even if lay people weren't aware of all its properties these are scientific facts capable of ready verification. In addition, it is common knowledge that

person's[sic] can be seriously hurt or killed if doused w/ gasoline that is then ignited. Moreover, that is again something capable of verification by expert testimony/scientific experiment. Thus, it was proper for the judge to notice these facts.

Effect of Notice

Since this was a criminal case, the effect of this notice was to relieve the prosecution of its burden of proving these facts & the jury could be told that the prosecution had met its burden but didn't have to accept it as conclusively proven.

4) Question on X

Every party has an absolute right to cross any live witness - even if that witness is the △ in a criminal case.

Here D took the stand & testified, thus he is subject to cross[-]examination on matters relating to his testimony on direct, or else his direct must be stricken.

D testified that he didn't have any lighter w/ him when he was in the garage. Thus it is proper for the prosecution to question him about the lighter on X.

Impeachment

Any witness can be impeached w/a prior inconsistent statement that is materially different from his testimony at trial.

Here D, [sic] testified that he didn't have any lighter when at the garage. The prosecutor is asking him about the lighter found at the scene that has his initials on it which clearly states that the lighter was in fact his. Since this is materially different from what D said at trial, the prosecution is entitled to use it to impeach D & discredit his testimony.

In addition, b[e]c[ause] the prior inconsistent st[ate]m[en]t of D's initials written on his lighter qualifies as a party admission, (st[ate]m[en]t by D, offered ag[ains]t him), the prosecution can use it as substantive evidence that the lighter did in fact belong to D.

5) The issue is whether the jury's conduct during deliberation was proper.

Jurors are not permitted to conduct independent investigations of the facts. Rather they are supposed to look at the facts presented by the parties & to apply the law as instructed by the judge.

Here, the jurors took their own initiative to go out & measure a truck that wasn't even the truck involved in the accident, & to reenact the accident themselves in the jury room. This was prohibited conduct, & in a criminal case could be grounds for mistrial if it had a

ESSAY QUESTIONS AND SELECTED ANSWERS

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Question 4

Dan was charged with arson. The prosecution attempted to prove that he burned down his failing business to get the insurance proceeds. It is uncontested that the fire was started with gasoline. At a jury trial, the following occurred:

The prosecution called Neighbor, who testified that fifteen minutes after the fire broke out, he saw a blue Corvette speed from the scene.

The prosecution next called Detective Pry. Pry testified that he checked Motor Vehicle Department records and found that a blue Corvette was registered to Dan. Pry also testified that he observed a blue Corvette in the driveway of Dan's house.

The prosecution then called Scribe, the bookkeeper for Dan's business. Scribe testified that, two months before the fire, Dan told Scribe to record some phony accounts receivable to increase his chances of obtaining a loan from Bank. Scribe then testified that she created and recorded an account receivable from a fictitious entity in the amount of $250,000, but that Bank denied the loan anyway. Scribe further testified that, two days after the fire, Dan again told her to create some phony accounts receivable, but that she refused to do so.

The prosecution called Jan, the night janitor at Dan's business, to testify that the evening before the fire, as Jan was walking past Dan's office, Jan heard a male voice say, "Gasoline is the best fire starter." Jan knew Dan's voice, but because the office door was closed and the voice muffled, Jan could not testify that the voice was Dan's.

Assume that, in each instance, all appropriate objections were made.

Should the court have admitted:

1. Detective Pry's testimony? Discuss.
2. Scribe's testimony? Discuss.
3. Jan's testimony? Discuss.

Answer A to Question 4

4)

State v. Dan

Admissibility of Detective Pry's Testimony

Logical Relevance

To be admissible, evidence must first be relevant. A piece of evidence is logically relevant if it has any tendency to make a fact of consequence in the case more or less likely to be true than it would be without the evidence.

Detective's Pry's testimony regarding what he learned from checking the DMV records is admissible because it tends to make it more likely that Dan was the one who committed the arson. Neighbor has already testified that he saw a blue [C]orvette speeding away from the scene of the arson. It is likely that the [C]orvette was driven by the one who had committed the crime. Therefore, if Dan also drove a blue [C]orvette, it would tend to make it more likely that Dan is guilty of the crime.

Detective Pry's testimony regarding the blue [C]orvette that he observed on Dan's driveway is also admissible. Since a witness saw a blue [C]orvette speeding away from the scene, the fact that Dan owns and possesses a blue [C]orvette makes it more likely that he committed the crime. The officer's testimony regarding seeing the car in Dan's driveway is also relevant because it tends to support the theory that Dan still possessed the car and had not sold it to someone else before the crime was committed.

Therefore, Detective Fry's testimony is logically relevant.

Legal Relevance

To be admissible, evidence must also be legally relevant. Evidence may be excluded if its probative value is substantially outweighed by the risk of undue prejudice to the jury.

Here, the evidence is legally relevant. The evidence has some probative value in making it more likely that Dan was the one who committed the arson, and there is little risk of undue prejudice. Evidence is only prejudicial if it is likely to lead the jury to draw improper conclusions about he defendant's guilt or innocence. The fact that Dan possessed a blue [C]orvette like that driven from the crime scene may hurt Dan's case, but it will be because the jury drew the reasonable conclusion that Dan may have been driving the car scene [sic] by neighbor, not because of any prejudicial effect.

Thus, the evidence is legally relevant.

Personal Knowledge

For the evidence to be admissible, Detective Pry must be competent to testify regarding it. A witness is competent if he has personal knowledge about the facts that he is testifying to.

In this case, [P]ry is competent to testify to the fact that he saw a blue [C]orvette in Dan's driveway, because he observed that himself and had personal knowledge of it. However, Pry's testimony regarding the DMV records will be inadmissible because Pry's only knowledge that the [C]orvette was registered to Dan came from the DMV records, and the DMV records have not been produced at trial, under the best evidence rule described below.

Best Evidence Rule

Under the best evidence rule, if a witness's sole knowledge of facts comes from a written document, then the fact must be proved from the written document unless the absence of the document is explained and excused.

On these facts, Pry's only knowledge of the fact that a blue [C]orvette was registered to Dan came from reading the DMV records. Therefore, the best evidence rule applies and Dan's ownership of the car must be proved with the DMV records themselves, rather than by Detective Pry's testimony regarding the contents of the records.

For this reason, Detective Pry's testimony regarding the contents of the DMV records should not have been admitted into evidence. Instead, the prosecution should have proved Dan's ownership of the car by introducing the DMV records themselves into evidence.

Hearsay

Another objection that Dan could make to the admission of the evidence is hearsay. Hearsay is an out[-]of[-]court statement offered into evidence to prove the truth of the matter asserted. The DMV records are hearsay because they are the out[-]of[-]court statements of DMV employees who prepared the report and it is being offered to prove the truth of the matter asserted – namely, that Dan was the registered owner of a blue [C]orvette.

Therefore, the evidence will be inadmissible unless a hearsay exception or exemption applies.

Business Records Hearsay Exception

Under the business records hearsay exception, the records of a business may be admitted into evidence if they were regularly prepared in the ordinary course of business by business employees with a duty to the business to maintain accurate records. Business is defined

to not only include for-profit businesses but also nonprofits and government agencies.

The DMV records could be admitted into evidence under the business records hearsay exception. As part of its business of regulating motor vehicles, the DMV regularly maintains records of the cars that are registered as owned by a certain person. These reports are prepared by DMV employees who have a duty as part of their job to maintain accurate records. Therefore, the statements in the DMV report are admissible under the hearsay exception for business records.

Government Records Hearsay Exception

The contents of the DMV records could also be admitted under the hearsay exception for government records. For this hearsay exception to apply, the records must have been maintained by a government agency and must be: (1) a record of the activities of that agency, (2) a report prepared in accordance with a duty imposed by law, or (3) a report of an investigation duly authorized by law. Government records of the police investigation regarding a crime are not admissible against the defendant in a criminal trial, but other government records are admissible.

In this case, the DMV records would qualify as records of the activities of the agency. When a person buys a car, they go to the DMV and register as the owner of the car, and the DMV makes the appropriate changes in its records. Therefore, it would qualify as a record of the activities of the DMV. It would also qualify as a report prepared in accordance with a duty imposed by law because the DMV is likely under a duty imposed by the state legislature to maintain vehicle ownership records.

Therefore, the contents of the DMV report would also be admissible under the hearsay exception for government records.

Conclusion

Detective Pry's testimony regarding observing a blue [C]orvette in Dan's driveway is admissible because it tends to make it more likely that Dan committed the arson and Pry had personal knowledge.

However, Pry's testimony regarding the contents of the DMV records should have been excluded because the best evidence rule required that the records themselves be produced rather than allowing someone else to testify to their contents. The prosecution should have instead introduced the DMV records themselves into evidence. The records would have been admissible under the hearsay exceptions for business records and government records and could then have been considered by the jury to help establish Dan's guilt.

Admissibility of Scribe's Testimony

Logical Relevance

Scribe's testimony is logically relevant because it tends to establish motive. If the jury believes Scribe's testimony, then it will establish that Dan's business was failing and that his previous desperate attempts to obtain financing through fraudulently obtained bank loans had failed. This would make it more likely than it would otherwise be that Dan would turn to other illegal measures, such as committing arson, to escape his precarious economic situation.

So the evidence is logically relevant.

Legal Relevance

Although Scribe's testimony is logically relevant, it could still be excluded at the discretion of the judge if its probative value was substantially outweighed by the risk of improper prejudice.

Dan would argue that this testimony is highly prejudicial and should be excluded. The testimony involves prior bad acts of Dan – specifically by inducing Scribe commit [sic] fraud in connection with a bank loan by falsifying the accounts receivable of the business and trying to do so a second time. Thus, Dan would argue, the evidence would be highly prejudicial because it would lead the jury to draw the improper inference that because Dan had done other bad things in the past, he was just a bad guy and is likely guilty of this crime as well.

However, the prosecution could successfully counter by pointing out that while the evidence does present some risk of undue prejudice, it is also quite probative of the issue of Dan's guilt. Scribe's testimony established that Dan was desperate for money because of his failing business and had resorted to illegal conduct in the past to try to get money. This established motive and makes it much more likely than would otherwise be the case that Dan is the one who committed this arson.

Although the evidence does present some risk of undue prejudice, it does not substantially outweigh the high probative value of the evidence. Therefore, Scribe's testimony is legally relevant and should not be excluded on this basis.

Character Evidence

Another issue presented by Scribe's testimony is character evidence. Character evidence – evidence of prior bad acts of the accused offered to prove the bad character of the defendant to show that he acted in conformity with the bad character – is generally inadmissible in a criminal case. However, character evidence may still be admitted if it is offered for some other purpose, such as to show motive, intent, modus operandi, or common plan or scheme.

Here, the evidence of Dan's prior activities in connection with falsifying the company's records is admissible for the non-character purpose of establishing motive. The evidence

is not being offered to prove that Dan is a bad guy in general. Rather, it is being offered for the specific purpose of showing that Dan had a strong motive to burn down his business because he was in financial trouble and his other efforts to obtain funding had failed.

Therefore, the judge should admit Scribe's testimony. However, the judge should also issue a limiting instruction informing the jury that they may only consider Dan's prior bad acts in establishing motive and may not infer from them that he had a bad character and so is likely to be guilty for that reason.

Personal Knowledge

Scribe is competent to testify regarding what he heard and did because he had personal knowledge of it. Scribe was there when Dan told him to falsify the books and did so himself, so Dan has personal knowledge.

Thus, this requirement for admissibility is satisfied.

Hearsay

A final issue is whether Scribe's testimony is inadmissible hearsay. Hearsay is out[-]of [-]court statement offered to prove the truth of the matter asserted, and is normally inadmissible unless an exception to the hearsay rule applies or the statement is exempted from the definition of hearsay under the Federal Rules of Evidence (FRE).

The prosecution would argue that Scribe's testimony regarding Dan's out[-]of[-]court statements and Scribe's out[-]of[-]court statement is not hearsay at all, because it is not being offered for its truth. A statement is not considered hearsay if it is being offered for some purpose other than its truth, such as to prove the mind of the speaker and the listener. Under this argument, Dan's statements to Scribe are not being offered to prove that the bank loan was really rejected, but to show that Dan believed that the business was desperate for money and was willing to do anything to get funds. Similarly, Scribe's out [-]of[-]court statement refusing to falsify the books a second time is being offered for the non-hearsay purpose of proving the listener's state of mind – that Dan knew his fraud scheme would not work and thus was likely to try some other way to get money.

Because the prosecution has a strong argument that Scribe's testimony is not hearsay at all, the testimony should be admitted into evidence.

Hearsay Exemption for Admissions by a Party Opponent

Furthermore, with regard to Dan's statements to Scribe, the statements will be admissible for their truth because the hearsay exemption for admissions by a party opponent applies.

Under this hearsay exemption, the statements of an adverse party in a proceeding are not considered hearsay, regardless of when they were made.

Thus, in this prosecution the prosecutor is offering the evidence against Dan, so Dan is an adverse party. Therefore, Dan's statement are [sic] not considered hearsay and are admissible for their truth.

Conclusion

In summary, Scribe's testimony should be admitted. The evidence is relevant to proving Dan's motive to commit the crime, a non-character purpose. And the conversations between Dan and Scribe are admissible because they are being offered for a purpose other than their truth and the hearsay exemption for party admissions applies.

Admissibility of Jan's Testimony

Logical Relevance

Jan's testimony is relevant because it tends to make it more likely that Dan committed the arson. As Jan walked by Dan's office she heard someone say "gasoline is the best fire starter". Because the statement was made in Dan's office, it was likely made either to Dan or in Dan's presence. Therefore, it establishes that Dan had knowledge regarding the means to commit the crime, which makes it more likely that he did in fact commit the arson. It also makes it more likely that Dan would have chosen gasoline if he were to commit arson, which matches up with the fact that the fire was indeed started with gasoline.

Of course, the conversation could have been perfectly innocent. Dan could have been seeking or obtaining advice on the best way to BBQ, or he could have not even been there are [sic] the time. But to be relevant, evidence must only have some tendency to make a fact of consequence more or less likely to be true. Because the evidence has some tendency to make it more likely that Dan committed the arson, it is logically relevant.

Legal Relevance

The evidence is also legally relevant. As discussed above, even relevant evidence can be excluded if its probative value is substantially outweighed by its prejudicial effect.

Here, the evidence is legally relevant because it has substantial probative value and poses little risk of undue prejudice. The fact that the defendant may have given or received advice on the best way to start a fire the night before the defendant's business burned down, coupled with the motive established by Scribe's testimony, is strong evidence of guilt. In contrast, there is little risk of undue prejudice. The defense will be able to argue that Dan was not present at the time the statement was made or that it was innocuous when they present their case.

Therefore, the evidence is legally relevant.

Personal Knowledge

Jan is competent to testify to what she heard because she had personal knowledge of it. She was there that night and heard the statement made.

Authentication

To be admissible, documentary evidence must be authenticated as being what it purports to be. For a voice recording by someone, this would normally mean that a witness who knows the person's voice must testify that the voice on the tape is the voice of the person. Dan would argue that Jan's testimony is inadmissible because Jan could not testify that the voice was Dan's.

However, the authentication requirement will not apply to bar admission of this evidence. First, the evidence is testimonial, rather than documentary, so authentication requirements would not apply. More importantly, it is irrelevant whether Dan was the one who made the statement. The statement could have been made by someone else in Dan's presence, for example if Dan sought the advice of someone in determining what the most effective way would be to commit the arson. Therefore, the statement is relevant even if it was not made by Dan and for this reason need not be authenticated as Dan's.

The defense can argue that Dan was not present when the statement was made or that it was innocuous, but deciding those issues will be up to the jury, not the judge.

Hearsay

A final objection Dan might make to admission of Jan's testimony is hearsay. Hearsay is an out[-]of[-]court statement offered to prove the truth of the matter asserted. Dan would argue that Jan's testimony is hearsay because she is testifying about what she heard someone say in Dan's office.

However, the hearsay objection will be rejected here. A statement is only hearsay if it is offered for its truth. An out[-]of[-]court statement is still admissible for other purposes. Here, it is irrelevant whether the statement is true. Whether gasoline is in fact the best fire starter has no bearing on the case. The significance of the statement is to establish either the speaker's or the listener's state of mind, which are both permissible non-hearsay purposes. If Dan made the statement, then it tends to establish that he had knowledge about how to commit the crime, which would help show his guilty [sic]. Similarly, if someone else made the statement to Dan, it would be relevant to show that Dan heard the statement and thus had obtained advice on the best way to start a fire, which again would be relevant to guilty [sic].

Although Dan may not have been in the office at the time, the fact that the statement was

made in Dan's office, a place where people would not normally be without Dan being there as well, justified the judge in concluding that there was sufficient evidence to find that Dan either made the statement or was present when it was made.

Conclusion

Jan's testimony should be admitted into evidence because it is relevant to establish Dan's guilt, Jan had personal knowledge of the statement, and it is being offered for a non-hearsay purpose.

Answer B to Question 4

4)

Detective Pry's Testimony about DMC [R]ecords

Logical/Legal Relevance

Relevant evidence is generally admissible. In order to be relevant the evidence must have any tendency to make a fact more or less likely than that fact would be without the evidence proffered. The prosecution is offering this evidence to prove that the car seen speeding away from the scene of the arson was owned by Dan (D). This evidence is logically relevant as it tends to prove identity of the arsonist.

Some logically relevant evidence will still be excluded if there are public policy reasons for the exclusion of that evidence. If the probative value of relevant evidence is substantially outweighed by the prejudicial nature of the evidence then the evidence will be excluded. D's attorney would argue that lots of people own blue [C]orvettes and thus using the [C]orvette to identify D as the guilty party is prejudicial. D's attorney would lose however because ownership of a car seen speeding away from the scene of a crime is not prejudicial and any possible prejudice resulting from the inference that D was driving the [C]orvette as it speed [sic] away does not substantially outweigh the probative value that this evidence possesses as far as identifying the arsonist.

Witness Competency

A witness is competent to testify if the witness has personal knowledge and is capable of understanding the oath or affirmation required of all witnesses.

Pry would be a competent witness because he read the dmv [sic] report and thus has personal knowledge of its contents.

Best Evidence

When a witnesses [sic] sole source of knowledge is from the contents of a document, and the witnesses [sic] testimony is being elicited in order to establish the contents of that document as true the best evidence rule requires the profferor of that evidence to either produce the document or explain why the document was not produced before allowing the witness to testify as to the contents of that document.

The defense's objection to Pry's testimony on the contents of the DMV printout should have been upheld as officer Pry's sole source of knowledge regarding D's ownership of a blue [C]orvette was from the DMV printout. Pry did not explain why he was not able to produce the dmv[sic] record. Without the DMV record or a reasonable explanation concerning why it was missing Pry's testimony should have been excluded.

Hearsay

Hearsay is an out-of-court statement offered for the truth of the matter asserted. Pry's

testimony about the DMV printouts[sic] contents would also be hearsay because it is a statement made by the employee transcribing data into the DMV database that is being offered to prove that D owned a blue [C]orvette. Because this statement was hearsay it should have been excluded unless on of [sic] the exceptions or exemptions from the hearsay rule applied.

Exemptions/Exceptions

Official Document

Official certified documents from public agencies charged with complying [sic] the information contained in the document are exempt from the hearsay rule. Because the prosecution failed to produce a certified record from DMV this exception to the hearsay rule would not have been available.

Business Record Exception

A record that is made in the ordinary course of a business by an employee with a duty to accurately report such information can be admitted in lieu of the employee's testimony. Since there was no dmv[sic] record being offered this exception would not have applied.

Presumption that owner was driver of a vehicle

A presumption can be raised that the driver of a car was the owner of the car. However in criminal trials the burden of proof is on the prosecution to prove each element of a crime and the identity of the person committing the crime beyond a reasonable doubt and thus the prosecution would not have been able to use the testimony regarding dan's[sic] ownership of a blue [C]orvette to raise a presumption that dan[sic] was driving the [C]orvette on the night of the arson.

Because of the best evidence and hearsay problems, Pry's testimony about the DMV printout should have been excluded.

Detective Pry's Testimony about Corvette in Driveway

Logical/Legal Relevance
This evidence is logically relevant because it makes it more likely than not than D owned a blue [C]orvette which was seen sp[e]eding away from the scene of the arson. This evidence would not be excluded due to legal relevance for the same reason the DMV printout testimony would not have been excluded for legal relevance reasons.

Witness Competency

The officer is competent to testify about seeing a blue [C]orvette in D's driveway because the officer has personal knowledge regarding what the officer saw in D's driveway.

Presumption that D was the driver of the blue [C]orvette on the night of the arson

The prosecution would still not be able to use the driver presumption because this is a criminal case.

Scribe's Testimony re: phony accounts receivable for bank loan

Logical/Legal Relevance

This evidence would be logically relevant to show that D needed money because he falsified account records to receive a bank loan which was denied. The defense would argue that this testimony is highly prejudicial and that its prejudicial effect outweighs its probative value substantially because the jury is likely to convict D for arson based on the fact that his [sic] is a dishonest person and not based on whether he actually committed the arson. While this evidence is highly prejudicial, the court was right to admit it as it goes to the d's[sic] motive in starting the fire.

Witness Competency

Scribe would be a competent witness because he or she had personal knowledge about D's request to make false accounts receivable.

Hearsay

This testimony would be hearsay because Scribe is testifying about a statement made by D out of court to prove the[sic] D had Scribe create false records in order to get a loan from the bank. The prosecution would argue that this is not hearsay because the evidence is not offered to prove that D tried to get a loan by false pretenses but that he had a motive to burn down his building for the insurance proceeds because he was denied a loan and thus was in need of money.

The court properly admitted this as non-hearsay if it allowed it in for the limited purpose of showing that D had a motive to burn down the building to collect insurance proceeds.

Admission of a party opponent made by an agent

A statement made by a party offered against the party by the opposing party that is adverse to the party's interest is admissible as non-hearsay. The statement did not have to be against the party's interest at the time that it was made. The prosecution would argue that D's request that Scribe falsify accounts receivable is a party admission exempt from the hearsay rule because it is a statement made by D that is now relevant to his culpability for the crime of arson. The statement would be admitted under this exemption to the hearsay rule because D made the statement and it is being offered by the opposition against D.

Present sense impression

S's testimony would not be excepted from the hearsay rule under the exception for a present sense impression as D's statement to falsify records was not made contemporaneous to d[sic] observing the falsification of the records.

Excited Utterance

It would also not qualify as an excited utterance because there is no evidence that D experienced a traumatic or exciting event around the time that his instructions were made.

Present Intent to engage in future conduct

Since D was instructing S to destroy the records it is unlikely that the prosecution could have this statement admitted as a present expression of intent to engage in future conduct to prove that the future conduct was engaged. D did not make a statement concerning conduct that he was about to engage in or planned to engage in in [sic] the future.

Double Hearsay

S's testimony about transcribing false accounts receivable would be double hearsay because S is testifying to an out[-]of[-]court statement that he made in response to a request that his boss made to prove that S engaged in the conduct alleged by the hearsay statement.

Vicarious Admission

S's statement would be admitted as a vicarious admission so long as transcribing records was [sic] part of the duties that S performed. As D[']s agent S' testimony would be vicariously attributed to D.

Character evidence

Character evidence is not allowed in a criminal trial by the prosecution to show that the defendant acted in conformity with his character unless and until the defendant offers evidence of his good character. Character evidence is however admissible to show motive, intent, a common plan or scheme, identity or opportunity.

D would argue that this evidence was offered to show that D is of bad character and likely to commit fraud and thus it should be excluded as impermissible character evidence.

The prosecution would argue that this evidence is being offered to show that D had the motive to commit an arson in order to collect the insuranc[e] proceeds on his failing business. Because the falsified accounts receivable are not required to prove that D did not get a loan from the bank which is the evidence that really tends to show that D had a motive to burn down his failing business for insurance proceeds the court should have excluded the portion of Scribe's testimony concerning the falsified records as impermissible

character evidence.

Scribe's Testimony Re: phony accounts receivable two days after fire

Logical/Legal Relevance

This testimony is not logically relevant because Scribe did not offer any reason related to the arson for falsifying the accounts receivable. While the prosecution may argue that D was falsify[sic] the records to get a bigger insurance payoff, Scribe's testimony does not suggest that this is the case. Even if the court did find the evidence to be logically relevant for showing that D was attempting to increase the amount of payoff from the insurance company, this testimony should have been excluded because its prejudicial value substantially outweighs its probative value. Without some testimony concerning why D asked Scribe to falsify the accounts receivable after the fire this testimony tends to suggest to the jury that it should convict D for being a dishonest guy generally instead of for committing the specific crime charged.

Witness Competency

Scribe would be competent because he or she had personal knowledge of what was said.

Hearsay

This testimony would be hearsay as was the prior testimony regarding false accounting records if it was admitted to show the truth of the statement – that D wanted to falsify accounts receivable. The prosecution could still argue that it was being offered to show motive which would be for a reason unrelated to the truth of the statement.

Admission

This testimony would also be an admission of D because it was made by D and is being offered against him and thus it is exempt from the hearsay rule.

The court should not have admitted this evidence because of its potential lack of logical relevance, it [sic] highly prejudicial nature in light of its relatively low probative value.

This testimony would also not fit under the exceptions to the hearsay rule for present sense impressions, excited utterances, or a present statement of intent to engage in future conduct for the same reasons the first statement regarding the falsification of accounting records would not fit under these exceptions.

Jan's Testimony re: "Gasoline is the best fire starter"

Legal/Logical Relevance

This evidence is legally relevant because it tends to show that D knew gasoline was the best fire starter and since it is undisputed that gas was used to start the fire at the business it would tend to show that D committed the arson.

Witness Competency

J is famil[i]ar with D's voice and he heard the statement[;] thus he would be competent because he has personal knowledge of the statement and is potentially capable of authenticating the identity of the speaker, a problem which will be dealt with more extensively below.

Hearsay

[T]his statement would not be hearsay because the purpose for its admission is not to prove that gasoline is the best fire starter. The prosecution wants this evidence in to show that D had knowledge that gasoline starts fires since gasoline was used to start this fire. Even if the statement was found to be offered for its truth a hearsay exemption would apply.

Party Admission

D is a party and the statement is being offered against him and thus so long as he can be identified as the speaker this statement would be admissible as a party admission.

Authentication of Voice

When the identify of a speaker is in issue because the speaker was not visible to the person hearing the speech the voice must be authenticated. A voice may be authenticated by the person who heard the voice so long as that person is familiar with the voice. Even if the hearer is not necessarily familiar with the voice of the speaker other facts can be admitted to establish the speaker's identity.

J is familiar with D's voice[,] however J is unable to authenticate the speaker's identity as that of D because the door was closed and the voice was muffled. However the prosecution would argue that there are enough circumstantial factors available that the jury should be allowed to decide whether or not the voice was D's. Such evidence exists from the fact that J was passing D's office and that the voice was a male voice coming from D's office. This should be sufficient to allow this testimony to go to the jury because J's testimony is enough to allow the jury to determine whether D was in his office.

The judge properly admitted J's testimony as either non-hearsay because it was not admitted to prove the truth of the matter asserted or as a party admission.

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2007 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2007 California Bar Examination and two selected answers to each question.

The answers selected for publication received good grades and were written by applicants who passed the examination. These answers were produced as submitted, except that minor corrections in spelling and punctuation were made during transcription for ease in reading. The answers are reproduced here with the consent of their authors.

Question 6

Officer Will, a police officer, stopped Calvin, who was driving a rental car at five miles an hour over the speed limit. Calvin gave legally valid consent to search the car. Officer Will discovered a substantial quantity of cocaine in the console between the two front seats and arrested Calvin. After being given and waiving his Miranda rights, Calvin explained that he was driving the car for his friend, Donna. He said that Donna was going to meet him at a particular destination to collect her cocaine, which belonged to her. Hoping to obtain a favorable plea bargain, Calvin offered to cooperate with the police. The police then arranged for Calvin to deliver the cocaine. When Donna met Calvin at the destination, she got into the car with Calvin. She was then arrested. Each was charged with and tried separately for distribution of cocaine and conspiracy to distribute cocaine.

Donna's trial began while Calvin's case was still pending.

At Donna's trial, the following occurred:

(1) The prosecutor called Officer Will, who testified to Calvin's statements after his arrest concerning Donna's role in the transaction.

(2) The prosecutor then called Ned, an experienced detective assigned to the Narcotics Bureau, who testified that high level drug dealers customarily use others to transport their drugs for them.

In the defense case, Donna testified that she was not a drug dealer and that she knew nothing about the cocaine. She stated that she was merely meeting Calvin because he was an old friend who had called to say he was coming to town and would like to see her.

(3) Donna further testified that when she was in the car with Calvin, she found a receipt for the rental car, which showed that Calvin had rented it six months prior to his arrest. She offered a copy of the receipt into evidence. The court admitted the document in evidence.

(4) On cross-examination, the prosecutor asked Donna whether she had lied on her income tax returns.

The prosecutor had no evidence that Donna had lied on her income tax returns, but believed that it was likely on the basis that drug dealers do not generally report their income. Donna denied lying on her income tax returns.

Assuming that, in each instance, all the appropriate objections were made, should the evidence in numbers **1**, **2**, and **3** have been admitted, and should the cross-examination in **4** have been allowed? Discuss.

Answer A to Question 6

6)

QUESTION 6

(1) Should Officer Will's Testimony Have Been Admitted?

Relevance

In order for Officer Will's testimony to be permitted it must be relevant. Federal Rules of Evidence (FRE) 401 provides that relevant evidence is evidence having any tendency to make a fact of consequence to the determination of the action more or less likely to be true than without the evidence. Officer Will's testimony was relevant because Calvin's statements, that he was driving the car for his friend Donna and that she was going to meet him at a particular destination to collect her cocaine, had a tendency to make the fact of consequence that he was a coconspirator with Donna for distribution of cocaine more likely. Therefore, the evidence was relevant.

FRE 403

Although relevant, Donna may argue that it should have been excluded on FRE 403 grounds. FRE 403 provides that relevant evidence should be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, waste of time, confusing/misleading the jury, or cumulative evidence. Donna will argue that there are no reliable ways of showing that this statement was true and therefore the probative value of the evidence is substantially outweighed by risk of unfair prejudice because a jury will hear the statement and automatically want to convict her. However, witnesses or convicts are often allowed to testify and any evidence against the truthfulness of the statement would be go to [sic] weight of Officer's testimony.

Hearsay

Donna will argue that the testimony was impermissible hearsay. Hearsay is an out-of-court statement made by the declarant, while not present in court, offered for the truth of the matter asserted. A statement is defined as an oral/written assertion or assertive conduct. Officer Will is testifying about Calvin's comments to him when he was arrested. The statements that he was driving the car for his friend Donna and that he was going to meet her at a particular destination to collect her cocaine are all offered to prove that indeed the car was being driven for Donna and he was meeting her because it was her cocaine. So it is an out-of-court statement offered for the truth of the matter asserted because it is an oral assertion by Calvin out of court. Therefore, it is hearsay and is not admissible unless it comes in under an exception.

Coconspirator Admission

Prosecutor would argue that the statement was a valid party-opponent admission. Party-

opponent admissions are categorically non-hearsay and are exempted from the hearsay rule's exclusionary effect. A party-opponent admission can be done by a statement by a coconspirator during the course of the conspiracy and in furtherance of the conspiracy. Donna would argue that Calvin had already been arrested and therefore this was not made in furtherance of the conspiracy. Therefore, Calvin's statements could not come in under this exemption, 801(d)(2).

Statement Against Interest

The prosecutor could also have argued that this was a statement against interest and hence is an exception to the hearsay rule. Statement against interest comes in under FRE 804, which requires unavailability of the witness, which can include witnesses not testifying because of self-incrimination. Here Calvin would not be testifying because of such self-incrimination and he is not present at the trial, so therefore he is considered unavailable. Statement against interest excepts statements from the hearsay rule that are so contrary to declarant's criminal liability that a reasonable person would not have made such a statement unless it were true. The prosecutor would argue that a reasonable person would not admit his involvement in the transportation of cocaine unless it were true and therefore this falls within the exception since Calvin would be subject to criminal liability. Therefore, the evidence could potentially be admitted under this exception.

Confrontation Clause

Donna would argue that regardless the statement should not be introduced because it violates the confrontation clause. The 6th Amendment Confrontation Clause provides that an accused has the right to confront his accusers. For this reason, hearsay testimony used against an accused is often not permitted. The Supreme Court has determined that testimonial evidence can in no circumstance be used against an accused without the right to cross-examination at trial or a prior proceeding with the same motive to develop such testimony. Testimonial evidence are all [sic] statements made that a reasonable person would believe would be used by the prosecution against another at trial. Usually there requires at least statements to the police. So when Calvin spoke to the police officer and made statements about the culpability of Donna, he was giving testimonial evidence since it could have been foreseen by telling the police it could be used against her. Furthermore, he did so in hoping to get a plea bargain and hence it shows that it was testimonial. Therefore, since he cannot testify because of self-incrimination/presence in court and Donna had no opportunity at any time to cross-examine him, the police officer's statement regarding Calvin's statements should be excluded.

(2) Should Ned's Testimony Have Been Admitted?

Relevance

It must be determined whether Ned's testimony was relevant to the case. Federal Rules of Evidence (FRE) 401 provides that relevant evidence is evidence having any tendency to make a fact of consequence to the determination of the action more or less likely to be true than without the evidence. Ned's testimony was relevant because it had a tendency to show that Donna was

potentially a high level drug dealer because she had someone else transport the cocaine and hence it is more likely that she should be convicted of distributing cocaine. Therefore, it should be allowed in as relevant.

Expert Testimony

Although relevant, the testimony must be valid expert testimony in order to be allowed in. Pursuant to FRE 104, a court must make the preliminary fact determination of whether an expert is qualified to give expert testimony. Under 104, evidence is not relevant if dependent on a conditional fact unless that condition is found to exist. A judge need only find sufficient evidence to show existence of the condition to allow the question to go to the jury for credibility and weight. Here the judge would consider the Daubert factors that were incorporated into the FRE on expert testimony in order to determine whether it should be allowed in.

The factors require that the expert testimony be based on the knowledge, experience, and training of the expert, be beyond the normal experience of an average lay juror, be helpful to the determination of the action, and based on proven and reliable data and methods, and be an application of such methods and data to the underlying facts of the case. Here Ned was an experienced detective in the Narcotics Bureau and hence had the knowledge, experience and training. His testimony was beyond the normal lay juror because it involved high level drug dealers' actions. Furthermore, it was relevant and helped to determine what Donna was guilty of. Finally, it was based on reliable data of customary experience in the field that high level drug dealers customarily use others to distribute the drugs. Therefore, the testimony should be allowed in.

(3) Should Donna's Testimony and Receipt Be Admitted?

Relevance

Federal Rules of Evidence (FRE) 401 provides that relevant evidence is evidence having any tendency to make a fact of consequence to the determination of the action more or less likely to be true than without the evidence. Donna will argue that the evidence is relevant because it makes the existence of the fact that Calvin had control over the cocaine more likely here and hence she was not involved. Therefore, it will be allowed in as relevant, unless there are other problems.

Best Evidence

Prosecutor will argue that this is not the best evidence. The Best Evidence Rule requires that one cannot testify to the contents of a writing unless the writing is presented. However, a copy is permissible. Therefore, since Donna brought a copy of the receipt that she found in the car, it should be allowed in.

Hearsay

Prosecutor will object on grounds of hearsay. Hearsay is an out-of-court statement made by the declarant, while not present in court, offered for the truth of the matter asserted. A statement is defined as an oral/written assertion or assertive conduct. Therefore since the document asserts that Calvin rented the car, it is offered for the truth of the matter and must come

in under an exception.

Business Records

Donna will argue this is a business record and should be admitted. Business records are records or documents made during the normal course of business with guarantees of trustworthiness. There needs to be some type of testimony demonstrating that this was in the normal course of business, and hence Donna would have needed some type of custodian or the person who entered the information testify to those facts. Therefore, the evidence will be excluded.

(4) Should the Cross-Examination Have Been Allowed?

Relevance

Prosecutor would argue that the question was relevant as to whether Donna was telling the truth. Federal Rules of Evidence (FRE) 401 provides that relevant evidence is evidence having any tendency to make a fact of consequence to the determination of the action more or less likely to be true than without the evidence. If Donna had lied in the past on her income tax then it would be more likely that she would lie at trial because she is dishonest. Therefore, it is relevant to the case.

Character Evidence of a Witness

Donna would initially argue that this is improper character evidence. Character evidence is evidence of a trait or character offered to prove action in conformity therewith. Character evidence is not allowed unless it falls under one of the exceptions to character evidence. Here this falls under the exception to character of a witness. Therefore, it is governed by 607 and 608 of the FRE.

FRE 607 allows an opposing party to generally impeach to show bias or lack of credibility of a witness. FRE 608 allows a party to use character evidence for the purpose of impeachment. However, if one wants to impeach by specific instances of conduct one can only do so by inquiring on cross-examination and not through extrinsic evidence.

Furthermore, it must bear on the truthfulness of the witness. The prosecutor's question about whether Donna lied on her tax return was valid because it was merely a question, and no extrinsic evidence was offered. It beared [sic] on whether she was telling the truth at trial after saying she knew nothing about cocaine and only met Calvin in order to see an old friend. Therefore, it was proper use of specific instances of conduct through cross-examination of a witness.

Answer B to Question 6

6)

1. Will's testimony of Calvin's statements were NOT properly admitted.

(a) Relevance

Evidence is generally admissible if it is relevant, meaning that it tends to make a material fact more or less likely to be true. Here, Will's testimony of Calvin's statements would make Donna's alleged involvement more likely to be true, and thus is logically relevant. However, evidence should not be admitted under Federal Rules of Evidence (FRE) 403 if its prejudicial effect substantially outweighs its probative value. Setting aside the Confrontation Clause question (discussed below), this evidence is prejudicial against Donna but is also very probative as to the central issue of the trial – whether Donna is guilty of distribution of cocaine and conspiracy to distribute. As such, the prejudicial effect does not substantially outweigh the probative effect, and testimony should be admitted absent other reasons for preclusion.

(b) Competence

A witness's testimony is admissible if he is competent to testify. A witness is competent if (1) he had personal knowledge of the fact he is testifying to, and (2) he takes an oath or affirmation to tell the truth.

Here, Will was present when Calvin made the statement about Donna's role in the transaction, and thus has the required personal knowledge. Assuming he took the proper oath at trial, Will is competent to testify as to what Calvin had said.

(c) Hearsay

Hearsay is not admissible unless an exemption or exception applies. Hearsay is an out-of-court statement offered for its truth. Here, Calvin's statement about Donna was made outside the court proceedings and was offered by the prosecution to prove that Donna indeed was involved in the cocaine transaction. Thus, it is hearsay. This issue here is whether a proper exemption or exception applies.

The prosecution will argue that this declaration is (1) a coconspirator admission and (2) a statement against interest. Coconspirator statements are exempted from the hearsay rule under FRE 801(d), and can be admitted as substantive evidence. Here, Calvin was allegedly a coconspirator with Donna. If the judge finds by a preponderance that the two were indeed coconspirators, Calvin's statement against Donna can be admitted, subject to the Confrontation Clause limitations, discussed below.

On the other hand, a statement against interest is a hearsay exception, allowing admission for a statement made by an unavailable declarant which was against the declarant's own penal, proprietary, or other interest. To apply, the declarant must be unavailable by reason of privilege, absence [sic] from the jurisdiction, illness, death, or stubborn refusal to testify. However, if the declarant's "unavailability" is procured by the party seeking to offer his statement, or if the party acquiesced in a plan to make the declarant unavailable, with the result that he is in fact made unavailable, the right to use such declarations is forfeited. Here, Calvin has the Fifth Amendment privilege against self-incrimination to refuse to testify in Donna's trial, and, assuming he exercised that privilege, and that his absence from Donna's trial is not encouraged or induced by the prosecution,

Calvin is properly deemed unavailable. Nevertheless, Calvin's statement identifying Donna's role in the transaction was made with the intent to push responsibility onto Donna, in an attempt to either secure a favorable plea bargain with the prosecution, or convince the arresting officer that Calvin was not in fact involved in the transaction at all. Statements like these which are made for the purpose of currying favor with the prosecution are not against the declarant's penal interest and cannot properly be admitted under the "statement against interest" exception.

(d) Confrontation Clause

Even though Calvin's statement is exempted form the hearsay rule as a coconspirator admission, it may not be admitted against Donna in her trial without Calvin actually testifying. Under the Sixth Amendment, the [sic] criminal defendant has a constitutional right to confront witnesses against him. In a recent Supreme Court case, Crawford v. Washington, the court held that hearsay statements that are testimonial in nature cannot be admitted against a criminal defendant unless the defendant had either (1) a prior opportunity to cross-examine the declarant, or (2) a present opportunity to cross-examine the declarant at trial as a witness. A statement is "testimonial" if the declarant reasonably could foresee that it would be used against the criminal defendant in her prosecution. Here, Calvin told a police officer that Donna was the person who owned the cocaine, and thus could reasonably foresee his statement would be used to prosecute Donna, making it testimonial. If Calvin is not now produced as a witness at Donna's trial, and subjected to Donna's cross-examination, his out-of-court statement could not be constitutionally admitted against Donna.

2. Ned's expert testimony WAS properly admitted.

As per the discussion on relevance, Ned's testimony is generally admissible because (1) it would make the prosecution's theory that Donna used Calvin to transport her cocaine more probable, and (2) its probative value is great, and not substantially outweighed by the risk of prejudice to Donna.

In addition to taking a valid oath, an expert witness is permitted to give expert testimony where (1) the subject matter is one where expert opinion would be useful to the fact finder, (2) the witness is properly qualified as a witness, (3) the judge finds that the expert opinion is reliable, and (4) the expert opinion has proper bases.

Here, whether or not drug dealers usually use others to transport drugs for them is a matter outside most average people's ken, and thus is a subject matter where expert opinion would be useful. As an "experienced detective assigned to the Narcotics Bureau," Ned has specialized knowledge and experience in the matter of drug dealers' behavior patterns, and would probably qualify as an expert.

The judge must also find, by a preponderance, that the expert opinion is reliable – that is, that the methodology the expert used to reach his conclusions were reliable, and that the methodology "fits" the facts in the case. Under the Daubert case, the judge can consider these following factors in considering reliability of an expert's methodology: (1) Existence of peer review, (2) the error rate of the expert's methodology, (3) the testability of the methodology, and (4) whether the methodology were [sic] generally accepted by experts in the field. Here, Ned's methodology in reaching the conclusion that drug dealers

customarily use others to transport drugs was probably his experience in dealing with narcotics cases, and perhaps an analysis of the rate of "using others" narcotics cases to other narcotics cases. The methodology should be explained to the court, and if the judge finds it to be reliable, and that it properly "fits" with the facts of this case (alleged use of others to transport drugs for the dealer), the court will find the expert opinion reliable.

Finally, expert opinion must have a proper basis – it must be based on either facts already in evidence, or facts not in evidence that are generally relied upon by experts in the field. Assuming that the data set [sic] from which Ned drew his conclusion was not admitted into evidence, it must be shown to be data relied upon by other drug dealer behavior experts in the field.

3. The copy of Calvin's rental car receipt was NOT properly admitted.

Because the evidence sought to be admitted here is a piece of writing (receipt), it must not only be relevant, but also be authenticated as the thing it is purported to be, satisfy the Best Evidence Rule, if applicable, and shown not to be barred by the hearsay rule.

Here, if the receipt was believed, it would tend to make the prosecution's theory that Donna rented the car and had Calvin drive it to distribute drugs less likely. Thus, it is relevant. Moreover, the prejudicial effect to the prosecution is not substantially outweighed by the probative value of the receipt as to who in fact rented the car.

Because the receipt's relevance is dependent upon it being the receipt recovered from Calvin's car, it must be authenticated as such, meaning that defense must present sufficient evidence for a reasonable jury to decide that the receipt in court was the one recovered from the car. Donna can do this by establishing a substantially unbroken chain of custody, testifying that she had kept the receipt in a safe place since she personally retrieved it from Calvin's car, that no one had the opportunity to access and materially alter it, and that the contents of the receipt were in fact substantially unaltered from when she retrieved it from the car.

The best evidence rule also applies here because defense is offering the receipt for its contents. Under the rule, an original or mechanically made duplicated [sic] must be presented into evidence. Here, if Donna can show that the copy presented was mechanically made from the original receipt, the rule is satisfied.

Finally, because the receipt is an out-of-court statement offered for its truth (that Calvin rented the car six months before his arrest), it is hearsay and inadmissible unless an exemption or exception applies. Here, the receipt might be admitted under the "business record" exception; if Donna could show that the receipt was made in the regular course of the car renter's business, made in the manner such records are usually kept and at or around the time the car was rented, then the exception applies. However, this requires that a record custodian form the car rental company testify at trial as to these elements. Assuming that the defense did not present a custodian from the car rental company, the receipt cannot be deemed a business record, and cannot be properly admitted.

4. The cross-examination question to Donna probably should NOT be allowed.

As discussed above, a piece of fact or, in this case, a question, that tends to make a material fact in case more or less likely to be true is relevant and generally admissible. Here, if Donna lied in [sic] her income tax return, it would make her a less credible witness, and more likely a drug dealer. Thus, the question is generally allowable as relevant.

Character evidence is generally inadmissible for the purpose of showing that a

person acted on the particular occasion according to her propensity to act a certain way. However, character evidence on [sic] a witness's veracity, including specific prior bad acts committed by the witness, may be used to impeach her credibility, provided that the cross-examining party has a good faith basis to believe that such prior bad acts in fact took place.

Here, whether Donna lied on her tax return goes to her veracity, and thus is character evidence. The cross-examination question was presented for the purpose of impeaching Donna's credibility, but the prosecution did not have actual evidence to believe that Donna had lied on her income tax returns. Instead, the basis for this question was a general impression that drug dealers usually do not report their income. While this impression was honestly held by the prosecution, its basis is weak as it relates to Donna, who has not even been proven to be a drug dealer. Moreover, the question creates a prejudicial effect on the jury's mind, making them doubt the veracity of the defendant herself. As such, the prejudicial effect of this question substantially outweighs its weak probative value, and should therefore not be allowed.

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2007 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2007 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 3

Dave brought his sports car into the local service station for an oil change. While servicing the car, Mechanic checked the brakes and noticed that they needed repair. The following events occurred:

(1) Mechanic commented to Helper, "Dave had better get these brakes fixed. They look bad to me."

(2) Mechanic instructed Helper (who did not himself observe the brakes) to write on the work order: "Inspected brakes — repair?", which Helper then wrote on the work order. However, Helper currently does not remember what words he wrote on the work order.

(3) Many hours later when Dave picked up his car, Helper overheard Mechanic say to Dave, "I think your brakes are bad. You'd better get them fixed."

(4) Dave responded, "I am not surprised. They've felt a little funny lately."

(5) Later that day, when Helper was walking down Main Street, he heard the sound of a collision behind him, followed by a bystander shouting: "The sports car ran the red light and ran into the truck."

The sports car involved in the accident was the one that Dave had just picked up from Mechanic. Polly owned the truck. Polly sued Dave for negligence for damages sustained in the accident. Polly's complaint alleged that the accident was caused by the sports car running the red light because the sports car's brakes failed. Polly's theory of liability is that Dave knew or should have known that his brakes were bad and that driving the car under those circumstances was negligent.

Polly called Helper as a witness to testify as to the facts recited in items **(1)** through **(5)** above, and she also offered into evidence the work order referred to in item number **(2)**. Assume that in each instance, appropriate objections were made.

Should the court admit the evidence offered in items numbers **(1)** through **(5)**, including the work order referred to in item number **(2)**? Discuss.

Answer A to Question 3

Polly v. Dave

(1) "Dave had better get these brakes fixed"

Logical Relevance

Only relevant evidence is admissible. Evidence is logically relevant when the evidence has some tendency to make a fact of consequence to the litigation more or less probable than it would be without the evidence.

Here, Polly alleges that her accident with Dave was caused by his car's brake failure. Thus, a statement that the brakes looked bad would be relevant for purposes of establishing that the brakes were bad. However, because Polly's theory of liability is negligence, and that Dave knew or should have known that the brakes were bad, anything that Mechanic said to Helper is irrelevant for showing that Dave had knowledge. Thus, the logical relevance of the statement is minimal.

Legal Relevance

Otherwise legal evidence may be inadmissible where the probative value of the evidence is substantially outweighed by the risk of unfair prejudice to the defendant, confusion of the jury or the issues, or waste of time.

Nothing about this evidence would be prejudicial. However, it may confuse the jury, again because Polly's claim is in negligence and thus any statement that Dave did not hear would have no bearing on his knowledge of the defect of the brakes.

Personal Knowledge

A witness can only testify about that which they have personal knowledge. This is true for the testifying witness, as well as for the declarant in any hearsay statement.

Here, Mechanic had personal knowledge of the condition of Dave's brakes, because he was conducting the inspection. Further, Helper heard Mechanic's comment, and so had personal knowledge of what Mechanic said.

Hearsay

Hearsay is an out-of-court statement, admitted for purposes of the proving the truth of the matter asserted. Hearsay is inadmissible unless exempt or unless an exception applies.

Mechanic's comment to Helper was made out of court, and is being introduced for purposes of showing that the brakes were bad. Thus, the statement is hearsay.

Present Sense Impression

A statement made concerning one's observations or impressions, made while or immediately after the observation or impression, is admissible as a hearsay exception.

Here, Mechanic made the statement while servicing Dave's sport car. Thus, the "They look bad to me" statement, which concerned his impressions of Dave's brakes, was made simultaneous to his visual inspection and thus admissible as a present sense impression.

State of Mind

A statement made concerning one's then present state of mind is admissible as a hearsay exception.

Here, because Mechanic was a mechanic, he was aware of the dangers posed by faulty brakes. Thus, when he said that "Dave had better get these brakes fixed, "he likely had the mental thought that they posed a risk to Dave and other drivers, and was speaking as to his knowledge that Dave needed to get the brakes fixed.

Thus, the statement should probably not be admitted, because the probative value is low because the statement has nothing to do with Dave's knowledge or lack thereof of the condition of his brakes.

(2) Work Order – "Inspected brakes – repair?"

Logical and Legal Relevance

Assuming that Dave received the work order, the "Inspected brakes – repair?" language would have a great tendency to make it more relevant that Dave had knowledge of the defective brakes than it would be without the work order. There is no risk of unfair prejudice to Dave, because there is nothing prejudicial about a work order. Further, given the highly probative value of the statement, there is no risk of confusing the jury or wasting judicial resources.

Totem Pole Hearsay

Where a piece of hearsay evidence contains other pieces of hearsay evidence, each statement must fall within an exception in order to be admissible. Here, because both the work order and Mechanic's statement to helper, which was recorded on the order, were made out of court and are being admitted for their truth, they are hearsay. If either statement is inadmissible, the whole piece of evidence is inadmissible.

Business Record Exceptions / Work Order

Information recorded in a business record is admissible under a hearsay exception where the information was recorded by somebody under a duty to record or report such

information, by somebody with personal knowledge of the information, and when the record was kept in the ordinary course of business (that is, the record may not be prepared in anticipation of litigation).

Here, Helper was assisting Mechanic, and Mechanic instructed Helper to write on the work order, "Inspected brakes – repair?," and Helper did. Thus, Helper was under a duty to record such information. Given that this was a mechanic shop, preparing work orders is likely a part of the ordinary course of business. Further, Helper had personal knowledge of Mechanic's statement, because he heard Mechanic say it himself and did himself record it in the work order.

Thus, if Mechanic's statement meets an exception, the whole piece of evidence will be admissible.

Present Sense Impression / "Inspected Brakes – Repair?"

Because Mechanic made the statement as or immediately after his inspection of the brakes, it would fall under the present sense impression, because his impression was that the brakes needed repair.

State of Mind / "Inspected Brakes – Repair?"

Additionally, Mechanic would have been speaking as to his knowledge that the condition of Dave's brakes was bad and that they required repair.

Recorded Recollection

A writing that was prepared by one with personal knowledge of the events contained in the writing, or at the instruction of the person with personal knowledge and adopted by them, and made soon after the event occurred and that was a true and accurate depiction of the events that transpired, is admissible as a recorded recollection.

Here, because Helper prepared the work order the same time as he heard Mechanic speak, the work order was likely a true and accurate record of what was said, and thus the writing will be admissible as a recorded recollection.

Best Evidence Rule

Where a witness is testifying as to the contents of a writing, and those contents are in fact at issue, the best evidence rule requires that the writing be admitted into evidence unless it has been lost or destroyed not due to any intentional misconduct of the party seeking to introduce the evidence.

Here, because Helper is testifying as to the contents of the work order, if the work order is available it should be admitted into evidence as the best evidence. If the work order that was provided to Dave is being introduced for purposes of showing that he knew or should have known that his brakes were bad, the best evidence rule is definitely

implicated. However, if it is unavailable, Helper would be permitted to testify as to the contents of the work order, if he remembered the words that were written (which he does not here remember).

Refreshing Recollection

If a witness did before have personal knowledge about something, and is simply unable to recall the specifics while on the stand, anything may be shown to the witness for the purposes of refreshing their recollection. Once the witness's memory is refreshed, the item that was shown to them must be taken away, and the witness must then testify from their refreshed memory. The item shown must be provided to the other party at their request.

Here, if the work order is available, it may be shown to Helper for purposes of refreshing his recollection as to the words that he wrote on the work order.

Thus, the work order should be admitted. Helper's testimony as to what Mechanic said should not be admitted, because it is not relevant for purposes of showing that Dave did or should have known of the condition of his brakes.

(3) "I think your brakes are bad."

Logical and Legal Relevance

Information that Mechanic told Dave that his brakes were bad would be extremely probative for purposes of establishing that Dave knew or should have known that his brakes were bad, which is the basis for Polly's complaint against Dave. Whether or not Dave had actual notice is very much a fact of consequence, because Polly's entire negligence claim will turn on Dave's knowledge of the conditions of his brakes. Thus, given the highly probative value, there is no likelihood of confusing the jury or wasting judicial resources.

Personal Knowledge

Because Helper heard the statement to Dave, he has personal knowledge of the contents of the statement.

Hearsay

Mechanic's statement to Dave is being admitted for purposes of establishing its truth, that Dave's brakes were bad. Thus, the statement is hearsay.

Effect on Hearer

One non-hearsay use for out-of-court statement is to show effect on the hearer – the statements are thus not admitted for the truth of the matter asserted. Here, even if

Mechanic's statement were not being admitted for its truth, it would be admissible as non-hearsay for purposes of demonstrating its effect on the hearer, or the effect on Dave, to show that he had been told that his brakes may be bad.

Thus, this statement should be admitted.

"I am not surprised. They've felt a little funny lately."

Logical and Legal Relevance

Against, because Polly's claim against Dave is in negligence, any evidence that Dave knew or should have known that his brakes were defective is highly probative of establishing that Dave was negligent, as the ordinary reasonable prudent person would either have their brakes inspected by another mechanic, have their brakes repaired, or cease driving the vehicle upon learning that their brakes were bad. Further, that Dave was not surprised to hear that Mechanic thought his brakes were bad and actually felt that the brakes felt funny himself, he had actual knowledge that they may be bad and thus any statement from Dave that they were bad should only have made it more apparent to Dave that he needed to have them repaired.

Although this statement is extremely bad evidence for Dave's position and extremely good for Polly, the mere fact that evidence is bad for one's case does not make the evidence unfairly prejudicial.

Personal Knowledge

Because Helper heard Dave's statement to Mechanic, he had knowledge of its contents.

Hearsay

The statement is hearsay because it is being admitted for its truth. If Dave was not surprised to hear that Mechanic thought his brakes were bad and actually felt that the breaks felt funny, he had actual knowledge that they were bad.

Admission of a Party Opponent

An admission is a statement made by a party to the litigation being admitted into evidence against the speaker, by the opposing party to the litigation. It is non-hearsay as an exemption under the Federal rules of evidence.

Here, because Dave is a party to the litigation, and because his adversary in the litigation, Polly, is admitting the statement against him, it is an admission of a party opponent.

Circumstantial Evidence of State of Mind

Circumstantial evidence of the speaker's state of mind, such as knowledge of circumstances, is non-hearsay under the Federal rules.

Here, the statement shows that Dave had knowledge that his brakes were or may be bad. Thus, the evidence is admissible for purposes of demonstrating Dave's state of mind at the time he made the statement to Mechanic.

Thus, this statement should be admitted.

(5) "The sports car ran the red light and ran into the truck."

Logical and Legal Relevance

That Dave ran the red light and crashed into Polly's truck is extremely probative for purposes of establishing that Dave was at fault in the accident. The evidence is extremely probative for that purpose. However, it does not appear to be a very important fact of consequence that Dave ran through the red light or crashed into Polly, because in fact it seems that these facts have been established. As the real issue here is Dave's negligence, and particularly whether he knew or did not know that his brakes were bad, it may confuse the jury to introduce evidence as to the cause of the accident.

Personal Knowledge

Because Helper heard the bystander's exclamation, he has personal knowledge of its contents.

Further, based on the contents of bystander's exclamation, it is apparent that he had personal knowledge of the facts exclaimed to.

Hearsay

Because of the bystander's exclamation is being admitted for purposes of showing that Dave ran through a red light and crashed into Polly's truck, it is hearsay.

Excited Utterance

A statement made while or immediately after an exciting event, while the declarant is still under the stress of the exciting event, is admissible under a hearsay exception.

Here, witnessing an accident is an exciting event, because it is extremely loud; whenever a person hears an automobile accident, they jump up to see if there is anything that they need to do to help those involved in the accident. As the statement was made immediately after Helper heard the sound of the collision, the declarant was likely under the stress of the event and thus is admissible as an excited utterance.

Present Sense Impression

Additionally, the bystander was attesting as to what he had visually witnessed moments before his exclamation, and the statement would be admissible as a present sense impression because it related to something that the bystander had just moments before witnessed.

Thus, this statement should be admitted, because although there is a chance of confusing the jury, Polly is entitled to prove that Dave did run into her with his car and not simply litigate the matter of his negligence with regard to the brakes.

Answer B to Question 3

Polly v. Dave

Proposition 8 is a Victim's Bill of Rights that is incorporated into the California Constitution. Therefore, in all criminal cases, all relevant evidence will be admitted, subject to a few exceptions. Here, because this is a civil case, the rules of Proposition 8 are inapplicable.

1. Mechanic's comment to Helper, "Dave had better get these brakes fixed. They look bad to me."

Relevance
In order for evidence to be admitted, it must be logically and legally relevant to the case.

Logical Relevance
Under the FRE, evidence is logically relevant if it tends to make any fact of consequence more or less probable than without the evidence. Thus, Mechanic's comment to Helper is logically relevant because it tends to show that the brakes were defective. Under CA rules, evidence is logically relevant if it tends to prove or disprove any fact in dispute. Here, it is unclear whether or not Dave disputes that the brakes were defective. If Dave does dispute that the brakes were defective, then Mechanic's comment to Helper does tend to prove that the brakes were defective. However, if Dave admits that the brakes were defective, but rather is arguing only that he did not know they were defective, then under California rules, this statement would not be logically relevant because it does not prove or disprove a disputed fact.

Legal Relevance
Evidence is legally relevant if its probative value outweighs undue prejudice or undue delay. Here, this evidence is probative to showing that the brakes were broken. And it outweighs any undue prejudice because, even if the brakes were defective, Dave may still argue that he did not know they were defective.

Lay Testimony
Here, Helper's testimony is being introduced as lay testimony rather than expert testimony, because he is testifying to what he heard, not to any observations or work he did on the brakes. Lay testimony must be helpful and based on personal observations. Here, this testimony is helpful to showing that the brakes were broken and Helper did personally hear Mechanic's comments. However, in order to admit this testimony, Helper must take an oath, and in California, this requires Helper to know that he has a legal duty to tell the truth.

Hearsay
Dave will argue that this is hearsay, not admissible under any exception. Hearsay is any

out-of-court statement offered for the truth of the matter asserted. This is hearsay because it is an out-of-court statement made from mechanic to helper, offered to prove that the brakes were broken.

Not for Truth of Matter Asserted

Out-of-court statements are not offered for the truth of the matter asserted, and thus admissible, when they are offered to show: a) effect on the hearer; b) the declarant's state of mind; c) impeach; d) legally operative language; or e) to refresh recollection. Here, there is no indication that Polly is introducing the evidence for any of these purposes.

Offered for Truth of Matter Asserted, but Hearsay Exception

Additionally, out-of-court statements may be offered for the truth of the matter, but be exempt hearsay (in California, all of these are hearsay exceptions, not exemptions): a) prior inconsistent statement, under oath; b) prior consistent statement; c) prior identification; or d) admission by party opponent. Here, none of these are applicable.

Offered for Truth of Matter Asserted, and Out-of-Court Declarant is Unavailable

Furthermore, hearsay may be admissible if it falls into one of the many hearsay exceptions. One category of exceptions is when the out-of-court declarant is unavailable. "Unavailable" means that the out-of-court declarant (Mechanic) is a) beyond the subpoena power of the court; b) invokes privilege; or c) is dead. Under the FRE, there are two additional times when an out-of-court declarant is considered "unavailable": a) lack of memory; and b) refusal to respond to subpoena. Here, there is no indication that Mechanic is "unavailable", thus, these hearsay exceptions do not apply.

Offered for Truth of Matter Asserted, and does not matter if Out-of-Court Declarant is Unavailable

Additionally, there are categories of hearsay exceptions regardless of whether an out-of-court declarant is available. Here, Polly may argue that Mechanic's statement should be admitted as a present sense impression.

Present Sense Impression

An out-of-court statement is hearsay within an exception when it is a present sense impression. A present sense impression is a statement describing an event contemporaneously or immediately thereafter. In California, this exception is narrowly construed to only statements made by someone "engaging in" the activity. Here, Mechanic is not describing any event that he is engaging in or observing. Rather, he is making a comment regarding the state of Dave's brakes. Thus, it is not hearsay within any exception.

2. Mechanic's Instruction to Helper to write on work order: "inspected brakes – repair?"

Relevance

Here, the work order is logically relevant because it tends to show that the brakes were broken. Again, if this was in dispute, then in California this would also be logically

relevant. For the same reasons discussed above under section 1, this is also legally relevant.

Best Evidence

Here the best evidence is arguably the work order. This is especially true since Helper is having difficulty remembering what words he wrote on the work order.

Hearsay

Here, this is hearsay within hearsay because 1) Helper did not himself observe the brakes and therefore he was simply writing down what he was instructed to do; and 2) Helper's statement in the work order is an out-of-court statement.

Mechanic's instruction to helper

Again, there is no evidence that Mechanic was unavailable to testify.

Present Sense Impression

Polly may argue that this was a present sense impression. If this was made immediately following Mechanic's inspection of the brakes, they may qualify as a present sense impression. However, in California, they would not because this comment was not made while Mechanic was engaged in fixing the brakes.

Helper's writing in the work order

Helper's writing in the work order "Inspected brakes – repair?" is hearsay within hearsay.

Past Recollection Refreshed

Polly may be able to introduce this as past recollection refreshed. Parties can use anything to refresh the recollection of witnesses. Here, Polly could show Helper the work order to refresh Helper's memory. However, the work order could not be read into evidence. If Helper's memory is refreshed from looking at the work order, then he can testify independently and that will be introduced. However, if Helper's memory is not refreshed by looking at the work order, Polly's counsel may look to past recollection recorded.

Past Recollection Recorded

Past recollection recorded may be admitted if it was made at or near the time of the event while the event was still fresh. Here, it appears that the work order was made immediately after Mechanic inspected the brakes, and Helper immediately wrote it in the work order, and thus it was at or near the time of the event. Therefore, the work order can be read into evidence, but not introduced as evidence.

Business Record

If Polly's attorney wants to actually introduce the work order into evidence, the best way to do so is as a business record. A business record may be introduced if it is made by one with a business duty, it is recorded in the regular course/practice of business, at or near the time of the event, by someone with knowledge, and it is trustworthy. Here, this record was made by Helper, who has a business duty. Additionally, it is likely that these

work orders are made in the regular course and practice of the business. This work order was not made in anticipation of litigation. Helper made the work order per Mechanic's instructions, and therefore it was made by one with knowledge. And there is an overall element of trustworthiness, since neither Helper nor Mechanic were the negligent party.

Therefore, the work order should be admitted as a business record.

3. Mechanic to Dave, "I think your brakes are bad. You'd better get them fixed."

Relevance

Here, Mechanic's statement to Dave is relevant because it tends to prove that Dave knew about his defective brakes. And in California, it would be admitted because it is in dispute whether or not Dave was aware of his bad brakes. Additionally, this is legally relevant because its probative value is very high (it shows that Dave knew his brakes were bad) and its chance for undue prejudice or delay are low.

Lay Opinion

Here, Helper may testify regarding this because this is helpful to the jury and because Helper was present and contemporaneously overheard Mechanic make this comment to Dave.

Hearsay: Effect on Hearer

Here, Dave will argue that this is hearsay not within any exception. However, Polly will counter argue that this is not hearsay at all. Rather, Polly will argue that this is not offered to prove the truth of the matter asserted (that the brakes were in fact bad and that Dave should get them fixed). Rather, this is offered to show the effect on the hearer (Dave). Polly will argue that this is offered to prove that Dave knew (or should have known) that his brakes were defective, and was negligent in driving his car without fixing the problem. Thus, this testimony is not hearsay and should be admitted.

4. Dave to Mechanic, "I'm not surprised. They've felt a little funny lately."

Relevance

This comment is relevant because it tends to show that Dave knew that his brakes were defective and was therefore negligent in driving the car. Additionally, this is logically relevant in California, because it is likely disputed whether or not Dave knew his brakes were defective. Additionally, it is legally relevant because its probative value outweighs any prejudice.

Hearsay

Not for Truth of Matter Asserted

First, Polly will argue that this is not offered for the truth of the matter asserted, but rather to show the declarant's state of mind (that Dave knew that the brakes were defective). Additionally, Polly may want to introduce this later on as impeachment evidence against

Dave if he testifies that he did not have any idea that his brakes were defective.

Offered for Truth of Matter Asserted, but Hearsay Exemption/Exception

Additionally, Polly may try to argue that this is within a hearsay exemption (FRE)/exception (CA) of a) prior inconsistent statement or b) admission by party opponent.

Prior Inconsistent Statement

Here, if Dave testifies that he never knew that his brakes were acting up, Polly may be able to introduce this as a prior inconsistent statement. In California, this would be permitted as a hearsay exception because California does not require that the prior inconsistent statement be made under oath. However, under the FRE, this would not be admitted because it was not made under oath.

Admission by Party Opponent

Here, Polly will try to introduce this as an admission by a party opponent (Dave) that his brakes were defective. As such, it would fall under a hearsay exemption (or exception in California). Here, this is Dave's own admission that he knew that the brakes have been acting oddly, and therefore should be admitted as a hearsay exception.

Offered for Truth of Matter Asserted, and Out-of-Court Declarant is Unavailable

Additionally, Polly may argue that this is a declaration against interest (against Dave's pecuniary, penal, or social interest (California only)). However, this hearsay exception is only available if the out-of-court declarant is unavailable, and here, Dave is available.

Offered for Truth of Matter Asserted, and does not matter if Out-of-Court Declarant is Unavailable

Additionally, this may be offered as current state of mind as a hearsay exception.

5. Bystander, "The sports car ran the red light and ran into the truck."

Relevance

Here, this statement is relevant because it shows that Dave was the one that ran the red light and hit Polly. This is likely an issue in dispute, so should also be logically relevant in California. Additionally, this is legally relevant because it has a high probative value that is not outweighed by any undue prejudice.

Offered for Truth of Matter Asserted, and does not matter if Out-of-Court Declarant is Unavailable

Present Sense Impression

A present sense impression is one that was made contemporaneously or immediately after an event that describes an event. In California, it is required that the out-of-court declarant be engaged in the event. Here, Bystander made the statement immediately after

the collision and the statement is describing what Bystander saw. However, in California this would not be admissible because the bystander was not engaged in the activity. However, under the FRE, this would be admitted.

Excited Utterance

An excited utterance is one regarding a startling event, relating to the startling event, and made while the out-of-court declarant is still startled. Here, the bystander was discussing a startling event (a car accident), and it was likely made while the bystander was still startled (certainly, it is startling to see a car accident and one would be startled immediately after observing one). Furthermore, the bystander's comments are related to the startling event – the bystander is saying what happened.

Therefore, this statement should be admitted as hearsay within an exception.

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ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2009
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2009 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 3

Dustin has been charged with participating in a robbery in California on the morning of March 1.

(1) At Dustin's trial in a California state court, the prosecution called Wendy, who was married to Dustin when the robbery took place. Dustin and Wendy divorced before the trial and Wendy was eager to testify.

During the direct examination of Wendy, the following questions were asked and answers given:

(2) Prosecutor: You did not see Dustin on the afternoon of March 1, is that correct?

Wendy: That is correct.

(3) Prosecutor: Did you speak with Dustin on that day?

Wendy: Yes, I spoke to him in the afternoon, by phone.

(4) Prosecutor: What did you discuss?

Wendy: He said he'd be late coming home that night because he had to meet some people to divide up some money.

(5) Prosecutor: Later that evening, did you speak with anyone else on the phone?

Wendy: Yes. I spoke with my friend Nancy just before she died.

(6) Prosecutor: What did Nancy say to you?

Wendy: Nancy said that she and Dustin had "pulled off a big job" that afternoon.

(7) Prosecutor: Did Nancy explain what she meant by "pulled off a big job"?

Wendy: No, but I assume that she meant that she and Dustin committed some sort of crime.

Assuming all proper objections, claims of privilege, and motions to strike were timely made, did the court properly allow the prosecution to call the witness in item **(1)** and properly admit the evidence in items **(2)** - **(7)**? Discuss.

Answer according to California law.

Answer A to Question 3

1. In the prosecution of D for a robbery, the prosecution called W, who was D's wife at the time of the robbery as a witness.

Spousal Testimonial Privilege

California recognizes a spousal testimonial privilege in both civil and criminal cases. Under that privilege, a person is permitted to refuse to testify against his or her spouse. However, this privilege does not bar W's testimony for two reasons.

First, because W and D are no longer married, the privilege does not apply; the spouses have to be married at the time of the trial for the privilege to apply.

Second, the testifying spouse holds the privilege, so that if W decided to testify because she wanted to, D could not assert the privilege to prevent her from testifying. Here, W is eager to testify, and D cannot prevent her from doing so.

Thus, W was properly called as [a] witness, even though she was D's spouse at the time of the robbery and even over D's objection.

Confidential Marital Communications Privilege

California also recognizes a confidential marital communications privilege. That privilege protects communications that were made during marriage if those communications were made in confidence. Even though W and D are no longer married, the privilege would still apply to statements made during the marriage. Additionally, D and W jointly hold the privilege, and D can prevent W from testifying as to confidential communications. However, the privilege would not preclude W from testifying in general, so W was properly called as a witness.

2. Question about seeing D on the day of the robbery

Presentation

D should object that to the form of this question because it is leading. A leading question is one that suggests the answer to the witness. Leading questions are only proper on cross-examination, or an direct examination if a witness is hostile or has trouble remembering. Here, the prosecutor's use of a leading question on direct examination is improper, and an objection to the form of the question should be sustained.

Relevance

The question, though leading, is nevertheless relevant. Relevant evidence is evidence that tends to establish the existence of a material, disputed fact. Here, it is likely material whether W saw D on the day of the robbery, depending on D's defenses and alibis about that day.

Relevant evidence is nonetheless inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, waste of time, or confusion. Nothing in W's answer suggests these factors, and it is therefore admissible.

3. W's answer to the question about speaking with D

Presentation

D should move to strike W's answer because it answers questions not asked. The prosecutor's question was simply if W spoke with Dustin on that Day. W should simply have answered yes, but instead offered "in the afternoon" and "by phone." That additional material was not in response to the question and could

be stricken by the court. In California, both the party conducting the examination and the opposing party can move to strike a witness's answer.

Relevance

The answer is, however, likely relevant to the existence of a material, disputed fact because it relates to where D was and what he was doing on the day of the robbery.

4. W's testimony of D's statement

Relevance

W's testimony is relevant because it is offered to prove the existence of a disputed, material fact: namely, that D was going to divide up money with his friends, which suggests that he participated in the robbery.

The testimony can nevertheless be excluded if its prejudicial value substantially outweighs its probative value. Although, it's prejudicial to D because it establishes guilt, it is not unfairly prejudicial because it does not improperly appeal to the jury's sensitivities. Thus, the information is relevant.

Competence

Furthermore, W is competent to testify about D's statement because she has personal knowledge of it, as she heard it.

Hearsay

D should object to this testimony on the basis that it is hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Here, the

D's out-of-court statement is being offered to prove that he was meeting up with friends to divide money, as evidence that D participated in the robbery.

Hearsay Exceptions

The prosecution should argue that a number of exceptions apply to this statement.

Admissions by Party Opponent

First, the prosecution should argue that D's statement is admissible hearsay under California law because it is an admission by a party opponent. D, the defendant, is the prosecution's party opponent. His statement that he was going to divide up money with friends is an acknowledgement of fact, and is, therefore, admissible hearsay as an admission from a party opponent.

Present State of Mind

Additionally, the prosecution could argue that the statement is admissible hearsay because it is not being offered to prove the truth of the matter asserted, but rather is being offered as circumstantial evidence of D's state of mind and his intent to go see his friends to divide up money and as circumstantial evidence that he carried out that intent. A limiting instruction could be given to limit the use of the evidence for that purpose.

Present Sense Impression

California also recognizes a hearsay exception where the declarant is describing his conduct at the time he is acting. However, because this statement is one of future action, this exception would not apply.

Confidential Marital Communication Privilege

D should also object on the basis that this statement is privileged through the confidential marital communications privilege. As described above, this privilege applies even where the marriage has ended at trial, if at the time the statement is made the parties are married and the statement was made in reliance of the confidential nature of the marital relationship. D will argue that his statement that he was going to divide up money with his friends was intended to be confidential. Given its incriminating nature, it is likely he will win that argument. Unless W can show that there was no confidentiality because others were present when the statement was made, the court should probably grant D's motion to exclude W's testimony about his statement on the basis of privilege.

5. Question about conversation with Nancy

Form of Question

D could object to this question as another leading question, because it suggests the correct answer, and is improper on direct examination.

Form of Answer

D could also object to the answer and move to strike, since it offers information ("just before she died") that was not asked for in the question. In California, both the person conducting the examination and the other party can move to strike an answer that is nonresponsive to the question asked.

Relevance

D could argue that this evidence is not relevant to a material fact in dispute. On the face of the question, it does seem irrelevant that W's friend Nancy died

shortly after they spoke. However, as explained below, at this information is probably relevant to lay the foundation to establish whether any hearsay exception (dying declaration) applied to Nancy's statement, and so is likely admissible for that reason.

6. Testimony of Nancy's statement

Competence

W is competent to offer this testimony because she has personal knowledge of the statement, that is, Nancy said it to her. However, she may not be competent to testify as to its meaning, as will be discussed below.

Relevance

The testimony of Nancy's statement is relevant to a disputed material fact because it tends to establish D's participation in the robbery and his guilt.

Hearsay

D should object to the admission of this statement on the basis that it is hearsay, that is, Nancy's out-of-court declaration is being offered to prove the truth of the matter asserted (that she and D committed a robbery).

Dying Declaration Exception

California's dying declaration hearsay exception applies to both criminal and civil cases and permits the admission of statements that were made while the declarant was dying, about the circumstances leading to her death. California requires that the declarant actually have died.

Here, Nancy actually died, and her statement was made shortly before her death. However, nothing indicates that the statement was related to the circumstances of her death. Perhaps if Nancy was injured during the robbery, the statement would be admissible, but on the facts presented currently, nothing suggests the statement was made about the circumstances of her death, and it is therefore not admissible under this exception.

Statement Against Interest

California also recognizes a hearsay exception where the declarant's statement is against his or her financial, social, or penal interest at the time it was made. The declarant must be unavailable.

Here, Nancy is unavailable because she is dead. Additionally, the statement that she and D "pulled off a job" suggests criminality on her part and is therefore, against her penal interest, and was so at the time that it was made. The statement should be admitted under this exception.

7. W's interpretation of Nancy's statement

Relevance

W's comment about Nancy's statement is relevant because it goes to prove a disputed material fact, that is, whether D committed a crime on March 1.

Form of answer

D should move to strike W's answer because the prosecutor did not ask W what she thought Nancy meant by the statement; the prosecutor only asked whether Nancy explained what she meant, and W's answer was therefore nonresponsive and possibly in narrative form.

Competence

However, D should object to W's statement on the basis that W is not competent to interpret Nancy's statement. W has no personal knowledge of what Nancy meant by "pulled off a big job" because, as W testifies, Nancy never explained what that meant.

Lay Opinion

D could also object to W's statement on the basis that it offers a lay opinion evidence, since W has no personal knowledge of what the statement meant when Nancy made it. Lay opinion is admissible where it is rationally based on a witness's perception and is helpful to the jury. Here, it is unlikely that W's statement is helpful to the jury because members of the jury are just as able to offer an interpretation of Nancy's statement as W is. Unless W has some other basis for her opinion (i.e., Nancy and D had used those terms in the past, or that it was customary where she lived), W should not be allowed to offer her interpretation of Nancy's statement.

Proposition 8

In a California criminal case, all relevant evidence is admissible, subject to certain exceptions (such as hearsay rules and privilege). Here, the court could determine that the evidence is admissible notwithstanding that it is an otherwise inadmissible lay opinion, if the evidence's probative value was not substantially outweighed by its prejudicial value.

Answer B to Question 3

Because this is a criminal prosecution in California, Prop 8 applies. Prop 8 makes any relevant information admissible subject to unfair prejudice balancing. However, Prop 8 doesn't apply to hearsay, rape shield, the exclusionary rule, privilege, evidence of D's character first presented by the prosecution, and secondary evidence.

1. Spousal Privilege

Testimonial Privilege

In California, a witness may refuse to testify against their spouse in both civil and criminal proceedings. This privilege exists only during a valid marriage. Further, it is the [witness] spouse that holds the privilege.

Because D and W are divorced and W wants to testify, she may.

Confidential Communication Privilege

All communications made during the course of a valid marriage and intended to be confidential between the husband and wife are privileged. The party spouse holds the privilege, and thus may prevent the witness spouse from testifying to these communications. The communications made during marriage remain privileged even after divorce.

Therefore, Wendy may testify to information other than confidential communications made between her and D during the marriage. The defense may not prevent her from taking the stand. The court allowed the prosecution to call the witness.

2. You did not see Dustin on ……

Relevance

Logical

In order to be admissible, evidence must be relevant. It is relevant if it tends to make any disputed material fact of consequence more or less probable.

Here, the fact that D wasn't in S's presence on the afternoon in question makes it more probable that he could have been participating in a robbery. Thus, it is relevant.

Legal

Although logically relevant, evidence may be excluded for public policy reasons or because the risk of unfair prejudice substantially outweighs the probative value. Neither of these apply here.

Form

The prosecution should object to this question as leading. Leading questions are questions that suggest the desired answer. They are inadmissible on direct except where the witness is hostile, adverse, or needs help remembering. It doesn't appear that any of these exceptions apply; thus, the form of the question was improper.

Competence of Witness

A witness may testify only based on personal knowledge and present recollection. Here, W is testifying based on what she observed that day from present recollection. Thus, it is proper.

Therefore, the question was asked in an improper form, and any objection to form would have been granted. However, the answer would be admissible.

3. Did you speak with D on that day?

Relevance

This information is relevant to lay a foundation for the next question. The fact that W spoke with D makes it more probable that he told her something in the phone conversation.

Further, it is neither unfairly prejudicial nor excluded for public policy reasons.

Competence

Evidence is based on present recollection and personal knowledge.

4. What did you discuss?

Relevance

Evidence is relevant in that it makes more probable that D committed the robbery if he had money to divide up.

Hearsay

Hearsay is an out-of-court statement used to prove the truth of the matter asserted. It is inadmissible unless it fits under one of California's hearsay exceptions.

W's response of what D said is hearsay because it is used to prove the truth of the matter asserted, i.e., that he would be home late because he had to divide some money. The prosecution is using it to show he did have some money from the robbery.

Exceptions

Party Admission

The statement, although hearsay, would be admissible under the party admission hearsay exception. A statement by any party is admissible hearsay regardless of whether the statement was against their interest when made.

Here, D's statement that he had money to count up is an admission by a party, D, that he had some money to divide up.

Statement Against Interest

Further, the statement may be admissible under the statement against interest hearsay exception. For this exception to apply, the statement must be against the declarant's interest and the declarant must be unavailable. It is unclear if D is testifying, but if he doesn't he is unavailable. Further, the statement could be argued to be against his interest because he is admitting he has a sum of money to divide.

Present State of Mind

This exception includes statement of intent as circumstantial evidence that the intent was carried through. D's statement of intent to meet people and divide some money may be admissible as circumstantial evidence that he did in fact do that.

Confrontational Clause

Under the 6th Amendment, criminal defendants have the right to cross-examine the witnesses against them. If a statement of a hearsay declarant is admitted, the confrontation clause is violated if the declarant is not available, doesn't testify, wasn't subject to cross, and the statement is testimonial.

The confrontation clause doesn't apply here because the declarant is the defendant himself and he wasn't giving testimonial evidence.

Privilege

As discussed above, the confidential communication privilege may bar this testimony. It was made during a valid marriage and intended to be confidential.

Therefore, the defense may properly object to this testimony, and it should be excluded.

Therefore, the evidence would be admissible hearsay as a party admission. However, the confidential communication spousal privilege likely would aply to exclude the evidence.

5. Later that evening did you speak with anyone else….

Relevance

Relevant to lay the foundation for the following question. If W spoke to Nancy, it is more likely she obtained the information she is about to testify to.

Form

This answer may be non-responsive in that it goes beyond the question asked of the witness. Further, it may assume facts not in evidence as there is no indication that Nancy had died. As such, an objection to form should have been granted.

6. What did Nancy say to you?

Relevance

It is relevant because it tends to make it more likely that D was in fact involved in a robbery.

Hearsay

W's testimony is an out-of-court statement by Nancy used for the truth of the matter asserted. Thus, it is inadmissible unless an exception applies.

Exceptions

Dying Declaration

The dying declaration hearsay exception applies to statements made with belief that death is imminent and that concern the cause of circumstances of death and, under California law, the declarant must actually die. In CA, it applies in both civil and criminal cases.

The declarant actually died, but the statement didn't involve the cause or circumstances of death. Thus, it is not applicable.

Party Admission

An admission by a coconspirator may be admissible against a fellow conspirator as an exception to hearsay. The statement must be made concerning the conspiracy and during the existence of the conspiracy.

It appears that N and D were coconspirators (an agreement between two or more persons w/the intent to agree and intent to complete the target offense). However, a conspiracy ends when the target offense is completed, and thus, when the bank robbery was completed, it is unlikely N and D were coconspirators any longer. Therefore, it is not an admissible party admission.

Statement Against Interest

A statement that, when made, was against the declarant's interest may be admissible under this exception. The declarant must be unavailable for this exception to apply.

Here, the statement that N and D had pulled off a big job, depending on how interpreted, was against N's interest when made. At the time made, it subjected her to criminal punishment because most people would interpret that as having committed a big robbery. Therefore, this exception likely applies.

Therefore, the statement is admissible hearsay under the statement against interest exception.

7. Did Nancy explain what she meant by “pull off a big job”?

Form

The defense could move to strike the witness’ answers as non-responsive (except the “No”). The prosecution asked [for] a “yes” or “no” answer, and the witness responded with something in addition to “yes” or “no” that did not respond to the question. The prosecution didn’t ask her what she thought of what it meant. This would be granted by the court.

Competence/Opinion Testimony

A witness must testify as to present recollection and personal knowledge. Here, W is testifying based on speculation and this is improper.

Further, a lay witness may give opinion testimony only if it is based on personal knowledge and helpful to the jury. Again, there is no personal knowledge and the speculation is not helpful to the jury. Thus, W’s last statement should be stricken.

FEBRUARY 2009
ESSAY QUESTIONS 4, 5, AND 6

California
Bar
Examination

Answer all three questions.
Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

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ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2009
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2009 California Bar Examination and two selected answers to each question.

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Question 3

While driving their cars, Paula and Dan collided and each suffered personal injuries and property damage. Paula sued Dan for negligence in a California state court and Dan filed a cross-complaint for negligence against Paula. At the ensuing jury trial, Paula testified that she was driving to meet her husband, Hank, and that Dan drove his car into hers. Paula also testified that, as she and Dan were waiting for an ambulance immediately following the accident, Dan said, "I have plenty of insurance to cover your injuries." Paula further testified that, three hours after the accident, when a physician at the hospital to which she was taken asked her how she was feeling, she said, "My right leg hurts the most, all because that idiot Dan failed to yield the right-of-way."

Officer, who was the investigating police officer who responded to the accident, was unavailable at the trial. The court granted a motion by Paula to admit Officer's accident report into evidence. Officer's accident report states: "When I arrived at the scene three minutes after the accident occurred, an unnamed bystander immediately came up to me and stated that Dan pulled right out into the path of Paula's car. Based on this information, my interviews with Paula and Dan, and the skidmarks, I conclude that Dan caused the accident." Officer prepared his accident report shortly after the accident.

In his case-in-chief, Dan called a paramedic who had treated Paula at the scene of the accident. Dan showed the paramedic a greeting card, and the paramedic testified that he had found the card in Paula's pocket as he was treating her. The court granted a motion by Dan to admit the card into evidence. The card states: "Dearest Paula, Hurry home from work as fast as you can today. We need to get an early start on our weekend trip to the mountains! Love, Hank."

Dan testified that, as he and Paula were waiting for the ambulance immediately following the accident, Wilma handed him a note. Wilma had been identified as a witness during discovery, but had died before she could be deposed. The court granted a motion by Dan to admit the note into evidence. The note says: "I saw the whole thing. Paula was speeding. She was definitely negligent."

Assuming all appropriate objections were timely made, should the court have admitted:

1. Dan's statement to Paula about insurance? Discuss.
2. Paula's statement to the physician? Discuss.
3. Officer's accident report relating to:
    a. The unnamed bystander's statement? Discuss.
    b. Officer's conclusion and its basis? Discuss.
4. Hank's greeting card? Discuss.
5. Wilma's note? Discuss.

Answer according to California law.

Answer A to Question 3

Preliminary Matters

Proposition 8 not applicable

Proposition 8 is an amendment to the California Constitution that states, in part, that all relevant evidence is admissible in a criminal trial. However, the present action is a civil action for negligence and thus Proposition 8 does not apply.

Standard of Relevance

In CA, evidence is relevant if it has any tendency to make disputed fact of consequence to the determination of the action more or less probable.

Discretion to Exclude under CEC 352

Under CEC 352, a judge has discretion to exclude evidence where its probative value is substantially outweighed by risk of unfair prejudice, waste of time, or confusion of the issues.

1. Dan's statement to Paula about Insurance

At the scene, Dan told Paula "I have plenty of insurance to cover your injuries."

Logical Relevance

Dan's statement is relevant in a couple of different ways. It might tend to show that D was driving negligently because he knew he was covered by insurance, and it may also show ability to pay a substantial judgment. Finally, it also indicates an admission of fault because D's insurance company would only pay for P's injuries if D was at fault. Thus, by admitting that his insurance would cover her, D implied he felt he was at fault. This is relevant because it tends to show that D was actually at fault and knew it immediately.

Legal Relevance

Insurance to Prove Negligence or Ability to Pay

Proof of D's insurance to show that D was engaged in negligent conduct or that D has ability to pay a substantial judgment is inadmissible for public policy reasons. We want to encourage people to have insurance and thus we do not allow it to be used against them in court. Thus, D's statement about his insurance should not be admitted to show that he was negligent or has the ability to pay a substantial judgment.

Use as Acknowledgment of Fault

However, the statement is still relevant as an admission of fault. Thus, it should be admitted unless the court finds that the danger of undue prejudice to D substantially outweighs its probative value. The statement will be harmful to D's case for sure, but mere harm is not substantial unfair prejudice. If D made this statement at the scene, he should be required to explain it and he can attack the probative value. The statement should have been admitted to show D believed he was at fault but it should not be admitted for the above improper purposes. A limiting instruction should have been given upon D's request to ensure it was only used for the limited purposes of showing D believed he was at fault.

Offer to Pay Medical Expenses

There is a public policy exclusionary rule for offers to pay medical expenses. Under the CEC admissions of fault made in conjunction with an offer to pay medical expenses are also inadmissible. Thus, D can argue his statement was an offer to pay P's medical expenses. However, P can argue that a statement that his insurance would cover her medical expenses is not really an offer to pay and thus his acknowledgement of fault should not be excluded. P seems to have the better argument on this point.

Hearsay

An out-of-court statement offered to prove the truth of the matter asserted is hearsay and is inadmissible unless it falls within an exception. Here, D's statement was made out of court at the scene of the accident. However, if used to show D believed he was

at fault, it is now being offered to prove the truth of the matter asserted - that D has insurance that will cover P's injuries. Thus, it is not hearsay if used for this limited purpose.

Even if offered for the truth of the matter asserted, under the CEC there is a hearsay exception for party admissions. Because D, the defendant here, made the statement, it would be admissible under the party admission hearsay exception.

Conclusion on Item #1: admission was proper for the purpose of showing that D believed he was at fault immediately after the accident but not to show that D was negligent or that D has the ability to pay a substantial judgment. The statement is non-hearsay or admissible as a party admission.

2. Paula's Statement to the Physician

Logical Relevance

Paula's statement tends to show that her right leg was injured and also tends to show how D was negligent - that he failed to yield to her right of way.

Hearsay

See hearsay definition above. P's statement to the physician was made out of court while at the hospital getting treatment. P's statement is best divided up into two distinct portions: (1) that her right leg hurts, and 2) that Dan failed to yield to her right of way. Both portions of her statement are presumably being offered for their truth - that she suffered an injury to her right leg and that Dan didn't yield to her right of way. As such, P's statement is hearsay and is inadmissible unless it falls within a hearsay exception.

Portion 1 – Statement About Injury to P's Right Leg

Present Physical Condition

A statement of present physical condition or of present state of mind is admissible as a hearsay exception. P's statement to the physician described her present physical condition. At the time she was seeing her doctor, her right leg was hurting her and her

statement described this present physical condition. Thus, the statement is admissible as a present physical condition.

Excited Utterance

An excited utterance is a statement relating to a startling condition made while the declarant is still under the stress caused by the condition. Here, P was injured in a car accident, which is a startling condition. However, the statement was made 3 hours after the car accident. Thus, P may not have still been under the stress caused by the accident at the time the statement was made. Perhaps if P's injuries were sufficiently severe, she could make a strong argument that she was still under the stress of the accident. It's a close call but P's statement is probably not admissible as an excited utterance.

Statement Pertaining to Medical Diagnosis or Treatment

Unlike the exception under the Federal Rules, California's exception for a statement made in connection with the receipt of medical treatment is very narrow and only applies to a child describing an incident of neglect or child abuse. Thus, P's statement is not admissible under California's narrow exception.

<u>Portion 2 – Statement about D Failing to Yield</u>

Present Physical Condition

Although made in connection with her description of her present physical condition, the second part of P's statement does not itself describe a present physical condition. Thus, it should not be admitted with the first portion under the present physical condition exception.

Excited Utterance

Following the same analysis above, the second part of P's statement may be admissible as an excited utterance. However, P would have to establish the preliminary fact that despite the passage of 3 hours she was still in a state of excitement as a result of the accident.

Exclusion under CEC 352

However, even if the second portion of P's statement to the physician were admissible under a hearsay exception, it should probably be excluded under CEC 352. It's not clear what the statement was based on. If she observed D's failure to yield, she can testify to that directly rather than admitting it this way. Thus, the probative value is minimal since we don't know the basis for P's statement. And it will probably be duplicative of P's actual testimony at trial and it's somewhat prejudicial to D because it asserts that D breached a duty without giving him an opportunity to cross-examine P when she made the statement. Thus, the second portion of the statement should be excluded under CEC 352 even if it is found to fall within a hearsay exception.

3. Officer's Accident Report

Logical Relevance:

The contents of the report tend to show that D drove out in front of P's car and was thus negligent and that D was responsible for the accident.

Report - Hearsay

The officer's report is hearsay because it is an out-of-court statement that was made by the officer prior after [sic] the accident and it is being offered to prove its contents - that a witness saw D pull out in front of [P] and that the officer concluded that Dan was at fault.

Public Records Exception

The CEC has a public records exception for records made by public employees in the course of their duties. However, the court may exclude the record if it does not appear trustworthy. Here, the police report is an ordinary record made in the course of a police officer's duties. Thus, it may be admitted under the public records exception. However, the police report contains a statement from a bystander which is hearsay and the public records exception does not permit that statement because the bystander had no duty to communicate the information to the police officer. The business records exception does not cover records including conclusions on complex issues. If the same requirement is

applied to the public records exception, Officer's conclusion that D was at fault may not be admitted under the exception.

Part A - Unnamed Bystander's Statement

Bystander's Statement - Hearsay

The bystander's statement is hearsay because it was made out of court at the scene of the accident and it is being offered to prove its content that D pulled in front of P's car. Thus, it is inadmissible unless it falls within a hearsay exception.

Excited Utterance

See definition above. The bystander witnessed a startling event: a car accident which he apparently saw at close proximity. The police report also indicates that the officer arrived only 3 minutes after the accident and the bystander made the remark to the police officer immediately upon his arrival. Thus, it is likely that the bystander would have still been under the stress of witnessing the accident when the statement was made. Thus, the bystander's statement falls within the excited utterance exception.

Present Sense Impression

The CEC's present sense impression exception is narrow in that it only applies to statements explaining the conduct of the declarant while engaged in that conduct. Here, the car accident wasn't the bystander's own conduct so the statement would not be admissible as a present sense impression.

Part B - Conclusion and Basis

Lay Opinion

The opinion of a lay witness is only admissible if it is a rational conclusion based on the witness's firsthand observations, is helpful to the jury, and does not require expertise or knowledge unknown to the general public. Here, the police report explains that the officer's conclusion as to fault is based on the bystander's statement, interviews with both parties, and the skidmarks. The officer's conclusion thus seems to be reasonably based on his own observations. The conclusion would also be helpful to the jury who

may not be able to understand the relevance of the skidmarks. However, it's not clear exactly how the officer formed his conclusion. If the skidmarks were an important factor, the analysis would seem to require some expertise not possessed by the general public. Thus, the opinion should not have been admitted as lay opinion because it relies on the officer's special expertise in accident reconstruction and analysis.

Expert Opinion

Expert opinion is admissible if it is helpful to the jury, the witness is qualified as an expert, the expert witness is reasonably certain of his conclusion, the analysis is supported by a proper factual analysis and is the result of reliable principles reliably applied to the facts. Here, P cannot establish the admissibility of the officer's conclusions as an expert opinion. First, the officer was never qualified as an expert and thus it is not clear whether he knows anything about analyzing skidmarks. Second, it is not clear whether the officer was reasonably certain of his conclusion or was just making his best guess based on what he observed. Third, we don't know what method of analysis the officer used. California has retained the Kelley-Frye standard which requires that the expert's methods be generally accepted by experts in the field. It is unclear how the officer analyzed the skidmarks and, thus, it is not possible to know if the officer's methods were generally accepted. In conclusion, the officer's conclusions could not be admitted as expert opinion.

Legal Relevance - CEC 352

Relevant evidence may [be] excluded where its probative value is substantially outweighed by risk of unfair prejudice. Even if the officer's conclusions were admissible as lay opinion or expert opinion, the conclusions in the police report should be excluded under CEC 352. The report is extremely vague in stating the basis for the officer's conclusions. For instance, it is not clear what the officer learned in his interviews of Dan and Paula that led him to the conclusion that Paula was at fault. And, as discussed above, the officer fails to describe how the skidmarks led him to conclude that D was at fault. For these reasons, the officer's conclusions have minimal probative value. On the other hand the conclusions in the report are very prejudicial to D because they state

that he is at fault and he is unable to cross-examine the officer who made them since he will not be testifying at trial. Thus, the risk of unfair prejudice substantially outweighs what little probative value the conclusions offer and the conclusions should have been excluded under CEC 352.

4. Hank's Greeting Card

Logical Relevance

The greeting card shows that P had a reason to rush home - to get an early start on their trip to the mountains and possibly that Hank would have been upset with P had she not hurried home. If P was rushing, it's more likely she may have been negligent, which is relevant to D's counterclaim and to D's defense that P was contributorily negligent.

Hearsay

See hearsay definition above. Henry's statements in the card are out-of-court statements because he wrote them up the morning of the accident. However, it does not appear that D is offering them for the truth of the matter.

Non-Hearsay - To Show Effect on Listener

Out-of-court statements are not barred by the hearsay rule if offered for some other purpose such as to prove the declarant's state of mind or to show the effect on the listener. Here, D is not offering the greeting card to prove that they were going to the mountains for the weekend. Rather, D is offering the card to show its likely effect on Paula - that it made her want to get home quickly and that she may not have been driving carefully as a result. Thus, the greeting card should be admitted as non-hearsay for this purpose.

Authentication

Physical evidence and writings must be authenticated before they may be admitted into evidence. Authentication requires such proof that is sufficient for a jury to find that the evidence is what the proponent claims it to be. Here, the greeting card was properly

authenticated by one of the paramedics who had seen the greeting card when treating Paula after the accident. Thus, it was properly admitted into evidence.

5. Wilma's Note

Hearsay

Wilma's note is an out-of-court statement because she wrote it down at the scene of the accident. Presumably it is being offered to prove the truth of the matter asserted, i.e., that P was speeding and that P was negligent. Because the note is hearsay, it is inadmissible unless it falls within an exception.

Excited Utterance

An excited utterance is a statement relating to a startling condition made while the declarant is still under the stress caused by the startling condition. Wilma witnessed the accident, which was a startling event. According to Dan's testimony, Wilma handed him the note immediately after the accident. Thus, it seems that Wilma wrote the note immediately upon witnessing the accident when she was probably still under the stress caused by witnessing the accident at close proximity. As such, the statement may be admitted as an excited utterance.

Lay Opinion re: Speeding

Lay opinions must be based on the witness's personal observations, helpful to the jury, and not based on special expertise. Wilma's note contains the assertion that Paula was speeding. This is a lay opinion because it is based on Wilma's observations (recall, Wilma states she "saw the whole thing") and does not communicate the facts directly to the jury. We don't know, for instance, whether Wilma was driving 80 miles per hour or 50 miles per hour. However, this type of lay opinion is usually permissible because it is helpful to the jury. The jury will understand that, under the circumstances, P appeared to be driving very fast. Thus, the opinion regarding P's speeding should be admitted.

Lay Opinion re: Negligence

Wilma's opinion that P was negligent is probably not admissible. This opinion would not be helpful to the jury because it's not clear what Wilma based this opinion on. If it was based merely on the speeding, then there's no need to admit the conclusion regarding negligence because the opinion regarding speeding was already admitted. If it was based on other things, then it cannot be shown to be based on Wilma's firsthand observations. Thus, the opinion regarding P's negligence should not be admitted.

Authentication

Dan, the recipient of the note, could properly authenticate it before it was admitted to evidence. Assuming that the foundation was established, the note would be admissible upon Dan's authentication.

CEC 352

The circumstances surrounding the note are strange. Unless Wilma was mute, it is unclear why she would write out a note rather than just make a verbal statement to Dan. In addition, the note is rather conclusory and as such it does not assist the jury much in ascertaining whether or not P was driving negligently. On the other hand, there is some unfair prejudice because P has no opportunity to cross-examine Wilma or to even depose Wilma prior to trial. This is a close call, but the note should probably [be] excluded under CEC 352 because its probative value is substantially outweighed by its prejudice to Paula.

Answer B to Question 3

Because this case takes place in California state court, the court will use the California Evidence Code as the basis for the admissibility of evidence. Further, because this is a civil case, the rules regarding California's Proposition 8 will not be applied to the evidence.

1. Dan's statement to Paula about the insurance

Relevance

For evidence to be admissible, it must be factually and legally relevant. In California, factual relevance is evidence that would tend to make a matter in dispute more or less probable. Here, it is in dispute whether Dan was liable. Therefore, Dan's statement that "he has plenty of insurance to cover the injuries" will be logically relevant to making the matter of Dan's negligence more probable.

Legal relevance means that the probative value of the evidence outweighs any prejudicial impact that the evidence may have. While Dan's comment may be slightly prejudicial in implicating him in the matter, it is highly probative because it establishes that he could have been liable. Therefore, the comment will be found to be legally relevant.

However, evidence can be excluded if a court finds that it has the tendency to confuse the issues and mislead the jury. The defendant's comment could only establish that he has the ability to pay, and not that he was negligent in the accident. However, such evidence is unlikely to be confusing, and would not be subject to exclusion on this basis alone.

Reliability

Evidence must be reliable, and based on the witness' personal knowledge in order to be admissible. Here, Paula heard Dan make the comment that he has plenty of insurance. Therefore, the evidence is reliable.

Evidence of Medical Insurance

According to the California Evidence Code, evidence of liability insurance is inadmissible in a civil trial to prove that the defendant was at fault or that the defendant has the ability to pay, because public policy concerns dictate that we should encourage persons to have insurance. Therefore, Paula's testimony that Dan said he had plenty of insurance to cover the injuries should not have been admitted.

Offers to pay for injuries

In California, offers to pay another person's medical costs are inadmissible in court to show that the defendant was at fault, or that the defendant had the ability to pay. In addition, any statements made in connection with the offer to pay for medical expenses are similarly excluded. Paula is likely introducing the evidence to show that Dan was at fault, and this is why he offered to pay her costs. Therefore, Dan's statement that he can pay for Paula's injuries should not be admitted.

Statements of sympathy

In a civil case, a defendant's statements of sympathy made at the scene of the accident are inadmissible to show fault; however, any accompanying statements can be admitted against the defendant. Here, however, Dan was not making a statement of sympathy, but only stating that he had liability insurance to cover the injuries. Therefore, this rule will not be applicable to the statement.

Statements to settle

In California, any statements made with regards to a settlement offer are inadmissible to show guilt or liability. However, in order for this exception to apply, the plaintiff must have filed a lawsuit against the defendant. Because Dan's statements were made at the scene of the accident, this rule will also not apply.

Hearsay

Hearsay is any out-of-court statement offered to prove the truth of the matter stated therein. Hearsay is generally inadmissible in court. In this case, Dan's statement was made out of court, and is being offered to show that Dan was liable; therefore, it will be inadmissible hearsay unless an exception applies.

In California, an admission by a party opponent is an exception to the hearsay rule. An admission includes any statement made by the opposing party that is a prior acknowledgement of any fact in the case. Here, Dan made a prior statement that he could pay for Paula's injuries. Therefore, the statement is an admission by a party opponent, and would fall under the hearsay exception.

However, as stated above, the evidence will be inadmissible, because of the public policy rule governing the exclusion of statements made in connection with proof of insurance and statements offering to pay for the plaintiff's injuries.

2. Paula's statement to the physician

Relevance

Paula's statement to the physician is factually relevant because it shows that she suffered from physical harm, and because it establishes that Dan was negligent. Further, it is legally relevant, because while it is prejudicial to Dan in establishing that he

was negligent, it is highly probative because it shows that Paula suffered from physical injury, and it shows that Dan did not yield to the right-of-way, and thus was the party at fault in the accident.

Reliability

Paula has personal knowledge of the statement to the physician, because she made the statement.

Hearsay

Hearsay is any out-of-court statement offered to prove the matters stated therein. Here, Paula is introducing the evidence to show that she was injured and that she was negligent. Thus, it will be inadmissible hearsay unless one of the exceptions apply.

Statements of a past physical condition made to a doctor in the course of treatment

California will admit statements made to a doctor and that were necessary to receiving treatment. However, this exception only applies to minors who make the statements in connection to a claim of child abuse or neglect. Therefore, this exception will not apply.

Statement of a then-existing physical or mental condition

A statement made by the defendant of a then-existing physical condition is an exception to the hearsay rule. Paula can argue that her statement that her leg hurts the most was a statement of a then-existing physical condition, because her leg was hurting while she made the statement. However, the statement that Dan failed to yield to the right of way will not be admissible under this exception because it constitutes a past belief, and therefore, is not a then-existing state of mind.

Statement of a past physical condition if the physical condition is at issue in the case

California also permits a statement of past physical condition if it is at issue in the case. However, in order for this exception to apply, the declarant must be unavailable, and here, Paula is in the court. Therefore, this exception will not apply.

Excited utterance

The excited utterance exception permits the admission of a statement of a declarant who experienced an exciting or startling event and [is] still speaking under the stress of such excitement. In this case, Paula's comment was made 3 hours after the accident. This suggests that the statement was too remote for Paula to still be under the excitement. Further, no statements indicate that she was still under the stress of the accident. Therefore, her statements will not be admissible as an excited utterance.

Present sense impression

A present sense impression is a statement made contemporaneously while witnessing the event. California only recognizes this exception to the extent that it applies to the conduct of the declarant, but not with regards to anyone else. Here, the statement was not made contemporaneously because it was made 3 hours after the accident. Further, it states the conduct of Dan and thus would not fall under the exception.

As a result, the court should have admitted her statement that her leg hurts the most because it was a statement of a then-existing physical condition. However, the further comment about Dan should be excluded because it is inadmissible hearsay.

3a. Officer's accident report relating to the unnamed bystander's statement

Relevance

The statement is logically relevant because the unnamed bystander's statement establishes that Dan caused the accident. Furthermore, it is legally relevant because it is highly probative in establishing who was at fault, and this probative value will outweigh any prejudicial impact of the testimony.

Reliability

The bystander personally witnessed the scene; therefore, he has personal knowledge with regards to his statement. Further, the police officer has personal knowledge as to the matters which he entered into the police report, because he wrote the police report.

Hearsay

The police report is an out-of-court statement being offered to prove the matters stated therein. Furthermore, the bystander's statement was an out-of-court statement that is being offered to prove the truth of the matters stated therein--that Dan was negligent. Thus, there are two levels of hearsay in the police report. Both levels of hearsay must fall within a hearsay exception in order to be admissible in court.

Excited utterance

The excited utterance exception permits the admission of a statement of a declarant who experienced an exciting event and is speaking under the stress of such excitement. The bystander made this statement three minutes after the accident occurred. It is likely that he was still under the stress of the excitement, because such a short time had elapsed, and he had run to the police officer in order to tell him the

statement. Therefore, the bystander's comment will be admissible under the excited utterance exception to the hearsay rule.

Public records exception to the hearsay rule for the police reports

In California, the public records exception to the hearsay requires that the record be made by a public employee in accordance with his duties, that the matters were recorded at or near the scene of the accident, that the official had personal knowledge of the matters contained in the record, and that the record was made under circumstances indicating trustworthiness.

Here, the record was made by a public officer while he was carrying out his duties. Further, he made the report at the scene of the accident, and made the record according to his observations and interviews. Therefore, the factors indicating trustworthiness were present. As a result, the report is admissible under the public records exception.

3b. Officer's accident report relating to his conclusion and its basis

Relevance

The conclusion and its basis are relevant to establish that Dan was negligent. Further, it is highly probative in establishing who was at fault, and the probative value of this determination far outweighs any prejudicial impact that it may have. Therefore, the evidence is admissible.

Expert witness opinion

Expert opinion is admissible in court if 1) the testimony is helpful, 2) the witness is qualified, 3) the witness is relatively certain of his statements, 4) the witness' testimony has a sound factual basis, and 5) the opinion was reliably based on matters

that were reliably applied. Lay opinion is an opinion by a person that is rationally related to that person's perception of the incident. Lay opinion does not include legal opinions of negligence and causation.

In this case, Officer is making an expert opinion because he is testifying as to the legal conclusions of the case. This is not conclusion on which a layperson would be able to testify. Therefore, Officer must establish his credentials as an expert. His testimony is certainly helpful to the jury, because it allows the jury to ascertain who was negligent. However, it is not clear if Officer is qualified to make such a legal conclusion (that Dan caused the accident) or that officer is relatively certain of his statements. Further, Officer is not present in court to be cross-examined; therefore, a judge will not be able to make the determination that Officer is competent to testify as an expert witness. While the skidmarks and the interviews may provide a sound basis to establish that Dan caused the accident, Officer has not been qualified as an expert, therefore, the evidence is inadmissible.

As a result, the police report will only be admissible as to the contents of the bystander's comments, but not as to Officer's conclusion and its basis.

4. Hank's greeting card

Relevance

The statement is relevant because it establishes that Paula was in a hurry on the way home, and as a result may have been driving too quickly. Further, the greeting card is probative in establishing that Paula was at fault in the accident.

Authentication

All physical evidence must be authenticated in order to be admissible. Here, the paramedic testified that she recognized the greeting card as the same greeting card that

she found in Paula's pocket. Therefore, the greeting card has been properly authenticated as belonging to Paula.

However, the note in the greeting card also must be authenticated to establish that it was indeed Hank who wrote the note. Circumstantial evidence can establish such authentication. The court may find that because it was found in Paula's pocket while she was being treated, and was signed by a man with the same name as her husband, Hank. Therefore, the note in the card has been properly authenticated.

Hearsay

Paula could argue that the note should be excluded because it is inadmissible hearsay. However, Dan could argue that the statement in the note is not being offered for the truth of the matter. It is not being introduced to show that Paula was getting an early start on the weekend trip, but rather to show that Paula was on notice that she needed to hurry, and to show the effect on the hearer (Paula) upon hearing that she had to get an early start on her weekend. Therefore, the statement is non-hearsay because it is not being offered to prove the matters stated therein, but rather to show the effect of the card on Paula.

Dan could further argue that the statement is an admission by a party opponent. However, the statement was made by Hank, and not Paula, and, therefore, this exception will not apply.

5. Wilma's note

Relevance

The note is highly relevant because it establishes that Paula was speeding during the accident, and thus was negligent. Further, it is probative to the issue of

Paula's fault, and this probative value would outweigh any prejudicial impact that the note would have.

Authentication

All real evidence must be authenticated in order to be presented in court. Here, Dan will likely authenticate the note as the same note that he received while he was waiting for the ambulance.

Reliability

Even if a court believes that Wilma saw the whole thing, the statement in the note is inadmissible lay opinion. Lay opinion must be 1) helpful to the jury, 2) based on the person's perception, and 3) the opinion is rationally related to the perception.

Here, Wilma is making a legal conclusion as to Paula's negligence. A layperson cannot testify as [to] legal conclusions such as negligence. Therefore, Wilma's statement as to Paula's negligence will be inadmissible as inadmissible lay opinion.

Hearsay

The note would also be inadmissible hearsay because it is an out-of-court statement that is being offered to prove the matters stated therein, that Paula was speeding and that Paula was negligent. The note may be admissible if it falls under any of the recognized exceptions to the hearsay rule.

Excited utterance

There are no facts indicating that Wilma wrote this note when she was under the stress of having viewed the accident. Further, it is unclear how much time had passed since the accident had occurred and Wilma wrote the note. Therefore, the statement in the note would not qualify as an excited utterance.

Present Sense Impression

As stated above, California only recognizes a present sense impression to the extent that it describes the declarant's conduct. Here, Wilma is describing Paula's conduct therefore, this exception will not apply.

JULY 2009

ESSAY QUESTIONS 4, 5, AND 6

California Bar Examination

Answer all three questions.
Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

THE STATE BAR OF CALIFORNIA
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ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2010
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2010 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 3

David and Vic were farmers with adjoining property. They had been fighting for several years about water rights.

In May, Vic and his wife, Wanda, were sitting in the kitchen when Vic received a telephone call. During the call, Vic became quite angry. As soon as he hung up, he said the following to Wanda: "That rat, David, just called and told me that he was going to make me sorry! He used some sort of machine to disguise his voice, but I know it was him!"

In June, Wanda and Vic passed a truck driven by David, who made an obscene gesture as they drove by. Vic immediately stopped and yelled that if David wanted a fight, then that was what he was going to get. Both men jumped out of their trucks. After an exchange of blows, David began strangling Vic. Vic collapsed and died from a massive heart attack. David was charged with manslaughter in California Superior Court.

At David's trial, the prosecution called Wanda, who testified about Vic's description of the May telephone call.

During cross-examination of Wanda, the defense introduced into evidence a certified copy of a felony perjury conviction Vic had suffered in 2007.

The prosecution then introduced into evidence a certified copy of a misdemeanor simple assault conviction David had suffered in 2006.

During the defense's case, David claimed that he acted in self-defense. He testified that he knew about two other fights involving Vic. In the first, which took place four years before his death, Vic broke a man's arm with a tire iron. In the other, which occurred two years before his death, Vic threatened a woman with a gun. David testified that he had heard about the first incident before June, but that he had not heard about the second incident until after his trial had commenced.

Assuming that all appropriate objections were timely made, should the California Superior Court have admitted:

1. Wanda's testimony about Vic's statement regarding the May phone call? Discuss.
2. The certified copy of Vic's 2007 felony perjury conviction? Discuss.
3. The certified copy of David's 2006 misdemeanor simple assault conviction? Discuss.
4. David's testimony about the first fight involving Vic breaking another man's arm with a tire iron? Discuss.
5. David's testimony about the second fight involving Vic threatening a woman with a gun? Discuss.

Answer according to California law.

Answer A to Question 3

1. Wanda's testimony about Vic's statement concerning the May Phone call:

Logical and Legal Relevance

For evidence to be admissible it must be relevant which, under California law, is any evidence that has any tendency to make any fact of consequence, that is at issue, more or less probable than it would be without such evidence. In this case, Wanda's testimony concerning the phone call is relevant, in that it goes to show that David's intent to hurt Vic in some way prior to the June fight, a fact that is at issue, since David is claiming he acted in self-defense when he killed Vic.

Under Proposition 8 of the California Constitution (hereafter Prop. 8), any evidence that is relevant may be admitted in a criminal case. However, Prop. 8 makes an exception for balancing under California Evidence Code (hereafter CEC) 352, which gives a court discretion in excluding relevant evidence if its probative value is substantially outweighed by a risk of unfair prejudice, confusion of issues, or misleading the jury. In this case, the evidence has significant probative value, as it tends to show that David had a preexisting intent to hurt Vic and thus makes it more likely than not that he, not Vic, was the initial aggressor in the June fight that led to Vic's death. There is no indication that such evidence poses a risk of unfair prejudice, confusion of issues, or misleading the jury, and as a result, the evidence would not be barred by CEC 352.

Personal Knowledge

A witness may only testify as to those matters to which she has personal knowledge, in that she must have perceived the matter in some manner, such as by hearing or observing it. In this case, Wanda personally heard Vic's statement concerning the phone call, and as a result, she has sufficient personal knowledge to testify.

Authentication

All evidence must be authenticated, in that it must be proven to be what it purports to be. In this case, the authenticity of the phone call – namely, whether David was the person who actually made the call – comes into question, given that Vic stated David

was using some machine to disguise his voice. To authenticate a phone call, the person hearing it must be shown to have some familiarity with the speaker's voice, which can be gained either from prior interactions before the trial or subsequent to the trial. In this case, David and Vic had been fighting for several years about water rights, and thus it would be likely that Vic was familiar with the sound of David's voice. As a result, he would be qualified to make an identification of David's voice over the phone. As a result, Vic's statement concerning the phone call would be properly authenticated for purposes of trial.

Hearsay

A statement is hearsay if it is made out-of-court and being offered to prove the truth of the matter asserted. In this case, Wanda's statement contains two pieces of hearsay: 1) Vic's statement made to her, and 2) David's statements to Vic over the phone. Both are being offered to prove the truth of the matter asserted, in that Vic's statement is being offered to show that David called him and Vic knew it was him despite the voice distortion, and David's statement is being offered to show that David was planning to make Vic sorry.

In general, hearsay is inadmissible. However, the CEC does contain numerous exceptions to this general rule of hearsay inadmissibility that may allow these statements in. In a situation where a statement contains two levels of hearsay, such as here, both levels of hearsay must fall within an exception in order to be admissible.

Prop. 8 would not be sufficient to admit the evidence, as Prop. 8 contains an exception which requires hearsay rules to be satisfied before admitting relevant evidence.

David's Statement to Vic:

Admission of a Party-opponent:

If the statement is made by one party to the case and is offered into evidence against him by the opposing party, it is an exception to the hearsay rule and is admissible. In this case, the person who made the statement is David, the party-opponent, and it is being offered against him by the prosecution. Thus, it would be admissible under the exception for statements of a party-opponent.

Statement Against Interest:

A statement may also be admitted if it is mad by one party against their penal or pecuniary interest, and such party is unavailable. Here, David is available to testify, and there is no indication that he made the statement knowing that it was against his penal interest to do so; thus, the statement would not qualify under this exception.

Then-existing State of Mind:

A statement may be admissible to show the party's then-existing state of mind at the time the statement was made. In this case, Wanda can argue that the statement shows David's existing state of mind at the time, namely, that he was going to make Vic sorry and intended to act on his statement. If the court finds this to be accurate, the statement would be admissible.

Vic's Statement to David:

Contemporaneous Statement:

A hearsay statement is admissible if it is made describing or explaining certain conduct of the declarant while the declarant is engaged in such conduct. In this case, while the statement does describe Vic's conduct, namely, that he was just on the phone with David, Vic made the statement about the phone call only after he had hung up, not while he was actively listening to David. Thus, the statement was not contemporaneous with Vic's action and would not be admissible under this exception.

Excited Utterance:

A hearsay statement is also admissible if it describes an exciting or startling event or condition and is made while the person is still under the stress of excitement from an event or condition. In this case, the facts indicate that Vic became quite angry during the call, thus indicating the call itself was a startling event or condition. In addition, given David's particular statements to Vic during the call, namely, that he meant to make Vic sorry, a court most likely would find this to be a startling event or condition. Vic's statements about the call were made to Wanda as soon as he hung up, thus indicating that he was still under the stress of the phone call – furthermore, the statements are followed by exclamation points, implying that he was still agitated from it.

Therefore, the statement would qualify as an excited utterance, and would be admissible.

Thus, in conclusion, the court did not err in admitting Wanda's statement.

2. Certified Copy of Vic's 2007 Felony Perjury Conviction:

Logical and Legal Relevance

The evidence of Vic's conviction is logically relevant to the case, as it goes to show Vic's character for truthfulness, and thus would be used to impeach his statements to Wanda above concerning the telephone call, indicating that David did not make the call or have the intent to hurt Vic. Further, David's preexisting intent to hurt Vic is in dispute, since David is claiming he acted in self-defense and was not the initial aggressor. Thus, the evidence is logically relevant.

The prosecution could argue that the evidence is inadmissible under CEC 352, on the grounds that it would mislead the jury by making them think that Vic's character for truthfulness is relevant to whether he started the fight or not. However, it is unlikely a court would find that a reasonable jury would make this inference, given that the conviction was for perjury, not for a crime of violence, and it is being offered during the cross-examination of Wanda, thus indicating that it is meant to attack Wanda's testimony, not Vic's character for violence as a whole. Furthermore, the evidence has substantial probative value, as it tends to show that Vic is not truthful, and was therefore lying about the phone call from David – thus making David's self-defense argument more probable. Therefore, the evidence would not be barred by CEC 352.

Character Evidence

Character Evidence is any evidence offered to show that a person acted in conformity with character on a particular occasion, and is generally inadmissible. Here, the evidence of Vic's prior conviction is being offered to show Vic's action in conformity with character – namely, his character for lying – and thus would ordinarily be inadmissible. However, evidence of a witness's or declarant's character for truthfulness can be

offered for the purposes of impeachment to attack the witness's or declarant's credibility on the stand. Therefore, the evidence would not be inadmissible character evidence.

Impeachment

Any party is permitted to impeach a witness in order to diminish his or her credibility for speaking the truth. In addition, a declarant, or out-of-court speaker, may be impeached in the same manner that a testifying witness may be impeached. Here, as the evidence goes to show Vic's – the declarant in Wanda's testimony – character for truthfulness, it would be permitted into evidence.

Under California law, the court has the discretion to allow in evidence of prior felony convictions for the purposes of impeaching if such convictions are for crimes of moral turpitude. In this case, the conviction is for perjury, or lying on the stand, which is a crime of moral turpitude, and thus the court would have the discretion to admit it for purposes of impeachment. In addition, prior convictions can be admitted in the evidence either through cross-examination or extrinsic evidence. Here, the conviction was introduced during cross-examination, but by means of extrinsic evidence – namely, the certified copy of the conviction, and therefore is a permissible means of impeachment.

Hearsay

The conviction is hearsay, in that it is an out-of-court statement offered to prove the truth of the matter asserted, namely, that Vic was convicted for felony perjury in 2007. However, a judgment of a prior felony conviction is an exception to the general hearsay rule, and would thus be admissible.

In conclusion, the court did not err in admitting the conviction.

3. Certified Copy of David's 2008 Assault Conviction:

Logical and Legal Relevance

The evidence is logically relevant for two purposes – first, it goes to show that David had a character for violence, and thus acted in conformity with such character during

the June fight, thus negating his claim of self-defense. In addition, the evidence can be used to impeach David's credibility on the grounds that his prior conviction speaks to his ability for truthfulness.

However, the evidence would be subject to CEC 352, particularly, the possibility of unfair prejudice. In this case, the evidence is being used to show action in conformity with character, which is an impermissible character inference and would unfairly prejudice David. In addition, as will be demonstrated, the use for impeachment is impermissible. As there is no other probative value attached to the statement, it would be inadmissible under CEC 352 for being unduly prejudicial.

Character Evidence

As stated, character evidence is any evidence offered to show that a person acted in conformity with his character on a particular occasion. In a criminal case, such evidence cannot be offered by the prosecution unless the defendant "opens the door;" in other words, the defendant must put his character at issue, and the prosecution can only then rebut with character evidence. In this case, David had not yet opened the door to his character – while he did plead self-defense, it was only after the prosecution offered his assault conviction into evidence, not before. Therefore, the prosecution could not admit such evidence prior to David's opening the door, and the evidence should have been ruled inadmissible.

Proposition 8 would not be applicable, as it contains an exception for the rules concerning character evidence.

Impeachment

Under California law, a witness can only be impeached with a misdemeanor conviction if it is one of moral turpitude – otherwise, it is inadmissible. In this case, the conviction was for simple assault, which is not a crime of moral turpitude. As a result, it would be admissible.

Thus, the court erred in admitting the prior felony conviction.

4. David's Testimony about the First Fight:

Logical and Legal Relevance

The evidence is logically relevant, in that it goes towards David's self-defense claim by showing Vic's character for violence and thus indicating that Vic acted in conformity with character on this particular occasion – which is a fact at issue, since the prosecution claims that David was the initial aggressor, while David claims that Vic started the fight.

The evidence is also substantially probative, as it tends to show that Vic started the fight and thus makes David's self-defense claim more likely than it would be without the evidence. However, it does carry a risk of unfair prejudice, in that it involves a character inference concerning Vic's character for violence. However, as described below, the character evidence is permissible under the circumstances, and thus the evidence would not be inadmissible under CEC 352.

Character Evidence

David's introduction of Vic's breaking a man's arm with a tire iron is character evidence, as it is being used to show that Vic had a character for violence and acted in conformity with such character during the June fight. However, under the CEC, a criminal defendant can bring in evidence of the victim's character for violence if he claims self-defense and wishes to show that the victim was the initial aggressor. As this is David's purpose in bringing this evidence, since he is claiming self-defense and is brining in the evidence to show Vic's initiation of the fight, the evidence would be admissible.

Character evidence can take the form of either reputation evidence, opinion evidence, or specific acts. Under the CEC, a defendant is permitted to use any of these methods in bringing in evidence of the victim's bad character for violence during the direct examination. Here, David's testimony would constitute specific acts, as he is testifying to specific acts that Vic had done in the past. Therefore, the method of character evidence used is permissible.

Personal Knowledge

In this case, David does not have personal knowledge as to the fight. While he heard about it from someone before June, he did not personally witness it, nor is there any indication as to who he heard it from, for example, whether the person who told him was the other man involved in the fight whose arm was broken, or was from someone else. Thus, there is no indication that he has personal knowledge as to the fight, and as a result, the testimony would not be admissible.

Thus, the court erred in permitting David's testimony into evidence.

5. David's Testimony about the Second Fight:

Logical and Legal Relevance

The evidence is logically relevant, in that it, like the testimony about the first fight, goes towards David's self-defense claim by showing Vic's character for violence and his action in conformity with such character on this particular occasion – a fact at issue in this case. The evidence is also substantially probative, as it tends to show that Vic, not David, started the fight and makes David's self-defense claim more likely. In addition, as will be demonstrated below, the use of such evidence is a permissible use of character evidence, and as a result, the testimony would not be barred by CEC 352.

Character Evidence

As with the first fight, David's introduction of Vic's prior threatening a woman with a gun is character evidence, as it is being used to show that Vic had a character for violence and acted in conformity with such character during the June fight. Yet, as indicated above, a criminal defendant can bring in evidence of the victim's character for violence if he claims self-defense and wishes to show that the victim was the initial aggressor – which is the case here, as David is claiming self-defense and wishes to show that Vic was the initial aggressor.

As with the testimony above, this testimony takes the form of specific acts, as David is testifying as to specific violent acts that Vic took in the past, and thus is a permissible use of character evidence.

Personal Knowledge

Here, David again does not have substantial personal knowledge to testify as to the fight. He only heard about it from someone else, and there is no indication as to whom; he did not actually perceive it himself nor hear about it directly from the victim or someone who saw it occur. Furthermore, he did not hear about the second incident until after his trial had commenced, thus running the possible risk of such evidence not being particularly reliable or truthful and being created solely for the purposes of trial. As a result, David lacked sufficient personal knowledge to testify as to the second incident, and the court erred in permitting the evidence to be admitted.

Answer B to Question 3

CA Constitution Truth-in-Evidence Provision

In California, evidentiary rules in criminal cases are sometimes changed by the Truth-in-Evidence Provision of the California Constitution. The Truth-in-Evidence provision generally provides that all relevant evidence is admissible in California criminal trials. As state constitutional law, the Truth-in-Evidence provision overrides any contrary California Evidence Code provisions. However, the Truth-in-Evidence provision itself explicitly preserves numerous rules of the California Evidence Code, including the rule against hearsay and the CEC 352 Balancing Rule. With this general framework in mind, we can discuss the individual evidentiary items.

Wanda's Testimony About Vic's Statement Regarding the May Phone Call

Logical/Legal Relevance

Irrelevant evidence is never admissible. In California, evidence is logically relevant if it has a tendency to make a disputed fact of consequence more or less probable. However, even if evidence is logically relevant, it may still be excluded at the discretion of the court if the court finds that the probative value of the evidence is substantially outweighed by concerns of prejudice, confusion or delay. Neither the basic rule governing relevance nor the balancing rule are changed in criminal trials by Proposition 8.

Here, Vic's statement that David planned to "make [him] sorry" is relevant because it tends to prove that David and Vic were in a feud and that David intended to hurt Vic. Thus, it tends to make more probable that David committed the later violence and strangulation to Vic. However, the fact David attacked Vic does not appear to be in dispute, because David is claiming he acted in self-defense. Thus, it is likely that Vic's statement about the phone call is not relevant under California standards.

If it is logically relevant, it will not be excluded. The evidence is probative of David having committed intentional violence against Vic, and there is no substantial risk of unfair prejudice.

Personal Knowledge

Wanda can only testify as to matters for which she has personal knowledge. Here, Vic told Wanda about the phone call directly; thus she personally perceived the statement by Vic and can testify about it.

Hearsay

Hearsay is an out-of-court statement that is offered to prove the truth of the matter asserted. Hearsay is not admissible unless an exception to the hearsay prohibition applies. Moreover, where a statement contains multiple levels of hearsay, a hearsay exception must apply to each level for the statement to be admissible.

Vic's Statement

In this case, Vic's statement that David called and said he would make Vic sorry is hearsay. Vic is making this statement to prove the truth of the matter asserted, i.e., that David did call and threaten Vic.

Vic's hearsay statement, however, is likely admissible as a spontaneous statement. Under the CEC, a hearsay statement made describing a startling event while still under the stress of excitement is an exception to the hearsay prohibition. In this case, Vic described the phone call to Wanda immediately after receiving it. Moreover, the evidence indicates that Vic was still in a state of anger and excitement after receiving the phone call. Thus, Vic's statement is a spontaneous statement.

The prosecution may also claim that Vic's statement was a contemporaneous statement. The contemporaneous statement exception applies to hearsay statements made by a declarant to describe his conduct contemporaneously to or immediately following his actually doing it. However, in this case, Vic's statement describes David's conduct, not his own, and thus would not fit within the contemporaneous statement exception.

David's Statement

David's statement that he would make Vic sorry is also an out-of-court statement. Moreover, it is also offered to prove the truth of the matter asserted in that it is intended to prove that David did intend to make Vic sorry.

David's statement is admissible under the present state of mind exception. The present state of mind exception applies to statements by a declarant that describe the declarant's state of mind at that time. The exception can be used to admit statements of the declarant's intent in order to prove that the declarant carried out that intent. In this case, David's statement that he "was going to make [Vic] sorry" was a statement of David's present intent and thus fits within the present state of mind exception. It is thus admissible to prove that David later carried out actions to make Vic sorry.

David's statement may also be a spontaneous statement. However, there is no indication that David was in a state of excitement, especially considering he initiated the call. Thus, this exception likely does not apply.

Accordingly, Vic's statement is admissible hearsay because both his statement and David's fit within hearsay exceptions.

Authentication of David's Statement

David's alleged statement, however, can only be admissible if properly authenticated. To be authenticated, there must be sufficient evidence for a jury to find that David's statement is what it was purported to be. In this case, Vic's statement indicates that the caller used a voice-changing device, calling into possible doubt whether David actually called. However, given Vic's belief that it was David that had called, and evidence of the feud between them, there is probably sufficient evidence for a jury to find David made the call. Thus David's statement is authenticated.

Spousal Privileges

David may claim that the evidence is not admissible because of spousal privileges. However, the spousal testimonial immunity only allows a current spouse to choose to refuse to testify against her husband. Moreover, although confidential marital

communications made during marriage are protected by privilege, this privilege is only held by either spouse, not an outside party. Thus, even though Vic's statement to Wanda was a confidential marital communication, only Vic or Wanda could assert the benefit of the privilege.

Confrontation Clause Issues

The confrontation Clause of the federal Constitution forbids the use of otherwise admissible testimonial hearsay evidence against a defendant if the defendant did not have an opportunity to cross-examine the hearsay declarant. "Testimonial" statements are those concerning a past event that are made to incriminate the defendant.

In this case, Vic's statement about David is likely not "testimonial" because it was not made to police or concerning a past event. Thus, it was not a statement that was made for the purposes of incriminating David and the Confrontation Clause will not apply.

Conclusion

Vic's statement should not have been admitted because it was irrelevant, but otherwise it would be admissible hearsay.

Certified Copy of Vic's 2007 Felony Perjury Conviction

Relevance

Vic's felony perjury conviction tends to prove that Vic's statement may have been a lie, negating [a] possible motive by David to attack Vic and strengthening his claim of self-defense. However, it is unclear whether there is any dispute about the veracity of Vic's statement, and thus it may not be relevant under California law. Assuming, however, that the fact of the phone call is in dispute, then Vic's prior conviction is relevant.

Authentication

The copy of the conviction must be authenticated. However, under the CEC, certified copies of public records are self-authenticating, meaning that the document itself provides sufficient evidence for a finding that it is genuine, and no additional foundational evidence is necessary.

Hearsay – Public Records Exception

The copy of Vic's conviction is hearsay because such a document is an out-of-court statement offered to prove the truth of its contents, i.e., that Vic was convicted of perjury. However, factual records made by public officials in the regular course of their duties are excepted from the hearsay prohibition. Records of convictions are made in the regular course of public officials' duties and thus are admissible hearsay as public records.

Character Evidence/Impeachment

Evidence of a victim's character to prove the victim acted in conformity with that character is generally inadmissible in a criminal trial. However, such evidence is permissible if first introduced by the defense or for the purpose of impeaching the victim. Moreover, Proposition 8 allows for the admissibility of the victim's character in a criminal trial wherever relevant, subject to balancing. Moreover, a hearsay declarant can be impeached by any applicable method.

In this case, the evidence was both introduced by David and to impeach Vic, so it is admissible either because David "opened the door" or because it is impeachment evidence.

Use of Conviction

However, a conviction can only be used for impeachment purposes under the CEC if the conviction is for a felony involving a crime of moral turpitude. Proposition 8 broadens this rule for criminal trials by allowing in any relevant convictions, which include misdemeanors involving a crime of moral turpitude.

In this case, Vic's conviction was for a felony involving a crime of moral turpitude, perjury, and thus was admissible to impeach Vic's statement.

Conclusion

The conviction was properly admitted as allowable impeachment evidence.

Certified Copy of David's 2006 Misdemeanor Simple Assault Conviction

Relevance

Evidence of David's misdemeanor assault conviction is relevant because it tends to prove that David was an aggressive individual and may have been the aggressor in the fight against Vic. This does concern a fact of consequence that is in dispute because it undermines David's claim of self-defense.

However, this evidence may be excluded because of its prejudicial effect. By introducing evidence of David's conviction for a violent crime, there is a risk that the jury will decide to punish David because of this past crime or "criminal character" rather than the conduct at issue in this case. Thus, the court should have excluded this evidence because of the risk of unfair prejudice.

Authentication

As with Vic's conviction copy, David's conviction copy is a self-authenticating document.

Hearsay

The certified copy of David's conviction is admissible under the public records exception for the reasons discussed above.

Character Evidence

Generally, evidence of a defendant's character cannot be introduced to prove the defendant acted in conformity unless first introduced by the defendant. However, where the defendant has introduced evidence that the victim has a character for violence, California law permits the prosecution to introduce evidence of the defendant's same character trait for violence.

In this case, the prosecution may be introducing David's prior conviction as evidence that David had a character for violence and acted in conformity on the particular occasion when he attacked Vic in June. This would be an inadmissible use of the conviction because at this point in the trial, David had introduced no evidence regarding his own character or evidence that Vic had a character for violence. However, because

the defendant later testified about Vic's prior fights, the error of admitting evidence of David having a trait for violence was harmless.

The Truth-in-Evidence Provision does not change the rules regarding character evidence about a criminal defendant.

Impeachment by Conviction

As discussed above, misdemeanor convictions cannot be used to impeach a witness or party. However, because of the Truth-in-Evidence provision, misdemeanors involving crimes of moral turpitude are relevant impeachment evidence.

In this case, the defendant has not yet testified, so it was improper for the prosecution to introduce the conviction in order to impeach him. Moreover, a conviction for simple assault is not a crime of moral turpitude because it does not involve lying or similar immoral conduct. Thus, the conviction is not admissible for impeachment purposes.

Other Purposes

The conviction may be used for non-character and non-impeachment purposes, however. Conviction evidence can be used if it is relevant to establishing the defendant's motive, intent, and absence of mistake, or other relevant non-character issues.

In this case, David's prior assault conviction does not appear to be relevant for any purpose besides proving that David was a violent individual. Thus, there are no other purposes for which it may be admissible.

Conclusion

David's conviction should not have been admitted because of its prejudicial effect.

David's Testimony About First Fight

Relevance

David's testimony about Vic's first fight involving the tire iron is relevant because it tends to prove that David reasonably believed Vic was violent and thus David's actions were reasonable self-defense. The fact of David's self-defense is in dispute.

Personal Knowledge

David cannot testify on matters to which he does not have personal knowledge. Here, David is claiming that he knew about the fight, however, and thus may have had personal knowledge about Vic's prior fight.

Character Evidence

As discussed above, the defendant can open the door to prove the victim's character. Thus, David could properly introduce evidence of Vic's character to prove that Vic acted in conformity with that character by attacking David on the occasion at issue.

Other Purposes

Furthermore, the evidence is also relevant to showing David's reasonable belief that he was in danger.

Conclusion

David's testimony about Vic's first fight was properly admitted.

David's Testimony About Second Fight

Relevance

David's testimony about Vic's second fight also tends to prove Vic was an aggressor. However, its probative value is likely substantially outweighed by unfair prejudice because it tends to show that Vic is a violent individual and thus may have deserved David's strangulation even if it wasn't in self-defense. The probative value is limited because David did not know about this fight before his fight with Vic, and thus it cannot be probative of David's belief regarding Vic's nature.

Personal Knowledge

David likely did not have personal knowledge of this incident, and thus it should not have been admitted on these grounds too.

Character Evidence

David could open the door on character evidence regarding Vic.

Conclusion

This evidence should not have been admitted because of its unfairly prejudicial impact.

JULY 2010
ESSAY QUESTIONS 4, 5, AND 6

California Bar Examination

Answer all three questions.
Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

THE STATE BAR OF CALIFORNIA
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ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2011
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2011 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 6

Green's Grocery Outlet ("Green's") sponsors a lawful weekly lottery. For one dollar, a player picks six numbers. All persons who select the six winning numbers drawn at random share equally in the prize pool.

Each week, for the past two years, Andrew has played the same numbers—3, 8, 10, 12, 13, and 23—which represent the birth dates of his children.

On June 1, Andrew purchased his weekly lottery ticket. Barney, a clerk employed by Green's, asked, "The usual numbers, Andrew?" Andrew replied, "Of course."

Barney entered the numbers on the computer that generates the lottery ticket and gave the ticket to Andrew. Without examining the ticket, Andrew placed it in his pocket. Unbeknownst to either Andrew or Barney, Barney had accidentally entered the number "7" on the computer rather than the number "8."

The winning lottery numbers that week were Andrew's "usual" numbers. Much to his horror, Andrew discovered Barney's error when he showed his wife the "winning" ticket. Andrew filed suit against Green's seeking to reform his lottery ticket by changing the "7" to an "8." Green's cross-complained seeking rescission.

1. At trial, Green's objects to Andrew's testimony about (a) Barney's question, (b) Andrew's answer, and (c) Andrew's attempt to explain what the phrase "the usual numbers" means. Should the court admit the testimony? Discuss. Answer according to California law.

2. How should the court rule on each party's claim for relief? Discuss.

Answer A to Question 6

1. How will the court rule on Green's objection to

a) Barney's question "The Usual Numbers, Andrew"

Relevant

All evidence must be logically and legally relevant.

Logical: Under California Rules of Evidence, evidence is relevant if it tends to prove or disprove a disputed fact. In this case, Green is disputing the fact that there is a contract or the terms of the contract. Therefore, Andrew's testimony regarding Barney's statement tends to prove that Andrew bought the ticket from Barney and that the terms were for the usual numbers. Andrew can show this is logically relevant.

Legal: To be legally relevant the probative value should outweigh the prejudicial effect. The probative value in this case is that this tends to show Andrew bought the ticket and that he had a usual set of numbers. While this may be prejudicial, the probative value is high and outweighs the prejudice because it establishes the facts of the situation.

Hearsay

Green will object that the evidence is inadmissible hearsay. Hearsay is an out-of-court statement made by a declarant used to prove the truth of the matter asserted.

Out-of-Court Statement by a declarant

In this case Barney's question was made out-of-court and by Barney, therefore meeting this element.

Truth of the Matter Asserted

The statements presented to prove what the statement is asserting. In this case Green will argue that Andrew is introducing Barney's statement to show that Barney knew about the usual numbers and that Andrew asked for the usual numbers.

Act of Independent Legal Significances

Andrew will argue he is not introducing to prove the truth of the matter asserted, but rather to show that there was a contract created when Andrew got the ticket. At this point this statement does not provide a contract.

Knowledge of facts stated

Andrew may also be using it to prove that he always purchased the same numbers and that Barney knew about his practice or habit. It is likely that Andrew can show this is not hearsay, but being used to show Barney had the knowledge of his usual numbers.

Even if this is being introduced for the truth of the matter asserted Andrew can see if it falls under an exception to the hearsay rule.

Party-opponent admission

Admissions by a party-opponent are an exception to the hearsay rule. Vicarious admissions by an agent are only attributed to the principal if the statement was made in the scope of the agency and the principal would be liable.

In this case Green will argue Barney made a mistake, but Barney was doing his job within the scope of the agency and principals are liable for the mistake of their agents.

Andrew can show this was a party-opponent admission.

Conclusion:

Barney's question is admissible evidence and the court should admit Andrew's testimony on this issue.

a) Andrew's answer

Relevant (see rule above)

Logical: (See previous rule.) Green may argue that the creation of a contract is not in dispute and Andrew's testimony only tends to prove the existence of a contract. Andrew will argue the testimony also refers to the question Barney asked and that he wanted his usual numbers. Andrew can likely show this is logically relevant because it tends to prove a disputed fact.

Legally: See previous rule: This is similar to the previous piece of evidence and tends to establish the facts of the incident and therefore the probative value outweighs the prejudicial effect.

Hearsay

Green will object that this testimony is hearsay. See previous rule. Green will assert that this is an out-of-court statement by Andrew to prove that he assented to the purchase of the lottery ticket which is the contents of his statement.

Independent Legal Significance

Andrew can show in this case as previously discussed that his statement created a contract and is therefore not being used to prove the truth of the matter asserted, but rather to prove the formation of a contract. Andrew's assent in this case does form a contract and is therefore not hearsay.

Party-opponent Exception (See previous rule)

In this case the statement is by Andrew and not a party-opponent because Andrew is testifying and Andrew is not the opponent against Andrew himself. So this exception does not apply.

Conclusion

Andrew's testimony about his own statement should be ruled admissible because it is not hearsay and is relevant.

b) Andrew's explanation of "usual numbers"

Relevant:

Logical: This is the issue in dispute. Therefore Andrew's testimony is highly relevant.

Legal: In this instance, this testimony is highly prejudicial to Green and therefore might be excluded. However it is also the main issue of the case and its probative value outweighs its prejudicial effect.

Character Evidence

Evidence of a person's character cannot be used to show they acted in conformity therewith on a particular occasion.

In this case Green will argue that the introduction of this evidence is trying to show Andrew acted similarly as he had on other occasions.

Habit

Evidence that shows specific instances of conduct to prove that they have a regular habit are allowed. Andrew will argue that in this case he is establishing a habit he has had every week for the past 2 years. Andrew can likely show this is habit evidence and not character.

Parol Evidence

Green may argue that the evidence violates the parol evidence rule because it is evidence prior to formation of an integrated contract to contradict the terms of that contract.

Andrew will likely be able to introduce this because he is trying to show a mistake and not to contradict the terms of an integrated contract. In this case there was a mistake Barney made and Andrew is trying to prove the mistake.

Conclusion

The court should rule that this evidence is admissible.

2. How should the court rule on each party's claim for relief?

Reform

The court will grant reformation of a contract when each party knew what the terms were and they both had the same mutual mistake.

Green will argue that Andrew had the opportunity to look at the ticket and negligently failed to do so and therefore assumed the risk of the ticket being wrong. Andrew will argue the prior course of dealing with Barney and Green establishes that lottery ticket was supposed to contain a seven instead of an eight.

Recission

The court will assert recission when there is evidence the contract was not valid or lacked assent on a material term.

Green will make the same argument that there was no meeting of the minds and as such the contract should be rescinded. Andrew will argue that this was just a transcription error and does not rise to a level warranting recission of the contract.

Conclusion

The court should reform the contract because there is evidence that the mistake was mutual, but the mistake was a transcription rather than the objective belief of the parties. Both Barney and Andrew thought that the ticket should contain one number eight and not seven. The court should reform the contact.

Answer B to Question 6

(1) Green's (G) objections to Andrew's (A) Testimony

(a) A's testimony re Barney's (B's) question

Green will object to A's testimony re B's question as irrelevant and inadmissible as hearsay.

Under California law, evidence is relevant if it has any tendency to make a disputed fact of consequence to the action more or less likely to be true. In this case, A is suing Green for breach of contract, and there is a dispute between the parties as to the terms of that contract (i.e., the lottery numbers A picked). As a result, A's testimony about B's question is relevant because it goes to whether A & B agreed about the numbers that should be on A's lottery ticket, and if so, what A & B agreed to, both of which are disputed facts in this case.

Under California law, a relevant statement may nonetheless be excluded if it is substantially more prejudicial than probative, a waste of time, or likely to confuse the jury. The probative value of B's question here outweighs any potential prejudice or confusion.

Under California law, hearsay is an out-of-court statement offered for the truth of the matter asserted. In this case, B's question to A is an out-of-court statement because it was made before the suit on the day that A bought the lottery ticket in question. But A will argue, persuasively, that he is not offering B's question for the truth of the matter asserted. A will argue that he is offering B's statement to establish a verbal act -- the fact that B asked A the question, "The usual numbers, Andrew?" As such, the statement is being offered for a non-hearsay purpose because it is not being offered to prove the truth of the matter that Andrew asked for the usual numbers.

A could also argue that B's question should be admitted for the truth of the matter because B's question shows B's then-existing mental condition, an exception to the hearsay rule. A will argue, persuasively, that B's questions shows that B knew that A wanted A's usual numbers.

A could also argue that B's question is offered for the effect it had on A, the listener, another non-hearsay purpose. Under this argument, A is offering B's question to show that A inferred from B's statement that B knew A's usual numbers.

A could also argue that B's statement is admissible hearsay in California because it is an admission of a party. Green will argue that B is not a party to the case, but A can persuasively respond that Green should be bound by B's statements because B was acting within the scope of his employment when he made them, i.e., part of B's job is to sell lottery tickets to customers.

(b) A's testimony re A's answer

B will argue that A's answer is irrelevant and inadmissible hearsay.

A will argue that his answer is relevant because it goes to the disputed facts of whether A & B agreed to the numbers in A's lottery ticket, and what those numbers were. Moreover, A will argue that his answer has great probative value because [it] is directly related to a key disputed fact in the case, i.e., what numbers A & B agreed to put in A's lottery ticket. A's answer is relevant for those reasons.

B will argue that A's statement was made out of court -- on June 1 -- and is being offered to prove the truth of the matter asserted, that A asked for his usual numbers.

A will also argue, persuasively, that his answer is not offered for hearsay purpose because he is not offering it for the truth of the matter asserted. Rather, it is being offered as a verbal act -- agreement to the offer from B. Alternatively, A could argue

that A's answer is being offered for the non-hearsay purpose of showing the effect on the listener B, i.e., that B understood that A wanted his usual numbers.

A's answer will be admissible on these grounds.

(c) Andrew's attempt to explain what "the usual numbers" means

B will argue that A is attempting to offer parol evidence regarding the terms of the contract in violation of the parol evidence rule.

The parol evidence rule excludes evidence extrinsic to a contract where that contract is considered a final, or integrated writing. There are exceptions to the parol evidence rule, including to show a clerical error.

Here Green will argue that any testimony regarding what "the usual numbers" means is extrinsic evidence because the lottery ticket is the contract, and there is no evidence within the ticket regarding what A's usual numbers are.

A will argue, persuasively, that parol evidence should be admitted in this case to prove that B made a clerical error in entering A's numbers into the computer that generated A's ticket, the contract. A's testimony on this point will be allowed under the clerical error exception to the parol evidence rule.

(2) The parties' claims for relief

Reformation

Reformation is an equitable remedy that is available where one party can show, among other things, a unilateral mistake of material fact that caused A irreparable harm.

In this case, A will argue that he is entitled to reformation because he suffered irreparable harm as a result of B's unilateral mistake -- a clerical error in entering his

usual lottery numbers. A will argue that Green should be bound by B's error because B is Green's agent and was acting within the scope of his employment at the time of B's mistake. And A will argue that he was irreparably harmed by B's mistake because but for B's mistake he would have won the lottery, and that A's harm was foreseeable because only a ticket that has all the winning numbers will win the lottery, and it is foreseeable that a clerical error in entering one number could cause a party to lose a lottery he otherwise would have won.

Green will argue that A is not irreparably harmed, because Green can refund A the price of the lottery ticket, and that there was no mistake because the numbers A paid for are the numbers that are clearly printed on his lottery ticket. Moreover, Green will argue that A does not have clean hands, because he could have and should have confirmed that the right numbers were on his ticket, and that by failing to do so, A waived his right to complain after the fact that he got the wrong numbers.

Rescission

Green will argue for rescission because there was no meeting of the minds as to a material term of the contract. Rescission is an equitable remedy available where one party can show, among other things, mutual mistake of fact. Here Green will argue that there was a mutual mistake of fact as to what numbers A wanted on his lottery ticket, and that therefore there was no meeting of the minds required to form a valid contract. Green will argue that B thought A wanted the number 7 on his ticket, and A wanted the number 8 on his ticket, and that the numbers on the ticket were material elements of the contract between Green and A. As a result, there was no meeting of the minds as to a material term of the contract, and the contract should be rescinded.

A will argue that there was a meeting of the minds based on the question and answer between B and A -- "The usual numbers, Andrew?" "Of course." A will argue that B's question shows that B knew A's usual numbers and offered A a ticket with those numbers. A will argue that A accepted B's offer of those numbers, and that there was

consideration in A's payment of the price of the lottery ticket and Green's promise to pay A the winnings if the numbers of A's ticket matched the winning numbers.

This is a close question, but in this case, because all of the testimony discussed above is admissible and support's A's position, a court would likely find that A is entitled to reformation and B cannot rescind the contract. A wins the lottery.

ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2012
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2012 California Bar Examination and two answers to each question that were written by actual applicants who passed the examination after one read.

The selected answers were assigned good grades and were transcribed for publication as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 3

Paul sued David in federal court for damages for injuries arising from an automobile accident.

At trial, in his case-in-chief, Paul testified that he was driving westbound, under the speed limit, in the right-hand lane of a highway having two westbound lanes. He further testified that his passenger, Vera, calmly told him she saw a black SUV behind them weaving recklessly through the traffic. He also testified that, about 30 seconds later, he saw David driving a black SUV, which appeared in the left lane and swerved in front of him. He testified that David's black SUV hit the front of his car, seriously injuring him and killing Vera. He rested his case.

In his case-in-chief, David testified that Paul was speeding, lost control of his car, and ran into him. David called Molly, who testified that, on the day of the accident, she had been driving on the highway, saw the aftermath of the accident, stopped to help, and spoke with Paul about the accident. She testified further that, as soon as Paul was taken away in an ambulance, she carefully wrote down notes of what Paul had said to her. She testified that she had no recollection of the conversation. David showed her a photocopy of her notes and she identified them as the ones she wrote down immediately after the accident. The photocopy of the notes was admitted into evidence. The photocopy of the notes stated that Paul told Molly that he was at fault because he was driving too fast and that he offered to pay medical expenses for anyone injured. David rested his case.

Assuming that all appropriate objections and motions were timely made, should the court have admitted:

1. Vera's statement? Discuss.

2. The photocopy of Molly's notes? Discuss.

Answer according to the Federal Rules of Evidence.

Question 3
Answer A

I. VERA'S STATEMENT

The first issue is whether or not Vera's statement to Paul claiming that the black SUV behind them was weaving recklessly through the traffic. Evidence is admissible if it is logically and legally relevant and not subject to any restrictions in the federal rules of evidence.

A. Relevance:

Logical Relevance: Evidence is logically relevant if it tends to prove any fact of consequence in the trial more or less probable. Here, Paul is suing David for injuries arising from an automobile accident. A central issue in this case will be who was at fault for the automobile accident that caused the injuries. The fact that David drives a black SUV and the fact that Vera observed a black SUV weaving recklessly through traffic tends to prove that David was driving recklessly and therefore was at fault for the accident. This evidence is logically relevant.

Legal Relevance: If evidence is logically relevant than [sic] it also must be legally relevant. Legal relevance is determined by whether the evidence is more prejudicial than probative. This requires a balancing test. Here, the evidence is probative because as mentioned it illustrates how one of the parties in this case was driving before the accident. David will argue that it is prejudicial because Vera called him "reckless" and that this statement might cause a jury to cast judgment on his driving. A judge will determine that the probative value outweighs any slight prejudice this evidence may include and is therefore legally relevant.

A court may also exclude evidence that is not legally relevant because it would waste time or confuse the jury. However, this evidence does not require any additional time to be spent to prove additional elements and is not confusing to a jury.

B. Lay Opinion:

David will argue that the statement should be inadmissible because it contains a lay opinion as to the nature in which he was driving his vehicle. Lay opinions are admissible evidence if they are (1) helpful to the jury and (2) do not require any special analysis. Here, if Paul is suing on a negligence theory, David might argue that Vera stating that he was driving recklessly is allowing the witness to testify as to an element of the cause of action. However, David will be successfully [sic] in arguing that Vera could easily see the car driving and that her expression that the car is driving recklessly is merely her opinion on how the driver was swerving through lanes. This evidence will be rendered inadmissible because it is a lay opinion.

C. Hearsay

Paul will argue that Vera's statement is inadmissible because it is hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. As a general rule, hearsay is inadmissible because the validity of out-of-court statements is questionable and unreliable. Hearsay is inadmissible unless a valid exception applies. David will argue that the following exceptions apply:

(1) **Present Sense Impression:** A present sense impression is when someone makes a statement about an event they are perceiving at the moment. Present sense impressions are exceptions to the hearsay rule, because they are presumed to be reliable. When someone makes a present sense impression, they have no motivation to lie or misstate what is actually occurring. The facts state that just 30 seconds after Vera made this statement that a black SUV hit Here [sic], Vera simply stated at the time of observing the black SUV that she saw that SUV weaving recklessly through traffic. Therefore, it will be admissible as a present sense impression.

(2) **Present State of Mind:** Another hearsay exception are statements made by individuals that express their current state of mind. Here, Paul will argue that when Vera made the comments about the SUV, she was expressing what she thought

and felt at the time. This statement would also be admissible under the Present State of Mind exception.

(3) **Excited Utterance**: Paul may argue that the excited utterance exception applies as well. An excited utterances [sic] is a statement made at the time of a shocking or exciting event that is made before the shock or excitement as [sic] worn off. Here, David will argue that the swerving of an SUV was not a shocking or exciting event. Further, the facts state that Vera calmly told Paul about the SUV which illustrates that she was not under the shock or excitement of any event. Therefore, the excited utterance exception does not apply.

(4) **Prior Statement:** Prior statements made by individuals that are unavailable to testify sometimes qualify as an exception to the hearsay rule. However, the federal rules of evidence require that the prior statement be made under oath in the course of some type of previous testimony. This statement was made in the car to Paul and is therefore not a valid exception under the prior statement rule.

(5) **Dying Declaration**: Paul may attempt to argue that Vera's statement qualifies under the Dying Declaration exception. This exception states that under some circumstances, statements made under the impression of impeding death are valid exceptions to the hearsay rule. However, the federal rules of evidence state that these statements are only admissible in criminal homicide cases. Moreover, the statement was not made with the knowledge of impending death because the car had not been hit yet and Vera did not know that she might be dying soon. Therefore, it would not qualify under this hearsay exception.

(6) **Federal Catchall Exception**: The federal rules of evidence also allow a catchall exception for statements that are made under circumstances of trustworthiness. Paul will argue that Vera did not have any motivation to lie or to make this information up because it happened at the time of the accident. He will also argue that because Vera is dead there is no other way for this evidence to be admitted for trial. The judge would likely not apply the federal catchall exception because the Present Sense Impression exception is a stronger argument, and you only need one valid exception to admit the evidence.

In conclusion, Vera's statement would be admissible evidence as a present sense impression.

II. PHOTOCOPY OF MOLLY'S NOTES

The issue here is whether or not the photocopy of Molly's notes that state that Paul told her he was at fault because he was driving too fast and that he offered to pay medical expenses can be admitted into evidence.

A. Capacity to Testify:

A witness may testify if she has personal knowledge of the event in question, she recalls the event in question, she has the ability to communication [sic] these perceptions, and she takes an oath to tell the truth. Here, Molly has personal knowledge of the facts perceived because she was there the day of the accident, saw what happened, and remembers that she took notes describing the day's events. While she does not recall the events at this moment, this can be satisfied in other ways that are discussed below. She has the ability to communicate and presumably took an oath prior to testimony.

B. Authentication of Document

Before any documents or other types of recordings are entered into evidence, they must be authenticated and the proper foundation must be laid. Here, Molly has testified that she was there on the day of the accident and they [sic] she remembers that she carefully wrote down notes of what Paul had said to her. Therefore, there is a foundation for the photocopy of the notes. Moreover, David showed Molly the copy of the notes while she was on the stand and she identified them as the ones that she took that day. This would suffice as authentication.

Documents being admitted into evidence are also subject to the Best Evidence Rule. The Best Evidence Rule states that if a document is going to be admitted into evidence, then the original must be produced or the party must account for why the original cannot be produced. The federal rules of evidence have accepted photocopies of documents as satisfying the best evidence rule.

Therefore, the document has been properly authenticated and a photocopy will suffice as a representation of the original.

C. Relevance

Logical Relevance: (See rule statement above.) Here, Paul's statements are logically relevant. They tend to prove whether or not Paul was at fault in the accident more probable than not. Whether or not Paul was at fault or not is a fact of consequence to this case since a central issue is who was at fault to the accident.

Legal Relevance: (See rule statement above.) These statements are more probative than prejudicial. There are not statements that might prejudice Paul because they are statements that Paul himself stated.

Offer to Pay Medical Expenses: However, there are some types of evidence that are not admissible for public policy reasons under the rule of legal significance. For example, evidence of insurance, subsequent remedial repairs, and offers to settle are inadmissible because as a society we want to promote people to carry insurance, rectify dangerous situations, and settle cases as not to clog the courts. Another such category is when one party offers to pay the medical expenses of the other party. Here, there are two statements that Paul made. The first is that he was at fault because he was driving too fast. The second is his offer to pay medical expenses for anyone injured. The ferenda rules of evidence will sever these two statements. Because the offer to pay medical expenses is inadmissible but the other statements made in connection with the offer are admissible.

D. Dual Hearsay:

(See rule statement above.) The issue with the photocopy of Molly's notes is that there are two levels of hearsay. In order for a document that contains two levels of hearsay to be admissible evidence, there must be valid exceptions for both statements.

a. First Level of Hearsay: Paul's Statements.

The first level of hearsay is Paul's statements that he made to Molly. These statements were made at the scene of the accident presumably and thus are out of court statements. David will argue that the following exceptions apply:

(1) Party Admission: An admission made by a party to the case is admissible because under the federal rules, it constitutes non-hearsay. Here, Paul admitted fault to the accident. He stated that he was driving too fast and explicitly said that he was at fault. Thus, this is a valid party admission and would be admitted as non-hearsay.

(2) Statement Against Interest: Another category of non-hearsay is when a party makes a statement against interest. Statements against interest are any statements that an individual makes that are against his pecuniary interest. Here, stating that one is at fault for an auto accident would be a statement against his interest. Therefore, this exception would apply.

b. Second Level of Hearsay: Molly's notes

The second level of hearsay is the notes that Molly wrote down on the paper. Molly wrote those notes on the day of the accident and not while in the courtroom. Therefore, the notes are Molly's out-of-court statements. David will argue that the evidence should be admitted because of the following two exceptions:

(1) Prior Recollection Recorded: Courts will admit prior recollection recorded if four elements are met. First, the witness must currently not be able to recall the facts that are in the writing. The facts state here that Molly testified that she has no recollection of the conversation. The second is that the writing be created by the witness or adopted by the witness. Here, Molly herself wrote down the notes. Third, the writing must have been made when her memory was still fresh. Here, Molly created the writing as soon as Paul was taken away in the ambulance; therefore, we can assume that her memory was still fresh. Fourth, the writing must have been made under reliable conditions. Here, there is no evidence of an alternative purpose that Molly created the writing except for the document [sic] the events as they occurred. If all of these elements are satisfied, the recollection may be read into evidence; however, the photocopy should not be admitted into evidence.

(2) Present Recollection Refreshed: A party can refresh a witness' memory with virtually any document. Therefore, if Molly did not recall the events, David could have shown Molly the document and allowed her to look over the writing. If this refreshed her memory, then she could testify as to her knowledge of the events. In this situation, the writing would normally not be entered into evidence unless the opposing party suggested that it be admitted. However, this does not apply because Molly was shown the document, but then did not review it or subsequently answer questions based off of her review.

In conclusion, the photocopy should not have been entered into evidence because even though there were valid hearsay exceptions applied, the appropriate way to admit the evidence would have been to read the evidence into the record as opposed to giving the jury the photocopy.

Question 3
Answer B

The case between Paul in [sic] David is a civil case, which means there are a few different rules than when you are in a criminal case. This case is about injuries arising out of an automobile accident in which Paul is suing David. At issue is going to be who is at fault for the injuries and the accident.

1. Did the court err in admitting Vera's statement?

Vera's statement was made while she was a passenger in the car with Paul on the day of the accident. She stated in a calm manner that she saw a black SUV behind them weaving recklessly through the traffic.

Logical Relevance

All evidence must be relevant to be admissible. This includes tending to prove or disprove a fact that is of consequence. Even if evidence is relevant it may be inadmissible if it is not legally relevant.

Here, Vera's statement is being offered to prove the identity of a vehicle that she observed driving recklessly, which is the same vehicle that David drives. It is also relevant to prove that Paul had notice/was aware of the black SUV driving radically. Additionally, it is relevant to prove that David was at fault and was driving recklessly.

So although Vera's statement has logical relevance its probative value must be determined.

Legal Relevance

Evidence that is logically relevant may be excluded if it will create an unfair prejudice. The court has discretion as to whether or not to exclude the evidence. The test to determine whether the evidence should be excluded on a legal relevancy

ground is whether the unfair prejudicial effect substantially outweighs the probative value.

Here, the prejudicial effect will be that David will be determined to have driven recklessly by weaving in and out of traffic. However, this is highly probative and is what is at issue and being determined in the case, so Vera's statement will not be excluded on grounds of legal relevance.

Even relevant evidence that is otherwise admissible can be inadmissible when it is in violation of one of the federal rules of evidence.

One of the objections that David could make regarding the admissibility of this evidence, besides relevancy, would be hearsay.

Hearsay

Hearsay is a rule which prevents out-of-court statements from being admitted into evidence, if the statement is being offered for the trust of the matter asserted. The reason hearsay evidence is prohibited is because it was not subject to cross-examination and cannot be determined if the statement was fabricated or reliable. Since the information in Vera's statement about a black SUV driving recklessly would be helpful to a jury or trier of fact and is being offered to prove that the reckless driving of the SUV did in fact take place it is being offered for its truth and should be excluded unless a hearsay exception or exemption applies.

Hearsay Exceptions

Hearsay exceptions are statements that are made out of court and are admitted for their truth but we allow them in for other reasons. Here, Paul will try and argue that Vera's statement should get in under several different exceptions.

Present Sense Impression

A present since impression is an exception to hearsay because it is considered to have reliability given the fact that the statement is made while or immediately after

perceiving an event. There seems to be little time to fabricate a statement when it is made while you are perceiving it.

Here, Paul is going to argue that Vera made the statement while still in the car when she saw the black SUV weaving recklessly through traffic. She was currently perceiving the SUV driving in such a manner and made the statement while making the observation. It is of no matter that she made the statement calmly because this does not negate that she had just observed the SUV driving recklessly.

David might try and counter that Vera did not make the statement immediately when she observed the car driving recklessly, but there are no facts to support that she didn't make the statement while she was observing. Also statements are allowed to be made immediately after observation, because there is still the indication that there is not time to fabricate. Absent any facts showing that Vera waited any amount of time after observing the SUV driving recklessly and telling Paul this statement could come in under the present sense impression.

Excited Utterance

Excited utterance allows hearsay evidence to come in if the statement was made while under the stress or effect of an exciting or startling event. Here, Paul might try and claim that Vera commented on the SUV's reckless driving while she was still under the stress of the observation. However, David will have a valid argument against this contention because Vera calmly told Paul about the SUV and did not seem to be effected by it in a manner to justify an excited utterance.

Former Statement

Former statements can be admitted as long as the declaring is unavailable. Unavailability of a declaring can be because of death, not able to locate after reasonable attempts, and/or incapacity. Here, Vera is dead so she is unavailable. Former statements that are made under oath at a previous proceeding can be admitted for impeachment purposes and to prove the truth of the matter asserted. Here, Vera's statement was not made under oath at a formal proceeding and could

only be used for impeachment. However, since there is no one to impeach because Paul is offering his case and chief [sic] as a plaintiff, thus going first, this statement cannot be admitted as a former statement even though Vera is unavailable.

Dying Declaration

Dying declarations are allowed in criminal homicide cases as well [as] civil. Here, we are in a civil case so a dying declaration is allowed as long as the declaring is unavailable, they do not have to actually die, they made a statement regarding the cause of their death, and they made the statement under the belief that death was impeding or imminent. Here, there is no valid argument to support that Vera's statement was a dying declaration since she made the statement prior to Paul's car being struck by the black SUV and prior to her death. Even though Vera is now unavailable she did not make a statement thinking she was going to die or describing the cause of her death and this exception is not available for Paul to get Vera's statement admitted.

Personal Knowledge

Personal knowledge is required for a witness to be able to testify as to an event. While Paul did not personally observe the black SUV driving recklessly as Vera did, he did perceive Vera's statement with one of his 5 senses and thus has personal knowledge that the statement was made and the manner in which it was made.

Hearsay Exemptions

These statements are not hearsay because they are not admitted to prove the truth of the matter and are admitted for a different purpose. Here, Paul is going to argue that Vera's statement should come in as non-hearsay under several different grounds.

Effect on the hearer

Effect on the hearer is not being offered to prove the truth of the matter and thus is not hearsay. This is offered to show the effect the statement had on the person hearing the statement. Here, Paul could assert this statement is being offered to

show that Paul was aware of a black SUV that was driving recklessly. Since Paul's driving is also being put at issue by David this is important for Paul to prove that he was on alert of the black SUV driving recklessly that struck him 30 seconds after hearing the statement from Vera.

Conclusion

Because this statement could fall under the present sense impression exception and effect on the hearer exemption to hearsay this statement cannot be excluded on hearsay grounds and the court properly admitted Vera's statement.

2. Did the court err in admitting the photocopy of Molly's notes?

Logical/Legal Relevancy

Molly's notes are relevant to prove that Paul made a statement accepting fault and offering to pay medical bills. They are being offered by David for this matter and to prove that it is true as well. Although relevant to determine fault the evidence must also not be unfairly prejudicial.

Policy reasons to exclude relevant evidence

Certain evidence although relevant will be excluded because of public policy reasons. Courts want to encourage parties to fix wrongs, settle cases, and help each other out. Here, Paul will argue that the notes should be excluded because they were an offer to pay medical bills. Offers to pay medical bills cannot be offered to show fault of a party.

Although offers to pay medical bills of the injured [sic] is not allowed into evidence under the federal rules of evidence, the FRE severs statements made in connection with the offers and allows them into evidence. Here, Paul made the statement that he was driving too fast, was at fault, and offering to pay medical expenses of anyone injured.

The statements regarding Paul driving too fast and being at fault will not be excluded under this policy reason but may be excluded on other grounds (see discussion below).

Error in allowing an offer to pay medical expenses

So in regards to the court allowing in a photocopy of a document that included the offer to pay medical expenses there is an error because public policy seeks to keep these sorts of statements excluded.

The statement regarding Paul driving too fast and being at fault

The photocopy of Molly's notes being admitted constituted a recorded recollection and is actual evidence being admitted. All tangible, physical, non-testimonial evidence that is being admitted must be authenticated in order to be admitted.

Authentification

Here, Molly is on the stand claiming that she wrote the notes immediately after the accident and that the notes are hers. This is sufficient to authenticate the notes because Molly is claiming they are what David purports them to be and she is on the stand and capable of being questioned as to the notes' authenticity.

Refreshing Recollection

Anything can be used to refresh a witness's recollection. Here, David is attempting to use notes to refresh Molly's recollection. Witnesses must be shown whatever is attempting to refresh their recollection in order to see if the item is successful in helping them recall. Whatever is used to refresh a witness's recollection may be offered into evidence by the opposing party.

Here, it is not Paul offering the notes used to refresh Molly's recollection into evidence; it is David, which means he is attempting to offer the notes as a recorded recollection.

Paul may argue that Molly was not given the notes before claiming that her memory failed and thus the rules regarding admitting record recollection evidence were not followed. Generally a witness should be given the document to review silently and then if they still cannot remember the document may be admitted into evidence. Paul may have a valid argument here since the facts do not say that this was done. It appears from the facts that Molly before even reviewing the document said she couldn't remember, then it was moved into evidence.

Record Recollection

Documents offered into evidence that were used to refresh a witness's recollection are permitted so long as the witness's memory has failed to be refreshed, the witness is on the stand and able to be crossed and authenticate the document, the witness accurately prepared the document close in time to perceiving the events, and had personal knowledge of the thing to which they recorded information about.

Here, Molly did testify that she was unable to recall the conversation. She is on the stand and subject to cross and questioning. And she testified that she carefully wrote down the notes as soon as Paul was taken away in the ambulance; additionally she had personal knowledge of the conversation with Paul since she heard the conversation herself. Given these facts David would be able to properly admit the evidence as record recollection as long as no other restrictions exist permitting the admissibility of the evidence.

Best Evidence Rule

The Best evidence rule is a rule which calls for the document itself to be admitted when someone is on the stand trying to testify as to the contents of the document. Here, Molly is trying to recall a conversation and the notes contain information about the conversation. Since the notes are her own memory and not of legal significance the best evidence rule does not apply.

However, Paul will try and assert that there is a problem with the best evidence rule as well as authentification because the actual note itself was not admitted and a

photocopy was admitted. Paul will try and argue that unless David can show a justifiable reason why a photocopy of the note and not the actual note was admitted there is a problem/violation with the best evidence rule. David will successfully counter that argument by claiming that a photocopy, properly authenticated, is an acceptable document to satisfy the best evidence rule.

Hearsay/ Multiple Hearsay

See rule above and discussion above. Here we also have a case of multiple hearsay since there is a statement within a document both made/prepared out of court and being offered for the truth of the matter asserted. So both the statement and the document must meet their own separate hearsay exception or exemption. As discussed above the document itself can get in under the record recollection rule but there needs to be an exception for the actual statements.

Party Admission-

Party admissions are considered non-hearsay and are statements offered by a party opponent made by the other party. These statements do not have to be against interest necessarily but they must be made by one party and offered by the other. Here David is attempting to offer statements that Paul made, and although not required, are against his interest and regard his fault in the accident. This could be a valid ground for admitting the statements made by Paul.

Statement against interest

David may try and assert that the statements made by Paul can come in under a statement against interest exception to hearsay. However, this exception requires that the declaring be unavailable which is not the case here, since Paul is the plaintiff in the matter and is available in court.

Conclusion

The court was likely proper in admitting the evidence because the document can come in under the record recollection and the statement is admissible as a party admission.

FEBRUARY 2012
ESSAY QUESTIONS 4, 5 and 6

California Bar Examination

Answer all three questions.

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles; instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2012
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2012 California Bar Examination and two answers to each question that were written by actual applicants who passed the examination after one read.

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Question 3

Vicky was killed on a rainy night. The prosecution charged Dean, a business rival, with her murder. It alleged that, on the night in question, he hid in the bushes outside her home and shot her when she returned from work.

At Dean's trial in a California court, the prosecution called Whitney, Dean's wife, to testify. One week after the murder, Whitney had found out that Dean had been dating another woman and had moved out, stating the marriage was over. Still angry, Whitney was willing to testify against Dean. After Whitney was called to the stand, the court took a recess. During the recess, Dean and Whitney reconciled. Whitney decided not to testify against Dean. The trial recommenced and the prosecutor asked Whitney if she saw anything on Dean's shoes the night of the murder. When Whitney refused to answer, the court threatened to hold her in contempt. Reluctantly, Whitney testified that she saw mud on Dean's shoes.

The prosecution then called Ella, Dean's next-door neighbor. Ella testified that, on the night Vicky was killed, she was standing by an open window in her kitchen, which was about 20 feet from an open window in Dean's kitchen. She also testified that she saw Dean and Whitney and she heard Dean tell Whitney, "I just killed the gal who stole my biggest account." Dean and Whitney did not know that Ella overheard their conversation.

Dean called Fred, a friend, to testify. Fred testified that, on the day after Vicky was killed, he was having lunch in a coffee shop when he saw Hit, a well-known gangster, conversing at the next table with another gangster, Gus. Fred testified that he heard Gus ask Hit if he had "taken care of the assignment concerning Vicky," and that Hit then drew his index finger across his own throat.

Assuming all appropriate objections and motions were timely made, did the court properly:

1. Allow the prosecution to call Whitney? Discuss.

2. Admit the testimony of:
   (a) Whitney? Discuss.
   (b) Ella? Discuss.
   (c) Fred? Discuss.

Answer according to California law.

Answer A to Question 3

California Proposition 8: Truth in Evidence Rule

Under Proposition 8 in California, all non-privileged, relevant evidence is admissible in a criminal prosecution brought in California unless it falls within one of the specified exceptions to the rule. Evidence that is admissible under Proposition 8 is still subject to CEC 352 balancing.

Here, as this case involves the prosecution charging Dean with murder, Proposition 8 will apply to admit any evidence that is relevant and is not excluded for CEC 352 balancing.

1. Allow the Prosecution to call Whitney

The first issue is whether the prosecution should be allowed to call Whitney. This depends on whether Whitney ("W") can claim one of the spousal privileges: spousal communications privilege or spousal testimonial privilege.

Spousal Communications Privilege

The spousal communications privilege protects all confidential communications between spouses that are made in the course of an existing marriage and in reliance on the intimacy of the marriage. This privilege belongs to both spouses and may be claimed by either to prevent the other spouse from testifying. Moreover, the privilege exists regardless of whether the marriage has ended in divorce, so long as the communication itself was made during a period when the marriage existed. For purposes of the privilege, marriage does not end until there is a valid divorce.

Here, Whitney was called by the prosecution to testify that she saw mud on Dean's shoes. This observation occurred when Dean and W were still married as Dean and W have yet to obtain a divorce and reconciled prior to W providing any testimony. Although W and D had separated because W had discovered that D was dating another woman and W had moved out, for the purpose of this privilege, it extends for any

communication made prior to divorce. Finally, as W was called to testify to an observation, rather than a communication between W and Dean, it would not be protected under the communications privilege.

Thus, this privilege would not apply to prevent W from testifying as she did or to prevent her from taking the stand.

Spousal Testimonial Privilege

The spousal testimonial privilege allows one spouse to refuse to testify against another spouse in any action. For this privilege to apply, a valid marriage must still exist. The privilege belongs to the testifying spouse, as the privilege is designed to protect the harmony of the marriage, which is not salvageable if the testifying spouse wishes to testify. Moreover, in California, the privilege allows the testifying spouse to avoid taking the stand entirely.

Here, W was called to the stand to testify that she saw mud on D's shoes during the night of the murder. Although W and D had been separated, because W moved out and stated the marriage was over when she discovered that D had been dating another woman and moved out, the marriage had not ended for the purposes of the privilege, which requires a valid divorce. As such, W was privileged to choose not to take the stand.

In this case, W initially was angry and was willing to testify against D and thus agreed to take the stand and testify. W actually took the stand and was sworn in, prior to the recess in which W and D reconciled and W decided not to offer testimony. Thus, the prosecution will argue that W waived the privilege because she took the stand and was sworn under oath.

By contrast, W will assert that she did not waive the privilege because, although she took the stand, she asserted the privilege the first time that she was asked a question

by the prosecution. W refused to answer when court resumed and the prosecutor asked W if she saw anything on D's shoes at the night of the murder.

As W asserted the privilege prior to answering any questions, the court will find that she had a spousal testimonial privilege and could not be forced to testify against D. However, W took the stand voluntarily and thus it was proper to allow the prosecution to call W because she was the holder of the privilege and had not yet claimed it. Proposition 8 does not allow privileged information to be admitted and thus will not change the outcome.

2. Admit the Testimony

(a) Whitney

The first issue is whether the court should have admitted the testimony of Whitney.

Logical Relevance

Under California law, evidence is relevant if it makes a fact of consequence that is actually in dispute more or less probable then it would be without the evidence.
Here, W testified that she saw mud on D's shoes. As V was killed on a rainy night, and the prosecution was arguing that D hid in the bushes outside her home and shot her when she returned from work, this evidence would make it more likely that D was present in a muddy flowerbed and committed the murder.
Thus, it is relevant.

Legal Relevance

Evidence is legally relevant if its probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, waste, or undue delay.

Here, D will argue that the testimony about mud on his shoes is likely to confuse and mislead the jury, particularly if the prosecution has failed to establish that the mud came from a flowerbed near Vicky's home. However, as this evidence has high probative value in that it shows that D was standing outside in mud on a rainy night, it will likely be admitted. Thus, this objection will fail.

Personal Knowledge

In order to be competent to testify, a witness must have personal knowledge of the facts to which she is testifying based upon her percipient observations.

Here, W saw mud on D's shoes in the night in question and thus testimony about the state of the shoes is within her perception and personal knowledge.

Spousal Communications Privilege

As discussed above, this will not protect W's testimony about the mud on D's shoes as it was not a communication, but was an observation.

Spousal Testimonial Privilege

As discussed above, this will protect W's testimony because she is still married to D and therefore cannot be compelled to offer evidence against him in the criminal action. Prop 8 does not change the outcome as privileged information is excluded.

Conclusion

W's testimony will be excluded as a result of the spousal testimonial privilege.

(b) Ella

The second issue is the admissibility of Ella's testimony.

Logical Relevance

See rule above.

Ella's testimony that she overheard D tell W that he "just killed the gal who stole my biggest account" is highly relevant to the case. D is charged with murder and his alleged motivation for killing Vicky is that they were business rivals. The statement thus indicates that D committed V's murder, particularly because it was made on the night that V was killed. This fact is in dispute as it relates to whether or not D is guilty of the crime with which he is charged. Thus, this testimony is logically relevant.

Legal Relevance

See rule above.

Although D will argue that this statement is highly prejudicial and should be excluded because it could be misinterpreted and it fails to identify V specifically, the court will likely find that its probative value in showing that D committed the murder and that he had a motivation to commit the murder far outweighs the risk of prejudice. Moreover, the information goes to the heart of D's guilt or innocence.

Thus, the evidence will not be excluded on this ground.

Personal Knowledge

See rule above.

Here, Ella was standing by an open window in her kitchen, which was about 20 feet from an open window in D's kitchen. Ella could both see D and W and could hear D tell W that "I just killed the gal who stole my biggest account." Thus, Ella's testimony was based on her percipient observations as she could personally see and hear what was happening in D and W's house.

Thus, this objection will be overruled.

Hearsay

Hearsay is an out-of-court statement that is offered to prove the truth of the matter asserted. Hearsay is inadmissible unless it falls within an exception or is being used for a non-hearsay purpose. Proposition 8 will not apply to admit otherwise inadmissible hearsay as hearsay is an exception to Proposition 8.

Here, Ella's testimony that D told W, "I just killed the gal who stole my biggest account" is offered to show that D was in fact the person who killed V. Thus, it is an out-of-court statement offered to prove the truth of the matter asserted and is only admissible if it falls within an exception.

Party-Opponent Admission

A statement by a party-opponent regarding a relevant fact of the case is admissible over a hearsay objection as it is a California exception from the hearsay prohibition.

Here, the statement that Ella testified about was a statement by D, who is the defendant in the criminal action. This statement is highly relevant to the issues involved in the case because it indicates whether or not D actually committed a murder of V, for which he is being charged.

Thus, this exception would allow the statement to be admitted.

Statement Against Interest

A statement is admissible under an exception if it qualifies as a statement against interest. A statement against interest is a statement of a now unavailable witness that was against the person's proprietary, pecuniary, penal, or social interest when made and that the declarant knew was against his interest when made.

Here, D made the statement to W that "I just killed the gal who stole my biggest account." This statement would be against D's penal interest, because it could subject him to prosecution for murder. Moreover, it could subject him to social ridicule, ostracism and humiliation because he would be labeled as a murderer. D will argue

that the statement was not against his interest because it was made to his spouse in reliance on the confidentiality of their marital relationship and thus he did not think that it could be used against him. Moreover, he did not believe at the time it was made that it would subject him to social disgrace as he expected his spouse to maintain the confidentiality of the statement. As D likely did not know that the statement could be used against his interest when it was made, this exception likely would not apply.
A declarant is unavailable if he can claim a privilege against testifying. As D can claim the privilege against self-incrimination under the Fifth Amendment, he would be considered unavailable for the purposes of this exception.

Thus, this exception would not apply because D likely did not know it was against his interest when made.

Spontaneous Statement

A spontaneous statement is a statement made shortly after witnessing a startling event and while the declarant was still under the stress of excitement.

Here, D made his statement to W and said "I just killed the gal..." indicating that he may still have been under the stress of excitement from the murder. Moreover, a murder is likely a startling event, especially when it involved hiding in the bushes and shooting someone at their home and then seeking to avoid detection.

Thus, D's statement might be a spontaneous statement if he was still experiencing the stress of excitement.

Contemporaneous Statement

A contemporaneous statement is a statement made at or near the time of an event that explains or describes the defendant's actions.

Here, D told W, "I just killed the gal who stole my biggest account." Because D specified that he "just" killed a gal, the statement may have been made near the time of

the event. Moreover, the statement describes D's own conduct in killing the gal and explains his reasons for that conduct--she "stole my biggest account."

Therefore, provided it was made sufficiently close in time, it may qualify as a contemporaneous statement.

Spousal Communications Privilege

See rule above. In addition, the spousal communications privilege is waived if the privilege is not made in reliance on the intimacy of the marriage. A statement is not made in this reliance, if it is made in the presence of a third person who does not fall within the privilege. If the spouses could not have reasonably foreseen that the communication would be overheard by a third party, then the privilege is not waived and D may prevent Ella from testifying on the basis of the privilege. However, if the spouses made the statement negligently when it could be overheard by a third party, then the privilege has been waived as no reasonable efforts were made to maintain its confidentiality.

Here, D and W had a conversation in their kitchen. No one else was present in the home and D and W were having an intimate conversation as spouses, thus suggesting that the conversation was made in reliance on the intimacy of the marriage. However, D and W had this conversation while the window to their kitchen was open. This window was only 20 feet from a neighbor's window which was also open and D was talking in a sufficiently loud voice such that Ella could overhear the conversation. But, because D and W engaged in a private communication between themselves and they did not know that Ella overheard the communication, they likely were not so negligent as to waive the confidentiality of the communications. D and W could rely on the privacy of their home, even with an open window.

Thus, the spousal communication privilege will prevent this testimony.

(c) Fred

Logical Relevance

Fred's testimony that the day after Vicky was killed he was having lunch and heard that two gangsters had "taken care of the assignment concerning Vicky" is relevant to establish that Dean was not the person who killed Vicky. As whether or not D killed Vicky is the primary issue in the murder trial, this is both highly relevant and in dispute.
This objection will be overruled.

Personal Knowledge

Here, Fred was having lunch at a coffee shop when he saw Hit and Gus conversing and overheard the conversation. Thus, Fred had personal knowledge regarding the statements that were made.

This objection will be overruled.

Hearsay

See rule above.

Here, F is offering testimony regarding the statements of both H and G, and both of these statements must fall within a hearsay exception in order to be admitted. These statements are offered to show that F and G committed the murder of Vicky.

G's Statement

Effect on Hearer

D will argue that G's statement asking whether H had "taken care of the assignment concerning Vicky" is not offered to show the truth of that statement, as it was a question, but instead to show its effect on H, who answered the question.
A statement offered to show the effect on the hearer is not hearsay and is admissible over a hearsay objection.

Here, as this question is offered to show the effect on H in answering, it will be admissible.

H's Statement

Although H merely made a gesture by drawing an index finger across his throat, such an action can qualify as hearsay if it is intended to communicate.

Here, H's conduct was done in order to answer G's question regarding whether or not H had "taken care of the assignment concerning Vicky." As this was intended to communicate that H had in fact gotten rid of Vicky, it will qualify as hearsay.

Statement Against Interest

Here, this statement is against H's penal interest as he would be subject to prosecution for murder if he killed Vicky. As H made this statement while at a coffee shop where other people like F were around, H would know that he could be subject to punishment for making it at the time it was made. It is unclear whether H is unavailable and the admissibility will depend on this.

Thus, this is likely admissible testimony.

ANSWER B TO QUESTION 3

People v. Dean

1. Did the court properly allow the prosecution to call Whitney?

Spousal Testimonial Privilege

The California Evidence Code (CEC) contains a spousal privilege. The spousal privilege allows a defendant's spouse to refuse to take the witness stand and testify against his or her spouse. Although Dean's trial is a criminal trial, the CEC makes no distinction between criminal and civil trials--the spouse may refuse to testify against his or her spouse in either civil or criminal trials.

The spouse and defendant must be married during the time of trial. Here, although Whitney had moved out of the house prior to Dean's trial and said the "marriage was over," there is nothing to indicate that Whitney and Dean's marriage was legally dissolved. Thus, Whitney was married to Dean at the time of trial, and therefore can invoke the spousal testimonial privilege.

The spouse--not the defendant--is the holder of the privilege. Thus, even if Dean did not want Whitney to testify against him, Whitney could if she so chose, and so long as the matter she testified to was not otherwise privileged.

Under the CEC, the witness spouse may refuse to take the witness stand completely. Here, although Whitney initially took the stand, intending to testify against Dean, she could have refused to take the stand altogether. The issue is whether Whitney could later invoke the privilege after voluntarily waiving the spousal testimonial privilege.

The CEC does not dictate that a spouse has waived the spousal testimonial privilege once he or she takes the witness stand. Here, Whitney has testified to nothing yet. Thus, although she has taken the witness stand, she is still not otherwise

prohibited from invoking the spousal testimonial privilege. Thus, her testimony should not have been compelled.

However, the court did not err in allowing the prosecution to call Whitney to the witness stand because Whitney initially wanted to testify against Dean. Thus, error, if any, was on the court's compelling Whitney to testify, not on the court allowing the prosecution to call Whitney to the witness stand.

2. Did the court properly admit the testimony of Whitney, Ella, and Fred?

Whitney

Logical Relevance

To be admissible, evidence must be relevant. Under the CEC, evidence is relevant if it has any tendency to make the existence of some fact of consequence to the action more or less probable than the absence of such evidence. The CEC further requires that to be relevant, the fact must be in dispute.

Here, Whitney's testimony that she saw mud on Dean's shoes is relevant because it makes a disputed fact--whether Dean was hiding in the bushes outside Vicky's home that rainy night--more probable than the absence of the evidence.

Legal Relevance

Even if logically relevant, the court may exclude evidence if its probative value is substantially outweighed by the risk of unfair prejudice, confusing the issues, or misleading the jury. Here, the probative value of Whitney's testimony is relatively high. Because Whitney is Dean's wife, her testimony tending to inculpate Dean is especially probative. That Dean had mud on his shoes the night of the murder tends to show that Dean might have been hiding in the bushes that night. There is little risk of unfair prejudice because there is nothing to indicate that Whitney's testimony that she saw mud on Dean's shoes will cause the jury to have prejudice against Dean.

Spousal Testimonial Privilege

As discussed above, Whitney should have been able to invoke the spousal testimonial privilege because she is married to Dean at the time of trial and thus may refuse to testify against him. Although she took the stand--which California allows a spouse to refuse to do--Whitney still had the privilege to not testify against Dean.

Confidential Marital Communications Privilege

Whitney may attempt to alternatively invoke the confidential marital communications privilege. Any confidential communication between spouses is privileged and inadmissible. Here, however, Whitney testified as to an observation, not a communication. Whitney merely saw mud on Dean's shoes. Whitney did not testify as to any communication Dean made to her. Thus, the confidential marital communications privilege does not apply.

In conclusion, Whitney's testimony--although relevant--should have been excluded because of the spousal testimonial privilege.

Ella

Logical and Legal Relevance

Ella's testimony that Dean told Whitney "I just killed the gal who stole my biggest account" is extremely relevant. If Dean told Whitney this, it tends to make it more probable that Dean in fact did kill Vicky. The probative value is high, and there is little risk of unfair prejudice as a result of Dean's statement to Whitney.

Hearsay

Ella's testimony may be objected to on the grounds that it is hearsay. Hearsay is an out of court statement being offered to prove the truth of the matter contained therein. Here, Dean's statement is out of court because it was made in his home to his wife. If offered to prove that Dean did kill Vicky, it would be being offered for its truth. Thus, the statement is hearsay by definition.

Nonhearsay: Declarant's state of mind

Dean's statement may be offered for the nonhearsay purpose of showing his state of mind. It could be offered to show Dean's intent to kill, rather than the fact that he did kill Vicky. However, if offered only for this purpose, it would be highly prejudicial because it would be very difficult for a jury to not consider the statement as evidence that Dean actually killed Vicky. Thus, it should not likely be admissible solely for this purpose.

Admission of a party/opponent

Alternatively, Dean's statement to Whitney could be offered for its truth if it comes under a hearsay exception. The CEC provides an exception to the hearsay rule for admissions made by parties and offered by an opponent. Here, Dean's statement to Whitney is a statement made by Dean--a party--and offered by the prosecution--an opponent. Thus, although hearsay, Dean's statement may be admissible as an admission--an exception to the CEC's rule against hearsay.

Confidential Marital Communications

However, Dean may seek to exclude his statement to Whitney on the grounds that the statement was a confidential communication between spouses and thus is privileged. Both spouses are holders of the privilege. Here there is a twist because a third person is attempting to testify as to a confidential communication between spouses. Both Dean and Whitney did not know that Ella overheard their conversation. Thus, Dean and Whitney believed Dean's statement to be in confidence. Ella was standing 20 feet away and in the house next door when the statement was made. If Dean and Whitney's belief that the communication was confidential was reasonable, such communication was privileged. Here, it appears that Dean and Whitney's belief that their communication was in confidence was reasonable--notwithstanding the fact that Ella overheard the communication 20 feet away.

The purpose of the confidential marital communications privilege is to foster the confidence of the marital relationship, and to encourage open and honest

communication. Here, if Ella is permitted to testify as to Dean's statement if Dean and Whitney reasonably believed their communication was made in confidence, such an allowance would seem to go against the grain of the purpose of the confidential marital communications privilege. Spouses should not have to take every measure to ensure their communications are confidential so as to invoke the benefit of the confidential marital communications privilege. A reasonable belief that the communication is made in confidence should be sufficient. Here, the court should not allow Ella's testimony for this reason.

Logical and Legal Relevance

Fred's testimony that Hit implicitly admitted to killing Vicky is relevant because it makes it more probable that Dean did not kill Vicky. Assuming that the Vicky that Gus was talking about was the same Vicky who died the day before, such evidence would be extremely probative to show that Dean was not the killer, but Hit was.

Hearsay

Hearsay is an out-of-court statement. To be a statement, there must be some assertive words or conduct. Although Gus's question to hit was out of court, it was not a statement because it was not assertive. A question is not an assertion. Thus, Gus's question to Hit whether Hit had taken care of the assignment concerning Vicky was not hearsay.

The issue becomes whether Hit's drawing his index finger across his throat was assertive conduct. Taken in light of the surrounding circumstances, Hit's conduct seems to indicate that Hit acknowledged to Gus that he in fact killed Vicky. To be hearsay, the declarant need not utter actual words. Here, the judge would use his or her discretion in deciding whether Hit's conduct was assertive. The court should hold that the conduct was assertive when taken in context with Gus's immediately preceding question.

Because Hit's assertive conduct was made out of court, and if offered to prove the truth--that Hit did kill Vicky--it is hearsay by definition. Hearsay is inadmissible absent any exception.

Statement against Interest

Dean may argue that Hit's statement was a statement against interest. However, for a statement against interest to be admissible, it must be shown that the declarant is "unavailable" to testify. No such showing has been made, and therefore Hit's statement may not be admitted as a statement against interest.

Admission

Hit's statement cannot come in as an admission because Hit is not a party to the action.

Present Sense Impression/Contemporaneous Statement

Hit's statement may not be admitted under the present sense impression/contemporaneous statement exception because Hit's statement was not made either while killing Vicky or immediately thereafter. Also, Hit was not describing his conduct, he merely made a motion tending to indicate that he killed Vicky. Thus, this exception does not apply.

Confrontation Clause

The Sixth Amendment right to confrontation applies to the states, including California, and provides that criminal defendants shall have the right to be confronted with the witnesses against them. Here, because Dean is offering the out-of-court statement made by Hit, the Sixth Amendment right of confrontation does not apply.

Conclusion

Because Hit's conduct was assertive, given the surrounding circumstances, and because it is only relevant to prove the truth of his statement--that he killed Vicky, and thus inferentially, Dean did not kill Vicky--Hit's statement was hearsay. Because no

exception to the rule against hearsay applies, Hit's statement should not have been admitted.

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2014

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2014 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Contracts/Remedies
2.	Evidence
3.	Business Associations / Professional Responsibility
4.	Criminal Law and Procedure
5.	Trusts / Community Property
6.	Torts

Question 2

Pete was a passenger on ABC Airlines (ABC), and was severely injured when the plane in which he was flying crashed because of a fuel line blockage.

Pete sued ABC in federal court, claiming that its negligent maintenance of the plane was the cause of the crash.

At trial, Pete's counsel called Wayne, a delivery person, who testified that he was in the hangar when the plane was being prepared for flight, and heard Mac, an ABC mechanic, say to Sal, an ABC supervisor: "Hey, the fuel feed reads low, Boss, and I just cleared some gunk from the line. Shouldn't we do a complete systems check of the fuel line and fuel valves?" Wayne further testified that Sal replied: "Don't worry, a little stuff is normal for this fuel and doesn't cause any problems."

On cross-examination, ABC's counsel asked Wayne: "Isn't it true that when you applied for a job you claimed that you had graduated from college when, in fact, you never went to college?" Wayne answered, "Yes."

ABC then called Chuck, its custodian of records, who identified a portion of the plane's maintenance record detailing the relevant preflight inspection. Chuck testified that all of ABC's maintenance records are stored in his office. After asking Chuck about the function of the maintenance records and their method of preparation, ABC offered into evidence the following excerpt: "Preflight completed; all okay. Fuel line strained and all valves cleaned and verified by Mac." Chuck properly authenticated Sal's signature next to the entry.

Assuming all appropriate objections and motions were timely made, did the court properly:

1. Admit Wayne's testimony about Mac's question to Sal? Discuss.

2. Admit Wayne's testimony about Sal's answer? Discuss.

3. Permit ABC to ask Wayne about college? Discuss.

4. Admit the excerpt from the maintenance record? Discuss.

Answer according to the Federal Rules of Evidence.

QUESTION 2: SELECTED ANSWER A

1) Wayne's Testimony about Mac's question to Sal

Logical Relevance; in order to be logically relevant, the evidence must make a fact that is of consequence in determination of the action more or less probable than without the evidence.

Here the evidence with regard to Wayne's testimony is highly relevant in that it tends to establish that Mac's (M) supervisor Sal (S) had notice of a potential problem with the aircraft prior to flight. Moreover, the second part of the statement shows, the ABC had the opportunity to do a systems check that was part of the routine operation, but ultimately failed to do so. It thus makes it more probable that ABC's employees were negligent in maintaining the aircraft, because S had notice of a problem and took no corrective action.

Legal Relevance - relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, waste of time, or confusion of the issues. Here ABC will argue that the evidence is highly prejudicial to ABC since it demonstrates that one of its employees noted a problem and stated, that corrective action should be taken. This is unlikely to be well received by the court, since, it is prejudicial, but not unfairly so, since it does not tend to arise the emotions or passions of the jury. Further, the evidence is highly probative in that one of its employees noticed a potential problem and recommended corrective action. As such, the statements about Mac's statements are legally relevant with the probative value not being substantially outweighed by unfair prejudice.

Hearsay: hearsay is defined as an out of court statement offered for the truth of the matter asserted. Here the statement by M was made out of the current proceeding in court, thus it was made out of court. The first part of Mac's statement is an assertion

and thus definition be considered a statement. However the second part of the statement with regard to the systems check is actually a question (further explained below), and as such is not an assertion. Accordingly it would fall outside the definition of hearsay as discussed below. Finally, both parts of the statement may be being offered for their truth. That M noticed a problem and cleared out the fuel lines, and that M asked whether they should conduct a full systems check. This would be offered to show that there was actually a problem detected in the aircraft.

Alternatively however, Pete (P) could argue that he is offering this evidence not for its truth, but only for the purpose of showing the effect on the hearer (S). As such, P is only showing that S had notice of a potential problem and failed to take corrective action. If the evidence were offered only for this purpose, it is admissible and not hearsay.

Assuming that P wants to offer the evidence for its truth (that there actually was a problem detected:

a) First part of statement regarding fuel reading and clearing the gunk from the line

Because the first part of the statement is hearsay, it will be inadmissible unless a hearsay exception applies, or the federal rules deem the statement Non-hearsay under an exemption.

Hearsay within Hearsay - when there are multiple levels of hearsay - each independent level of hearsay must be satisfied either by an exception or exemption.

1st Layer - The reading on the fuel gauge. ABC might try to argue that this is an independent level of hearsay, and is an out of court statement being offered for the truth of the matter asserted. This argument would be unavailing however, since gauges which simply provide readout of data (which is not entered by a human) are not considered statements under the traditional hearsay definition. As such the first layer

with regard to the fuel indicator would be deemed non-hearsay and would be admissible.

2nd layer - The statement itself

A statement that is made by a party opponent is admissible against that party when introduced by an opposing party. Further, within this exception, an employee's statement related to a matter of employment, while within the scope of employment are exempt from the hearsay definition under this exemption. Similarly, the statements by spokespersons or agents for an individual can be admitted under this exemption. In sum, under the FRE, statements under this exemption are deemed non-hearsay and can be offered for the truth of the matter asserted.

Here the statement made by Mac is was made while he was employed with ABC and related directly to matter of his employment - the mechanical evaluation of the plane before flight. As such it would be deemed non-hearsay and admissible.

Present sense impression - a statement made while contemporaneously perceiving and event and describing that event may be admissible under the present sense impression exception. Here, the statement involves M relaying what he just read and the actions he took on the line. If it was made right after the observations, which it appears to be, it would also be admissible under the present sense impression hearsay exception.

b) Second part of statement with the question regarding the systems check

Here as indicated above, M is actually asking a question, as to whether they should perform a systems check As such it would fall outside the hearsay definition regarding. A statement under the hearsay definition requires an assertion. As such a question cannot be considered hearsay, and would be properly admissible.

In sum, the evidence of Mac's question is properly admissible both for its truth and for the effect on the hearer to show negligence.

2) Wayne's Testimony about Sal's answer

Logical Relevance; in order to be logically relevant, the evidence must make a fact that is of consequence in determination of the action more or less probable than without the evidence.
Here the evidence is clearly logically relevant, it shows that S believed that the gunk wouldn't cause any problems, and more importantly did not take any corrective action upon hearing the findings of Mac.

Legal Relevance - relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, waste of time, or confusion of the issues. Here, there does not seem to be any danger of unfair prejudice, and thus is legally relevant.

Hearsay - an out of court statement offered for the truth of the matter asserted.
Here the statement is made out of court and is likely being offered for the truth of the matter asserted, namely that as the supervisor, S took no corrective action with regard to the plane.

Because it is hearsay it will be inadmissible unless an exception applies.

Non-hearsay, as statement by part opponent (an employee). As defined above, the statement by S will be deemed a statement of party opponent (ABC) since it related to a matter of employment (inspecting the aircraft) and was made while S was employed with ABC. As such, it will be deemed non-hearsay and is properly admitted.

3) ABC inquiry to Wayne about college

Logical Relevance; in order to be logically relevant, the evidence must make a fact that is of consequence in determination of the action more or less probable than without the evidence. Here the evidence is relevant because it tends to impeach the credibility of

Mac a testifying witness. As such it logically relevant because it may make the jury not believe his testimony, and impact the outcome of the proceeding.

Legal Relevance - relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, waste of time, or confusion of the issues. Here, the jury may give unfair weight to the evidence, and discredit Wayne's (W)'s testimony. However, it is unlikely a court would find this unfair prejudice, and it probative value is high, since it tends to demonstrate W has been untruthful in the past. As such it would be legally relevant.

Impeachment - prior instances of uncharged conduct - probative of truthfulness - on cross-examination a party is permitted to inquire in specific instances of uncharged prior bad acts if they are probative of truthfulness. It bears noting however, that counsel is bound by the witnesses answer and may not provide extrinsic evidence to prove up the prior bad act.

Here, ABC's counsel is asking W about a specific instance of uncharged conduct - the lying in the course of a job application. Because the lying on a job application with regard to whether W went to college links directly on W's truthfulness as a witness, it is properly admitted. Additionally, since ABC's counsel did not try to introduce extrinsic evidence of the bad act, its form of introduction into evidence was also proper.

4) Excerpt from the maintenance record

Logical Relevance; in order to be logically relevant, the evidence must make a fact that is of consequence in determination of the action more or less probable than without the evidence. Here the evidence is relevant in that it demonstrates that the fuel lines were cleaned and the preflight checks were completed. As such it is relevant, to show that proper care was taken before flight, and less likely ABC was negligent in performing maintenance.

Legal Relevance - relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, waste of time, or confusion of the issues. Here there are no issues with danger of unfair prejudice; the evidence is also legally relevant.

Hearsay - an out of court statement offered for the truth of the matter asserted. Here the maintenance records are made out of court; they are a statement and are being introduced for the truth of the matter asserted. Specifically, that the maintenance was in fact performed. As such they will be inadmissible unless a hearsay exception or exemption applies.

- Hearsay within hearsay: here there are two levels of hearsay. The first is Mac's entries and the second is the business record itself, each must independently satisfy the hearsay exception.

Statement by Party Opponent

Here the entries by Mac would fall not fall under the statement of party opponent exception because they are being offered by ABC and not P. As such an alternate exception must be used.

Business Record Exception - a report that is created within the regular course of business, is recorded contemporaneously or near after the action of the business, and has indications of reliability can be offered under the business record exception. The business records will be inadmissible if they contain entries by a person who is not under a business duty to report, or are completed with anticipation of litigation.

Here, the custodian of records is proffering the business records. The custodian testified how the records were prepared and their method of preparation. Assuming there were no indicators of untrustworthiness the records are properly admitted. It bears mentioning that the custodian can properly authenticate the signature if he was familiar with the handwriting of Sal. Additionally, the hearsay within hearsay problem is

alleviated because the business record exception covers all employees who are creating and contributing to the record who fall under the business duty. As such, M's statements would be properly admitted within the business record.

QUESTION 2: SELECTED ANSWER B

1. Ok to Admit Wayne's testimony about Mac's question to Sal

Relevance = The testimony is logically and legally relevant.
For an evidence to be admissible, it must be relevant. To be relevant, the evidence has to have any tendency to make any fact that is of consequence to the determination of the action more or less probable than without the evidence. Here, Wayne's testimony is most likely logically relevant because Mac's question ("Shouldn't we do a complete systems check of the fuel line and fuel valves?") shows that Mac and Sal, both ABC employees, was on notice that Mac thought they should do a complete systems check of the fuel line and fuel valves. Because Mac has stated that he just cleared some gunk from the line, he probably though more gunk would exist in other parts of the fuel line and valves. If ABC employees thought this way, then this could be relevant to prove that ABC knew that plane had some fuel line blockage problem before operating.

Even if the evidence is relevant, court may not admit the evidence if its probative value is substantially outweighed by unfair prejudice, waste of time, or confusion. Here, ABC would argue that this was only a question by Mac, and it does not indicate whether Mac actually thought there would be Gunk in other parts in the fuel line and valves. ABC would further argue that this question would confuse the jury (if this is a jury trial) to think that the employees actually thought there would be gunk in other places in the fuel lines and valves. However, Wayne's testimony is relevant, and is not substantially outweighed by any unfair prejudice. Although it would prejudice ABC, it is not unfair since opposing party's evidence would most likely be prejudicial to the other party due to nature of the adversarial setting of the trial.

Hearsay = The testimony is either not hearsay or falls under an exception
Hearsay is an out of court statement offered to prove the truth of the matter asserted. Statement can be a conduct or question as long as it is intended by the declarant to communicate something. Here, Mac's question was made outside of the court. Pete

would argue that Mac's question is not hearsay because it is a question. However, this question appears to be communicating. Mac stated that he just cleared some gunk from the line, and asked Sal if they should do a complete systems check of the fuel line and valves. Because of his previous statement before the question, Mac's question seems to communicate to Sal that they should be doing some systems check to see if other gunk exists elsewhere. Thus, Pete's argument that this is not hearsay because it is a question will not be too good.

It is not hearsay if the purpose of introducing the statement is not to prove the truth of the matter asserted but to show effect on the listener. Here, this is double-edged sword for Pete. Pete can probably get this in if he argues that this question should be admitted to show the effect on Sal. However, he also wants this question admitted for the truth of the matter asserted to show that Mac most likely thought that gunk existed elsewhere in fuel lines and valves. Thus, Pete can use this argument, but probably is not a good one to make.

The most successful argument would be that this statement falls under a hearsay exemption of statement of party opponent. Statement of party opponent can be admissible even if it is an opinion statement. An employee's statement can be admitted against an employer if the statement was made during the employment and statement describes a matter within the scope of their employment. Here, Mac was employed as an ABC mechanic when he made his question. Also, his statement directly related to his scope of employment as a mechanic because he was talking about doing some system check on the plane. Thus, his question would be admissible as a hearsay exemption of statement against party opponent.

Pete can also use a hearsay exception of present sense impression. A statement describing a condition or event while the declarant is perceiving the condition or event or immediately thereafter is admissible under hearsay exception. Here, Mac stated that he just cleared some gunk from the line, and asking a follow up question to his work. Thus, Pete can argue that Pete was asking that question pursuant to his observation of

his clearing of some gunk. ABC would argue that the question pertains to some future work that Mac is thinking about doing, so it does not relate to Mac's present sense impression of his past work completed. Even if ABC has a better argument here, this statement will pass the hearsay hurdle as a statement against party opponent.

Ok to Wayne's testimony about Sal's answer

Relevance = Sal's statement is logically and legally relevant
Here, Sal's statement is logically relevant because it can show negligence of ABC. Sal was notified by Mac that the plane had some gunks, but decided not to do system check because "a little stuff" (i.e., gunks) is normal for this fuel. Pete would argue that ABC knew about the gunks and decided not to clean or do any further systems check. Thus, it bolsters Pete's claim of negligent maintenance of the plane by Mac when he was on notice that the gunk was present in the fuel line. Thus, this is logically relevant.

Additionally, this statement is not substantially outweighed by any unfair prejudice. ABC may argue that little gunks in plane is normal, and this evidence may mislead the jury to think that having little gunk would cause problems.

Although this evidence is prejudicial, this is not unfair because jury can weigh the evidence after it is admitted.

Hearsay = this is not a hearsay statement and falls under a hearsay exception
Here, Sal's statement is a hearsay. His statement was made outside of the court; it was intended to communicate to Mac that little gunk is ok and that it would not cause problems; Pete is introducing this statement for the truth that Sal knew about there being some gunk and little gunk would not cause problems. Pete can argue that he is not offering this statement for the truth of the matter asserted but that Sal knew of some gunks and affirmatively decided not to conduct a system check even after being put on notice. In such a case, this statement would be admitted as non-hearsay.

Like Mac's question, Sal's statement would fall under statement against party opponent. Sal made this statement when he was employed by ABC and it was within the scope of his employment as an ABC supervisor. As a supervisor, he would ordinarily make decisions on whether to do a systems check of the fuel line and valves, and his statements regarding decision not to do such check and reasoning behind such decision would be constituted as statement within his scope of employment. Thus, Sal's statement would be not a hearsay statement.

Pete can also argue that Sal's statement is then-existing state of mind hearsay exception. A statement of past mental or physical condition or then existing statement of mind is admissible even if it is a hearsay statement. Here, Sal is telling Mac to not worry because little gunk will not cause any problems. This shows Sal's lack of worry at the time the statement was made with respect to little gunk in the fuel line system. Thus, Sal's statement would also fall under this hearsay exception.

3. Ok to permit ABC to ask Wayne about college

Relevance

This evidence of Wayne's lying on his job application is relevant because it goes to the credibility of the witness testifying in the court. Here, if Wayne is shown as a liar, it is relevant because then his other testimony cannot be fully trusted. Also, it is not outweighed by unfair prejudice. Jury can determine how much weight to give to a witness who has been impeached.

Leading Question ok here

Leading question is permitted on direct examination in certain circumstances, but is generally allowed in cross-examination. Here, Wayne is being cross-examined, so it is ok for ABC's counsel to use leading questions.

Character Evidence vs. **Impeachment** = Impeachment with prior misconduct related to lying

Character evidence is almost never allowed in civil cases except for few exceptions. Character evidence is given to prove that the person has acted in conformity with his character. However, under right circumstances this is ok if the purpose is to impeach the witness. A witness can be impeached with his prior misconduct related to lying. This impeachment can only be done on cross-examination and cannot be done with an extrinsic evidence. Here, Wayne is on cross-examination, so it was ok for ABC to ask Wayne about his lying on his job application about graduating from college.

4. Ok to admit the excerpt from the maintenance record

Relevance

The maintenance record is relevant because it shows that preflight check was completed with all okays. The record also shows that fuel line strained and all valves were cleaned and verified by Mac. This shows proper maintenance on the part of ABC to counter Pete's negligent maintenance claim. Also, it is not substantially outweighed by any unfair prejudice.

Authentication proper

When non-testimonial evidence is being introduced, it must be authenticated (i.e., prove the evidence is what it purports to be). This can be done several ways. One way is for a custodian of the record to testify to the creation or how the record gets maintained. Here, the maintenance record has been properly authenticated by Chuck, ABC's custodian of records. He testified that all ABCs maintenance records are stored in his office and discussed about the function of the maintenance records and their method of preparation. Also, facts indicate Chuck properly authenticated Sal's signature next to the entry.

Best Evidence Rule

When a written document is introduced as an evidence, courts usually allow the original document or its duplicate (photocopy or another method to re-create the original) to be admissible to prove the content of the written document. However, handwritten copy is

not admissible in lieu or an original or a duplicate. Although it is not clear whether the original maintenance record is being introduced, but it would be reasonable to assume that either an original or a duplicate is being introduced.

Hearsay

This maintenance record is hearsay. It is made outside of the court. It was a statement intended to communicate that preflight check was completed, fuel line was strained and all valves were cleaned. ABC is offering this written statement for the truth of matter asserted so that proper maintenance has been conducted. To be admitted, it must fall under a hearsay exception.

ABC would argue that it falls under a hearsay exception of business records. To be a business record exception, it must be (1) a statement of diagnosis, opinion, condition, event, (2) kept at a regularly conducted business activity, (3) made at or near the time matter observed, (4) by personnel who had personal knowledge or gotten the information from someone who had duty to report, and (5) it is regular practice for business to make such record. Here, the maintenance records had statement of plane's condition because the maintenance was completed and the fuel line was strained and all valves were cleaned and verified. Also, it was kept at a regularly conducted business activity because it would be safe to assume that such preflight maintenance records are kept. Although it doesn't say when the record was created, it is reasonable to assume that these records are maintained as Sal and Mac do maintenance checks. Also, Sal as a manager probably has duty to report the maintenance record. Chuck also testified that all ABC's maintenance records are kept in his office, so it would be safe to assume that it is regular practice for ABC to make and keep these types of records. In conclusion, the maintenance records probably fall under business records hearsay exception.

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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2016

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2016 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Trusts
2.	Torts
3.	Professional Responsibility
4.	Remedies
5.	Evidence
6.	Contracts

QUESTION 5

Mike, Sue, Pam, David, and Ed worked at Ace Manufacturing Company. Mike had been the president and Sue supervised Pam, David, and Ed.

Pam was fired. A week later, David circulated the following email to all the other employees:

> I just thought you should know that Pam was fired because she is a thief. Sue caught her stealing money from the petty cash drawer after Pam's affair with Mike ended.

A month later, Mike died.

Pam sued David for defamation.

At trial, Pam testified that, although it is true she was fired, the remaining contents of the email were false. Pam called Ed, who testified that he had received the email at work, that he had printed it, and that he had received hundreds of other unrelated emails from David. Pam introduced a copy of the email through Ed.

In defense, David called Sue, who testified that she had caught Pam stealing $300 from the petty cash drawer, and that, when Sue confronted Pam and accused her of taking the money, Pam simply walked away. David himself testified that the contents of the email were true. He also testified that he had overheard Pam and Mike yelling at each other in Mike's office a few weeks before Pam left; that he recognized both of their voices; and that he heard Pam cry, "Please don't leave me!," and Mike, in a measured tone, reply, "Our affair is over — you need to get on with your life."

Assume all appropriate objections were timely made.

Should the court have admitted:

1. The email? Discuss.

2. Sue's testimony? Discuss.

3. David's testimony about

    a. what Pam said to Mike? Discuss.

    b. what Mike said to Pam? Discuss.

Answer according to the California Evidence Code.

QUESTION 5: SELECTED ANSWER A

Because this is a civil case, Proposition 8 does not apply.

1. The email

The issue is whether the court properly admitted the email.

Relevance

The first question is whether the email was relevant. Under the California Evidence Code (CEC), evidence is relevant if it tends to make an issue of consequence (a material fact) more or less probable. In other words, evidence must be material and probative (although the level of probativity is very low--it must only affect probability to a slight degree). Under the California rule, the issue must be actually disputed (this is different than the Federal Rules). Relevance is in general a low bar.

Here, the email is relevant. First, it is relevant to the issue of whether the allegedly defamatory statements were made at all. It is also relevant to the question of publication. Defamation requires publication (dissemination) of a statement to a third party. Here, the existence of the email is relevant (although the printing of the email was not necessary for publication). There may be some argument that the issue of the statement and the publication are not disputed, but this would probably not succeed, especially given that under the secondary evidence rule, the email itself should be admitted rather than mere testimony as to its contents.

The next issue is whether the relevance is substantially outweighed by the likelihood of unfair prejudice. It is important to note that any prejudice must be unfair--any evidence counter to a party's case will be prejudicial. The prejudice must actually be unfair--the type that would unduly influence a finder of fact. Here, it is highly unlikely that the email would be found to be unfairly prejudicial.

Authentication/Foundation

The next question is whether the email was properly authenticated/whether a proper foundation for introduction of the email was made. Here, the email has likely been properly authenticated. Ed testified that he has personal knowledge of the email--he received it. Moreover, his testimony that he had received hundreds of other emails from David supports a finding that the email did in fact come from David. It should be noted that the evidence need not be proven to be conclusively authentic. Rather, a jury must be able to conclude that the email is authentic.

Hearsay

Next, there could be an argument from David that the email is inadmissible hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Here, the email is an out-of-court statement made by David. However, it is not being offered for the truth of the matter asserted. The email is not being introduced to prove its contents (Pam is in fact arguing the email was false). The email is of independent legal significance--the fact that the statement was made is relevant to the cause of action. Moreover, even if the email were hearsay, it would be admissible under the exception for statements of a party-opponent (California does not make party-opponent statements exempted from hearsay; they merely fall under an exception).

Therefore, the email was properly admitted.

2. Sue's testimony

Relevance

The first issue is whether the testimony is relevant, under the standard recited above. Here, Sue's testimony is relevant to the issue of whether the contents of the email were truthful, which is an issue disputed in the case. Her testimony makes it more probable

that the email is true (as compared to the likelihood without her testimony). And there does not appear to be any unfair prejudice that would substantially outweigh the relevance.

Foundation

The next issue is whether Sue has personal knowledge and the proper foundation has been laid. Here, Sue is testifying based on her own personal knowledge that she saw Pam stealing. Therefore, the proper foundation exists.

Character Evidence

Pam may object to the evidence being introduced as character evidence. Normally, character evidence is not admissible in civil cases. An exception applies when character is at issue. Here, Pam's character is at issue. Her argument is that the email was false. Therefore, whether Pam embezzled or not is directly at issue, and evidence on embezzlement is relevant and admissible. Therefore, Sue's testimony that she had seen Pam stealing money from the cash drawer is not inadmissible as character evidence.

Hearsay

Pam may also argue that the testimony about her walking away is inadmissible hearsay. As discussed above, hearsay is an out-of-court statement offered to prove the truth of the matter above. "Statements" can include assertive conduct, such as nodding or hand gestures. Here, Pam would argue that her walking away was an assertive act and therefore a statement. It is questionable as to whether her act in walking away is a statement. But even if it is, here the statement is admissible under the hearsay exception for party-opponent statements. Pam is a party to the lawsuit and she is David's opponent (David is offering the testimony).

Pam could further try to attack Sue's testimony that she "accused [Pam] of taking the money" as inadmissible hearsay. It is unclear exactly how Sue's testimony was phrased. However, even if the testimony did constitute an out-of-court statement, David has several arguments for admitting the testimony. First, he could argue that Pam adopted the statement and that therefore it falls under the party-opponent statement. A statement is adopted where a person could reasonably be expected to respond to a statement but does not. Here, David would argue that Pam could reasonably be expected to deny the accusation and that her silence and walking away adopts Sue's statement. However, this is not a typical situation where the adopted statement theory would apply, since it is unlikely that Pam would adopt a statement that she had stolen the money. There could also be an argument that the statement is not hearsay at all because it is not being offered to prove the content of Sue's statement. For example, it could be argued that the statement is being offered to show its effect on Pam (although this argument does not seem particularly strong). It could also be argued that the statement goes to a fact of independent significance, since it shows the fact that Sue caught Pam stealing money (as asserted in the email).

It seems most likely that this testimony was not recounting an out-of-court statement at all, and was merely discussing Sue's action. But the other arguments above may also allow admission, even if it is testimony of an out-of-court statement.

David could also argue that, if it were determined that Pam had adopted Sue's statement, it was a prior inconsistent statement (Pam testified that the email was false), and that therefore the statement was admissible under the CEC for both impeachment and to show the truth of the matter asserted. However, as discussed above, the argument that Pam adopted the statements seems likely to succeed.

Overall, the court was likely correct in admitting the testimony.

3. David's testimony

The next issue relates to David's testimony.

a. Pam's statements to Mike

Relevance

As to Pam's statements to Mike, the first issue is relevance. This testimony is relevant because it again goes to whether the contents of the email were true. With the testimony, it is more likely than without the testimony that the email's contents about David's and Pam's relationship is true. Pam could argue that her statement by itself does not establish that there was any relationship--it was ambiguous. But, the evidence need not be sufficient to establish the ultimate fact at issue. Instead, it merely needs to make the likelihood that there was an affair (a disputed issue) more probable than it would be without the evidence. The testimony here clears that low bar. And again, there does not seem to be any unfair prejudice that would substantially outweigh the relevance.

Foundation

The second question is foundation. David testified that he recognized Pam's voice. Without more, that assertion may not be enough to show foundation and personal knowledge. But if David were to testify, for example, that he had long worked with Pam and had previously heard her voice, the foundation would likely be sufficient.

Hearsay

Pam may attempt to argue that this testimony is inadmissible hearsay. The statement is likely hearsay--it was an out-of-court statement. And it is being offered to show that Pam made that statement to Mike (because they were having an affair). But this

statement falls into the party-opponent exception for hearsay. Even if it did not, it may also fall under the excited utterance exception since Pam's emotions seem to have been aroused the time of her statement. A witness need not be unavailable for that exception to apply.

Moreover, David could argue that this statement is admissible as a prior inconsistent statement. Pam testified that the email was false. David could argue that this statement was a previous inconsistent statement, which under the California Evidence Code would be admissible for both impeachment purposes and to show the truth of the matter asserted.

b. Mike's statements to Pam

The next issue is whether the court previously admitted David's testimony about what Mike said to Pam.

Relevance

The first question is relevance. As discussed above, the question of whether there was an affair is at issue in the case because Pam is arguing falsity of the email. David's testimony about Mike's statements makes it more likely that the email was true than without his testimony. Again, the testimony need not conclusively establish truth. Rather, it must only make it more likely than it would be without the evidence. Mike's statement is even more clearly relevant than Pam's statement, since it explicitly references an affair.

Foundation

The next issue is whether David testified with the appropriate foundation and personal knowledge. As mentioned above, Pam may argue that David lacked the foundation to testify based on only hearing the voices rather than actually seeing the argument.

Without any testimony as to how David knew that Mike was speaking, the proper foundation is probably lacking. But if David were able to testify that he had previously heard Mike's voice, there would be a proper foundation. Moreover, the fact that the conversation was overheard from Mike's office would support the identification of Mike. Again, it need not be conclusively proven that it was Mike's voice. It just needs to be enough to support a verdict.

Opinion Evidence

Pam could potentially argue that David offered improper opinion evidence when he said that Mike replied in "a measured tone." Lay opinion testimony is admissible if it is 1) based on the witness's perception, 2) helpful, and 3) did not require any specialized knowledge. Here, David has a strong argument that his statement that Mike responded in a measured tone is helpful to provide context to the jury and to show the affair (if David were mad, for example, it could be argued that his statements were false or made in the heat of passion). This testimony as to the tone of voice is probably admissible.

Hearsay

The crux of whether the statement is admitted is likely whether it is inadmissible hearsay. Here, there was an out-of-court statement made by Mike. And it is likely being offered for the truth of the matter asserted--that there was an affair (see below for an argument that it is not hearsay). Therefore, the question is whether it falls under the California exceptions.

California has a hearsay exception for dying declarations in all civil and criminal cases. But Mike's statement does not satisfy that exception. True, Mike is dead, as is required by the California exception. But Mike did not make the statement as his death was impending and it does not relate to the cause of his death.

This also is not an excited utterance--Mike replied in a measured tone. This is not a statement of past or present physical or mental condition (although Mike would satisfy the unavailability requirement). And this is not a statement where Mike is describing his current actions.

David may have a good argument that this is a statement against interest. Under the federal rules, a statement is against interest if it is against penal or pecuniary interest. California also applies the exception where the statement is against social interest. The witness must be unavailable. Here, Mike satisfies the unavailability requirement (he is dead). And this statement could be found to be against social interest. Mike's statement that he was having an affair could be seen as exposing him to adverse social judgments. This would be David's best exception for a hearsay exception to apply.

David could also attempt to argue that this was not hearsay at all because, while it is an out-of-court statement, it is not being offered to prove the truth of the matter asserted. Rather, David could attempt to show that it was being introduced to show its effect on him, the listener. This argument may not be successful because it would be questionable whether such evidence would be relevant. In a defamation case, truth is a defense. But it is not clear that David's state of mind is relevant. If Sue and/or Mike were public figures or if the matter were one of public interest, then David's state of mind would be relevant, since fault would need to be shown. But if fault need not be shown, then the statement may not be admissible for its effect on him. If the statement were admitted for such a purpose, a limiting instruction would likely be given.

David could also attempt to argue against inadmissibility by arguing that this statement is being used for impeachment purposes, since Pam testified. However, the out-of-court statement of another person is generally not admissible to impeach.

Overall, the best argument is that this was not hearsay or, even better, was a statement against interest. It seems that the testimony was very likely properly admitted.

QUESTION 5: SELECTED ANSWER B

California Evidence Code & Truth in Evidence (Prop 8)

The California Evidence Code (CEC) governs the admission of evidence in California state courts. A constitutional amendment called the Truth in Evidence Amendment (Prop 8) was passed in the 1980s. Prop 8 applies only in criminal cases. It provides that all relevant evidence in California is admissible notwithstanding CEC rules to the contrary. Prop 8 has a number of exclusions, however: (1) hearsay rules; (2) the confrontation clause; (3) CEC 352 (balancing test); (4) privileges; (5) character evidence; (6) the secondary evidence rule.

Because this is a civil lawsuit and not a criminal lawsuit, Prop 8 does not apply.

1. The Email

- *Logical relevance*

In order for evidence to be admissible, it must be logically relevant. That means that it must have the tendency to make any fact of consequence to the dispute more or less probable than without the evidence. Under the CEC, the fact must also be in dispute. Here, the email is logically relevant because it constitutes the basis of the lawsuit and is actually in dispute.

- *Legal relevance*

In order for evidence to be admissible, it must also be legally relevant, as tested under CEC 352. In order to be legally relevant, the probative value of the evidence must not be substantially outweighed by undue prejudice, waste of time, or confusion. In addition, there must not be any policy exclusions that might apply to prevent introduction of the evidence (such as prior offers to settle, etc.). Here, the email is

legally relevant because its probative value--whether it supports a case for defamation--is not outweighed by undue prejudice, waste of time, or confusion.

- *Authentication*

In order for relevant tangible evidence to be admissible, it must also be authenticated. The standard for testing this is whether it is sufficient to sustain a finding of authenticity. A number of different kinds of authentication evidence are permissible: (1) personal knowledge; (2) circumstantial evidence; (3) expert testimony; (4) admission, etc. Here, Ed introduced the email. He testified that he had received the email at work and printed it, and that he had received hundreds of other unrelated emails from David. While it would be preferable to have David authenticate the mail he wrote, this authentication is likely sufficient to sustain a finding of authenticity.

- *Secondary Evidence Rule*

When the contents of a writing are at the heart of the matter, the secondary evidence rule requires that either an original or duplicate of the document be introduced into evidence (or testimony where the original is unavailable). In California, a duplicate can be: (1) photocopy; (2) carbon copy; or (3) handwritten copy (not true in FRE). Here, the contents of the email are relevant to defamation cause of action. This printing of the email is essentially a photocopy and would satisfy the secondary evidence rule.

- *Independent Legal Significance*

Pam might argue that the email is not hearsay because it has independent legal significance. Indeed, because this is a defamation action and the email is the defamatory statement, this is likely to be successful.

- *Layered Hearsay*

Hearsay is an out-of-court statement offered for the truth of the matter asserted. It is generally inadmissible unless it falls within an exception. (The FRE has both exemptions and exceptions, but the CEC only has exceptions.) Here, if the email were not admitted as having independent legal significance, the email is layered hearsay so both the email itself and the statement contained therein must fall admissible under an exception.

- *Email: Business Record*

A business record is: (1) a recording of an event or condition; (2) made by someone with personal knowledge; (3) made at or near the time the event; (4) kept in the ordinary course of business. Here, the email would not qualify as a business record because David was under no business duty to send this email.

- *Statements in Email: Admission by Party Opponent*

A statement being offered against a party is an admission by a party opponent. The statement need not have been against the party's interest at the time it was made to qualify. Here, David's statement is being offered against him, and thus it would be admissible as an admission by a party opponent.

- *Conclusion*

The email will be admissible because it has independent legal significance and is thus not hearsay.

2. Sue's Testimony

- *Logical Relevance*

See rule above. This evidence is logically relevant because it has the tendency to make a fact of consequence that is in dispute (whether Pam is a thief) more or less probable.

- *Legal Relevance*

See rule above. This evidence is legally relevant because its probative value--whether Pam is a thief--is not outweighed by undue prejudice, waste of time, or confusion. Pam may argue that this is unduly prejudicial because it paints her as a thief, but she has asserted that the statement in the email is false, and thus the court will allow it.

- *Competence*

For a witness to be competent to testify, she must have personal knowledge, present recollection, the ability to communicate, and understand that she is under a legal duty to tell the truth. These factors appear to be met -- Sue has personal knowledge of her interaction with Pam and appears to have a present recollection of the interaction. Furthermore, there is nothing to indicate that she lacks the ability to communicate or that she doesn't understand her legal duty to tell the truth. Sue is competent to testify.

- *Character Evidence: Pam Stealing $300 of Petty Cash*

Character evidence is evidence that tends to convey a moral judgment about someone. The testimony about Pam stealing $300 from the petty cash drawer is character evidence. In California, character evidence in civil cases is inadmissible to prove circumstantial evidence of guilt (there are no exceptions like under the FRE). <u>However</u>, character evidence is admissible if it is in issue, as is the case

here. This is a defamation case where Pam has alleged that David's statement calling her a thief is false. Therefore, evidence of her being a thief is highly probative and directly in issue. Thus, the court will allow Sue's testimony that Pam stole $300 of petty cash.

[Note that this could also be considered impeachment evidence. Pam has testified that the contents of the email were false. Specific incidents can be used to impeach a witness, and this would also be appropriate impeachment evidence.]

- *Sue's statement accusing Pam of Taking the Money: Not Hearsay*

Sue's statement accusing Pam of taking the money is not hearsay because it is not being offered for the truth of the matter asserted. Instead, it is being offered to show its effect on the listener (Pam).

- *Sue's statement that Pam walked away: Hearsay*

Sue also seeks to testify about Pam walking away when accused of a crime. This statement is hearsay. Hearsay encompasses all assertive conduct, which is conduct that is intended to communicate something. Thus, unless it falls within a hearsay exception, this statement which is being offered for the truth of the matter asserted (that she would not have walked away if she weren't guilty) is hearsay.

- *Admission by Party Opponent: Adoptive Admission*

A statement being offered against a party is an admission by a party opponent. The statement need not have been against the party's interest at the time it was made to qualify. Adoptive admissions occur where a party is accused or confronted and we would expect them to deny a statement but instead they remain silent, implicitly adopting the statement. Here, we would expect an innocent party accused of stealing

to defend herself if it were not true. By simply walking away, Pam has adopted the statement.

- *Conclusion*

Sue's testimony about Pam stealing $300 of petty cash is admissible because it is character evidence that is in issue in a defamation case; her statement to Pam accusing her of taking the money is not hearsay because it is offered to show its effect on the listener; her statement about Pam's reaction is admissible as an adoptive admission by a party opponent.

3a. David's Testimony About What Pam Said to Mike

- *Logical Relevance*

See rule above. This evidence is logically relevant because it relates to whether Pam was having an affair with Mike, a key subject of the defamation action and one that is hotly contested.

- *Legal Relevance*

See rule above. This evidence is legally relevant because its probative value--whether Pam was having an affair with Mike--is not outweighed by undue prejudice, waste of time, or confusion.

- *Authentication*

In order for this testimony to be admissible, David must be able to authenticate that it was, indeed, Pam speaking. The standard for testing this is whether it is sufficient to sustain a finding of authenticity. Here, David is presumably familiar with Pam's voice

and has heard it many times before. This will be adequate to sustain a finding of authenticity.

- *Hearsay*

See rule above. This evidence is being offered to prove the truth of the matter asserted (i.e., that Pam was having an affair with Mike). Thus, unless an exception applies, it is inadmissible.

- *Hearsay Exception: Admission by Party Opponent*

A statement being offered against a party is an admission by a party opponent. This statement, made by Pam, is being offered against her. It is thus admissible as an admission by a party opponent.

- *Hearsay Exception: Excited Utterance*

An excited utterance is a statement made relating to a startling event or condition made while under the stress or excitement of that event or condition. A declarant's availability is irrelevant. Here, Pam cried in what appears to be an excited voice: "Please don't leave me!" This may qualify as an excited utterance, but the better fit is an admission by a party opponent.

- *No privileges*

Because Pam and David are not married, there are no privileges that might apply to this otherwise confidential communication.

- *Conclusion*

This testimony is admissible as an admission by a party opponent.

3b. David's Testimony About What Mike Said to Pam

- *Logical Relevance*

See rule above. This evidence is logically relevant because it relates to whether Pam was having an affair with Mike, a key subject of the defamation action and one that is hotly contested.

- *Legal Relevance*

See rule above. This evidence is logically relevant because it relates to whether Pam was having an affair with Mike, a key subject of the defamation action and one that is hotly contested.

- *Authentication*

See rule above. Here, David is presumably familiar with Mike's voice and has heard it many times before. This will be adequate to sustain a finding of authenticity.

- *Hearsay*

See rule above. This evidence is being offered to prove the truth of the matter asserted (i.e., that Pam was having an affair with Mike). Thus, unless an exception applies, it is inadmissible.

- *Declaration Against Interest*

A declaration against interest is a statement made by an unavailable declarant that was against his interest at the time it was made and that the declarant knew was against his interest at the time it was made. In California, it can be against a person's penal, financial, or social interest. A statement is against someone's social interest if it would

subject them to hatred, ridicule, or disgust. Declarations against interest are only admissible where a declarant is unavailable. A declarant can be unavailable due to death, inability to secure their presence through reasonable process, total memory failure, privileges, or their refusal to testify out of fear and despite a court order.

Here, Mike died and is thus unavailable. The statement by Mike ("Our affair is over") is against his social interest. He was acknowledging that he was having an affair with Pam in the first place. Thus the first part of his statement "Our affair is over" is admissible as a declaration against interest.

- *Dying Declaration*

A dying declaration is a statement made by a declarant while he thought he was imminently dying and describing the conditions or circumstances of his death. The declarant must be unavailable, and in California the declarant must have actually died and it can be used in either civil or criminal cases. This statement does not appear to be while David thought he was dying or about the conditions and circumstances surrounding his death. It is thus inadmissible as a dying declaration.

- *Excited Utterance*

See rule above. This exception does not apply because the facts state that David responded "in a measured tone." Therefore, he was not under the stress or excitement of an event.

- *Present State of Mind*

A statement describing a person's present state of mind (usually statements like "I intend" or "I plan") are admissible as hearsay exceptions regardless of the declarant's availability. Here, the first part of the statement may also qualify under the present state of mind exception because it is demonstrating that David intends to end the

affair. Nonetheless, the declaration against interest exception is the best fit for this statement.

- *No privileges*

Because Pam and David are not married, there are no privileges that might apply to this otherwise confidential communication.

- *Conclusion*

This testimony "Our affair is over" is admissible as a declaration against interest. The second half of the testimony "you need to get on with your life" may be admissible only if it is being offered to show the effect on the listener, Pam.

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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2017

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2017 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Wills
2.	Remedies / Torts
3.	Evidence
4.	Business Associations
5.	Professional Responsibility
6.	Criminal Law and Procedure

QUESTION 3

Pete sued Donna's Pizza in federal court.

At trial, in his case-in-chief, Pete testified that, as he was driving his car one day, he entered an intersection with the green light in his favor. He further testified that when he entered the intersection, Erin, an employee of Donna's Pizza, was driving a company van, ran a red light, and collided with his car. He sustained serious injuries as a result and was taken to the hospital.

Pete then called Nellie, a nurse, who testified that she treated Pete when he was at the hospital. Nellie testified that Pete told her that, during the collision, his head struck the windshield and that he was still in a great deal of pain. Nellie, pursuant to standard hospital procedure, recorded the information on a hospital intake form. Pete moved the hospital intake form into evidence and rested.

During Donna's Pizza's case-in-chief, Erin testified that she had the green light and that it was Pete who ran the red light. Donna, the owner of Donna's Pizza, then testified that Donna's Pizza was not responsible for the accident. On cross-examination, Donna was asked whether she had ever offered to pay for any of Pete's medical expenses, and she denied she had. Donna's Pizza rested.

In rebuttal, Pete testified that, at the accident scene, Erin told him, "I was in a hurry to make a pizza delivery and that is why I ran the red light." Pete also testified that Donna visited him in the hospital and told him that Donna's Pizza would take care of all of his medical expenses. Pete testified that Donna's Pizza, however, never paid for any of his medical expenses.

Assume all appropriate objections and motions to strike were timely made.

Did the court properly admit:

1. The hospital intake form? Discuss.

2. Pete's testimony about Erin's statements at the accident scene? Discuss.

3. Pete's testimony about Donna's statements at the hospital? Discuss.

Answer according to the Federal Rules of Evidence.

QUESTION 3: SELECTED ANSWER A

1. HOSPITAL INTAKE FORM

Logical Relevance

Evidence is logically relevant if it has any tendency to make a disputed fact more or less probable than it would be without the evidence. Here, Pete (P) is suing Donna's Pizza (D) for a car accident allegedly caused by D's employee, Erin (E). The hospital intake form is logically relevant because it tends to make the fact of P's physical injury, and therefore, damages, more probable.

Legal Relevance

Evidence must be both probative and material in order to be legally relevant. Relevant evidence may nonetheless be inadmissible if its probative value is substantially outweighed by a risk of unfair prejudice. Here, the hospital intake form is legally relevant because it is probative and material as to whether P suffered damages, and its probative value is not outweighed by a risk of unfair prejudice to D.

Witness Competence

A lay witness must have personal knowledge of a matter in order to testify about it. Here, Nellie is a nurse who treated P at the hospital. She was also the one who recorded the information on the hospital intake form. Therefore, Nellie is competent to testify.

Authentication

Tangible evidence must be properly authenticated, either through personal knowledge, distinct characteristics, by showing chain of custody, or, in the event of a reproduction of a photo, knowledge of the person who took the photo. Here, the hospital intake form can be authenticated by Nellie's personal knowledge, because Nellie was the one who filled out the intake form. Therefore, the intake form has been properly authenticated.

Best Evidence Rule

The best evidence rule applies when a witness is testifying about a document or the document is at issue. It mandates that in those circumstances, the original document or a properly authenticated duplicate be entered into evidence. Here, Nellie is testifying to her personal knowledge of what P said to her at the hospital. The best evidence rule does not apply, and the business records exception allows the intake form to be admitted.

Hearsay

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted and is generally inadmissible unless it falls under an exemption or an exception to hearsay. The hospital intake form may be hearsay because it was made out of court and is being offered to prove that P struck his head on the windshield and was in a great deal of pain. The intake form is hearsay within hearsay. However, it may fall under one of the following exceptions if both levels of hearsay are exceptions.

Statement for Medical Diagnosis/Treatment

When a statement is made for medical diagnosis or treatment, it falls under an exception to the hearsay rule regardless of whether the declarant is available to testify. Here, P told Nellie that during the collision, his head struck the windshield and that he was still in a great deal of pain. If these statements were made for medical diagnosis or treatment of his head injury, then it is likely the statement will come in.

Statement of Mental/Physical Condition

When a statement is made about a mental, physical, or emotional condition, it falls under an exception to the hearsay rule regardless of whether the declarant is available to testify. Here, P told Nellie that he was still in a great deal of pain. This will likely come in under this exception.

Business Records

Business records fall under an exception to the hearsay rule regardless of whether the

declarant is available to testify. The business records must be made in the regular course of business at or near the time of the event, by a person who had knowledge of the event. It must also be a regularly conducted activity of the business to make such records. Here, the facts indicate that Nellie recorded the information on a hospital intake form at or near the time of the event. Nellie had knowledge of the event because the person to whom P made the statements was Nellie and she recorded them during the regular course of her business as a nurse at the hospital. The facts also indicate that she recorded the information pursuant to standard hospital procedure, making the recording a regularly conducted business activity. Therefore, the hospital intake form is admissible under the business records exception to the hearsay rule.

Conclusion

The statement made to Nellie is a statement for medical diagnosis or treatment and also a statement of a physical condition; it is admissible despite the hearsay rule. The intake form itself is admissible under the business records exception. Therefore, despite being hearsay within hearsay, the court properly admitted the hospital intake form.

2. P'S TESTIMONY ABOUT E'S STATEMENTS AT THE ACCIDENT SCENE

Logical Relevance

Evidence is logically relevant if it has any tendency to make a disputed fact more or less probable than it would be without the evidence. Here, P's testimony about E's statements at the accident scene is logically relevant because they tend to make the fact that E was responsible for the accident more probable than without the statements.

Legal Relevance

Relevant evidence may nonetheless be inadmissible if its probative value is substantially outweighed by a risk of unfair prejudice. Here, P's testimony about E's statements is legally relevant because their probative value is not outweighed by the risk of unfair prejudice to D.

Witness Competence

A lay witness must have personal knowledge of a matter in order to testify about it. Here, P is testifying about statements E made to him at the scene of the accident; therefore, he has personal knowledge of the statements and is competent to testify about them.

Hearsay

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted and is generally inadmissible. P's testimony about E's statements at the accident scene is hearsay because they are out-of-court statements and they are being offered to prove E ran the red light. They will be inadmissible unless they fall under one of the exemptions or exceptions to hearsay discussed below.

Prior Inconsistent Statement

A prior inconsistent statement is admissible as an exemption to hearsay. Here, E testified during D's case-in-chief that she had the green light and that it was P who ran the red light. However, at the accident, P is willing to testify that E told him, "I was in a hurry to make a pizza delivery and that is why I ran the red light." As this statement is inconsistent with what E has testified during D's case-in-chief, it may be admissible under the prior inconsistent exemption.

Vicarious Admission

An employee's statement may be admissible in a case against the employer if the employee was acting within the scope of her duties. A vicarious admission is an exemption to the hearsay rule. Here, E is an employee of D's. She was making a pizza delivery, which is within the scope of her employment. Therefore, what E said at the accident scene is admissible as a vicarious admission in P's suit against D.

Statement Against Interest

A statement against interest is admissible as an exception to the hearsay rule, only if the declarant is unavailable. A declarant may be unavailable for a number of reasons

including she is dead, missing, or refuses to testify. Here, E's statement is a statement against interest; however, E is available, therefore, her statements to P at the accident scene will not come in under this exception.

Present Sense Impression

A statement of present sense impression is admissible as an exception to the hearsay rule, regardless of whether the declarant is available. The statement must be made at or soon after the event that is described. It is possible that E's statements could come in under the present sense impression exception because they were made to P immediately following the accident, at the scene of the accident, and they related to the circumstances of the accident--that she ran the red light because she was in a hurry. However, they are more likely to come in via the prior inconsistent and vicarious admission exemptions to the hearsay rule.

Excited Utterance

An excited utterance is admissible as an exception to the hearsay rule, regardless of whether the declarant is available. The declarant must make the statement while under the stress or excitement of the event. Excitement can be evidenced by shouting or other excited behavior. Here, there is no evidence to suggest E's statements were made to P under the stress or excitement of the accident. Therefore, they are not admissible under this exception.

Conclusion

The court properly admitted P's testimony about E's statements at the accident scene, because they were prior inconsistent statements as well as vicarious statements.

3. P'S TESTIMONY ABOUT D'S STATEMENTS AT THE HOSPITAL

Logical Relevance

Evidence is logically relevant if it has any tendency to make a disputed fact more or less probable than it would be without the evidence. Here, P's testimony about D's

statements at the hospital is logically relevant because they tend to make the fact that E, and therefore D, was responsible for the accident more probable than it would be without the statements.

Legal Relevance

Relevant evidence may nonetheless be inadmissible if its probative value is substantially outweighed by a risk of unfair prejudice. Here, P's testimony about D's statements is legally relevant because their probative value is not outweighed by any risk of unfair prejudice.

Witness Competence

A lay witness must have personal knowledge of a matter in order to testify about it. Here, P is testifying about statements D made to him at the hospital; therefore, he has personal knowledge about the statements and is competent to testify about them.

Hearsay

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted and is generally inadmissible. P's testimony about D's statements at the hospital is hearsay because it is being offered to prove that D offered to take care of all of his medical expenses. However, they are not admissible, even if they fall under the following exemptions or exceptions, because of the public policy exception regarding offers to pay medical expenses (see below).

Prior Inconsistent Statement

A prior inconsistent statement is admissible as an exemption to hearsay. Here, D testified during D's case-in-chief that D was not responsible for the accident. On cross-examination, D testified that she had never offered to pay for any of Pete's medical expenses. Since P is testifying that D had said before that she would pay for his medical expenses, these out-of-court statements may be admitted as prior inconsistent statements.

Statement of Party Opponent

A statement made by a party opponent is admissible as an exemption to the hearsay rule. Even though P's testimony about D's statements at the hospital may be a statement of a party opponent, because P is suing Donna's Pizza, it does not fall under this exemption due to the public policy exception regarding offers to pay medical expenses (see below).

Offers to Pay Medical Expenses

Offers to pay medical expenses are not admissible. Under the Federal Rules of Evidence, statements that accompany offers to pay medical expenses are admissible. Here, the only statement P is offering is D's statement that it would take care of all of his medical expenses. The offer is inadmissible under this public policy exception. Therefore, the court did not properly admit P's testimony about D's statements at the hospital.

Conclusion

The court improperly admitted P's testimony about D's statements at the hospital because an offer to pay medical expenses is never admissible. While not admissible as substantive evidence, it may be used to impeach D.

QUESTION 3: SELECTED ANSWER B

1. Hospital Intake Form

Relevance

Evidence is logically relevant if it tends to prove or disprove a material fact. Evidence is legally relevant if its probative value is not substantially outweighed by the risk of unfair prejudice. Here, the hospital intake form includes Pete's (P) statement to the nurse regarding his injury and how it occurred. Thus, it tends to prove a material fact - damages. Additionally, there is little chance of unfair prejudice here as the statement relates directly to the accident and is not shocking to a jury. The form is relevant.

Hearsay

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Generally, it is inadmissible, unless an exemption or exception applies. Here, the hospital intake form is offered to show P's injury immediately after the crash. It was created out of court and is therefore hearsay. It is inadmissible unless an exception applies.

Double Hearsay

Documents or statements that have different layers of out of court statements are double hearsay, and each statement must be analyzed for admissibility. Here, not only is the hospital form hearsay, as discussed, but P's statement contained within is also hearsay, as it was made out of court and is offered to prove its truth. Thus, both the form and the statement must apply to a hearsay exception to be admissible.

a. Pete's Statement

Opposing Party

A statement made by an opposing party is not hearsay and thus is admissible. Here, P has offered the hospital record which contains his statement for evidence.

Accordingly, this is not an opposing party, and this exception does not apply.

Medical Diagnosis / Treatment

An out of court statement made to obtain a medical diagnosis or treatment is considered reliable. It is therefore excepted from the hearsay rule and admissible. Here, P had just been in a car accident and was transported to the hospital. There, he told the attending nurse that he "struck his head on the windshield," and that he "was still in a great deal of pain." Accordingly, P was making these statements to obtain a diagnosis and treatment for his pain. This statement is likely admissible as an exception to the hearsay rule.

Physical Condition

A statement by the declarant describing his current physical or emotional condition is admissible as a hearsay exception. Here, P was describing his current condition - he was in a great deal of pain. The defense may argue that the entire statement does not qualify: while the "great deal of pain" portion describes P's condition, the "my head hit the windshield" does not. It describes the reason for the condition, but not the current condition itself. Accordingly, D may move to strike that portion of the statement.

However, because the statement was made for medical treatment and diagnosis, and the "my head hit the windshield" was necessary to determine the type and extent of the injury, the entire statement is admissible.

b. Hospital Record

Business Record

A business record is an out of court statement and thus is hearsay. However, it may be admissible as an exception if it was created in the ordinary course of business, by someone with knowledge, and not in anticipation of litigation. Here, the facts indicate that Nurse Nellie created the document immediately after speaking with P. She had actual knowledge of the information she included in the form. Additionally, the form was created pursuant to standard hospital procedure. Accordingly, the hospital form is

admissible as a business record.

Authentication

Evidence must be authenticated. Typically, personal knowledge is sufficient to authenticate a document. Here, Nellie herself is available to testify as to the creation and the contents of the form. She has personal knowledge and the form is properly authenticated.

Best Evidence Rule

The Best Evidence rule states that an original document must be admitted whenever the contents of a document are at issue. The contents are at issue when a witness is testifying about its contents. Here, P has moved to admit the hospital form. Accordingly, the best evidence rule mandates that the original be admitted. The facts do not indicate that the form is a copy, or that the original is unavailable. It appears that the form is the original, and the best evidence rule is satisfied.

2. Erin's Statements

Relevance

E's statement to P at the scene admits liability, and therefore proves a material fact of the case. Further, there is no risk of unfair prejudice. D may argue differently, claiming that E was acting outside of the scope of D's control and thus the statement is irrelevant to the case against D, and unfairly prejudices her. However, as discussed below, this argument will fail. The statement is both logically and legally relevant.

Hearsay

See rule above. Here, Erin (E) told the P at the scene that she "was in a hurry to make a delivery and that's why [she] ran the red light." This is an out of court statement offered to prove that E ran the red light. It is hearsay.

Opposing Party

See rule above. An employee or agent may be considered as part of the opposing party, if the statement was made within the scope of employment. Here, E was a delivery driver for Donna's Pizza (D). She was delivering pizza when the accident occurred. Accordingly, she was acting within the scope of her employment. Subsequently, when she spoke to the officer at the scene, she was speaking within that same scope of employment. E's statement can be attributed to D, and is thus a statement by an opposing party.

However, D will argue that she is not responsible for the accident. She has claimed that she has no connection to the events. Thus, D will argue, E's statements cannot be attributed to her. However, because E is acting as D's driver, within the scope of her employment, the statement can be attributed to D, and it is admissible as a statement by an opposing party.

Excited Utterance

An excited utterance is admissible as a hearsay exception if the statement is in response to a shocking or startling event, and if the statement is made while the declarant is still under the stress of that shocking event. Here, even if E were not an opposing party, P may argue that her statement is an excited utterance. She was just in a car accident that resulted in injury, a startling event, and she was describing the event immediately after it occurred.

However, D will argue that E was not still under the stress of the accident; enough time had passed and the parties were speaking calmly after the fact. This is likely not an excited utterance.

Present Sense Impression

Like an excited utterance, a present sense impression is admissible if the statement describes an event and was made during or immediately after the event occurred. Here, P will also argue that E was describing the event immediately after it occurred. However, as above, it is likely that some time had passed, and a court may rule that this does not qualify as a present sense impression.

Because E was acting within the scope of her employment, the statement is likely admissible as an admission by an opposing party.

3. Donna's Statements

Relevance

See rule above. D's offer to P tends to prove her control over the car and E's conduct. It is relevant to D's liability.

Hearsay

See rule above. D's statement to P in the hospital in which D promised to pay for P's medical expenses is an out of court statement. It is hearsay.

Opposing Party

See rule above. D is the opposing party, and the statement likely qualifies as an admission by an opposing party. This is non-hearsay, and the statement is admissible barring some other limitation.

Offers to Pay Medical Expenses

Offers to pay medical expenses, even if admissible as a hearsay exception, are inadmissible as they violate public policy. However, the statements, though not admissible as substantive evidence, may be admissible as impeachment or to establish ownership or control of the thing in question. Here, D will argue that her offer to pay P's medical expenses is inadmissible, because public policy encourages these offers. Therefore, the statement is inadmissible.

Ownership: However, P may bring in the statement for two reasons. First, D has denied liability for the accident. An offer to pay medical expenses may be offered to show ownership or control of the subject matter in question. Her offer to P then, may be offered to establish that D owned and/or controlled both the car and her employee E. This is a disputed fact and highly relevant. Thus, the statement may be offered for this

purpose.

Impeachment: The credibility of a witness is always at issue. Thus, statements offered to rebut witness testimony are admissible as impeachment evidence. D has testified on the stand that she did not offer to pay P's medical expenses. Accordingly, P may offer D's out of court statement to him, offering to pay expenses, as impeachment evidence. This is a prior inconsistent statement offered to impeach, and it is admissible.

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2017

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the July 2017 California Bar Examination and two selected answers for each question.

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Question Number	Subject
1.	Community Property
2.	Professional Responsibility / Evidence
3.	Remedies
4.	Civil Procedure
5.	Torts

QUESTION 2

Claire had been a customer of Home Inc., a home improvement company owned by Don. Dissatisfied with work done for her, she brought an action against Home Inc. and Don in California state court, alleging that they had defrauded her.

Don entered into a valid retainer agreement with Luke, engaging Luke to represent him alone and not Home Inc. in Claire's action. Luke then interviewed Don, who admitted he had defrauded Claire but added he had never defrauded anyone else, before or since. Luke subsequently interviewed Wendy, Don's sister. Wendy told Luke Don had admitted to her that he had defrauded Claire. Luke told Wendy that Don had admitted to him too that he had defrauded Claire. Luke drafted a memorandum recounting what Wendy told him and expressing his belief Wendy would be a good witness for Claire.

Shortly before trial, Don fired Luke. Don soon died unexpectedly.

Claire filed a claim against Don's estate and a claim against Home Inc., alleging as in her action that they had defrauded her. As the final act in closing Don's estate, the executor settled Claire's claim against the estate, but not against Home Inc.

At trial against Home Inc., which was now the sole defendant, Claire has attempted to compel Luke to testify about what Wendy told him, but he has refused, claiming the attorney-client privilege. She has also attempted to compel him to produce his memorandum, but he has again refused, claiming both the attorney-client privilege and the attorney work-product doctrine.

1. Should the court compel Luke to testify about what Wendy told him? Discuss. Answer according to California law.

2. Should the court compel Luke to produce his memorandum:

    a. To the extent it recounts what Wendy told him? Discuss. Answer according to California law.

    b. To the extent it expresses his belief that Wendy would be a good witness for Claire? Discuss. Answer according to California law.

3. What ethical violations, if any, has Luke committed? Discuss. Answer according to California and ABA authorities.

QUESTION 2: SELECTED ANSWER A

1. Should the court compel Luke to testify about what Wendy told him?

Attorney-Client Privilege: Don and Luke

The attorney-client privilege protects confidential communications made to facilitate legal representation. It is narrower than the duty of confidentiality, which applies to any information related to the representation of a client, even if no attorney-client relationship is formed. The attorney-client privilege protects communications made by the client or the client's agent to the lawyer or the lawyer's agents. In the corporate context, the attorney-client privilege, in California, protects communications made by a spokesman for the corporation or by someone whose actions could be imputed to the corporations for purposes of liability.

The attorney-client privilege attaches and applies even if a lawyer is subsequently removed from a case. Thus, here, Don's decision to fire Luke did not prevent the privilege from applying to confidential communications made to facilitate legal representation. However, in California, the attorney-client privilege ends when the client dies and his estate is entirely disposed of. Consequently, here, the attorney-client relationship between Luke and Don ended when Don died and his estate settled Claire's claim against the estate. In California court, Luke would not be able to claim attorney-client privilege.

Moreover, the issue here is whether the attorney-client privilege covers communications between Wendy and Luke in the first place. As noted, in order for the privilege to apply, the communication must be confidential and it must be made for the purposes of facilitating a legal relationship. Additionally it must be communicated by either the client or the client's agents. Here, it does not appear that the communication was confidential or that Wendy was Don's agent. Wendy told Luke that Don had admitted to her that he

had defrauded Claire. By sharing this information with a third party, Don arguably made it unprotected because it was no longer confidential. Consequently, the attorney-client privilege would not apply on that basis.

Second, it does not appear that Wendy was Don's agent. The attorney-client privilege will potentially protect communications made by a client to the lawyer's agent, such as a physician hired to examine the client, or by the client's agent, such as an employee speaking on behalf of the corporation. But it does not cover statements made by everyone who knows the client or is in a familial relationship with him or her. Here, Wendy does not appear to have been acting in any way as an agent of Don, nor is she an agent of Luke. Consequently, the attorney-client privilege between Luke and Don would not apply.

Attorney-Client Privilege: Wendy and Luke

Additionally, Wendy was not speaking with Luke for the purpose of facilitating his legal representation of her--she was not a client. Moreover, as noted above, it does not appear the communication was confidential. Consequently, there does not appear to be an argument for an independent attorney-client privilege between Wendy and Luke.

Given that Wendy's statement does not appear to have been protected by the attorney-client privilege based on Luke's representation of Don or any purported attorney-client relationship between Luke and Wendy, the court should likely compel Luke to testify about what Wendy told him.

2. Luke's Memorandum

Attorney-Client Privilege

As noted above, the attorney-client privilege does not seem applicable here, either based on Luke's representation of Don or any purported attorney-client relationship

between Luke and Wendy. Consequently, the attorney-client privilege is not a basis for the court to refuse to compel production of the memorandum.

Work Product

In California, the work product privilege applies solely to materials prepared by the attorney in anticipation of litigation. This is unlike the federal rules, where the work product doctrine applies generally to materials prepared in anticipation of litigation. Materials prepared in anticipation of litigation that are comprised of the attorney's mental impressions, notes, or opinions, are absolutely protected and are not discoverable. Other materials prepared in anticipation of litigation received are qualified work product. These materials may be discoverable upon a showing of substantial need and inability to acquire the materials elsewhere.

a. Wendy's Statements

To the extent the memorandum recounts what Wendy told Luke, it is qualified work product. This portion of the memorandum would not constitute Luke's mental impressions or opinions regarding the interview. It is merely a factual recounting of the interview. Consequently, this portion of the memorandum would likely receive qualified protection. If Claire can show substantial needs and inability to acquire the information contained in the interview without compelled disclosure, then the court should compel Luke to produce his memorandum. However, this seems unlikely to apply here. The facts indicate Don died, but they do not state that Wendy died. Based on the facts, it appears that Claire could easily subpoena Wendy in order to ask her questions and try to establish the same information she is seeking from Luke. Without this showing of inability to get the information without compelled disclosure, it appears unlikely the court should compel Luke to turn over the memorandum.

b. Luke's Belief That Wendy Would be a Good Witness for Claire

To the extent the memorandum expresses Luke's belief that Wendy would be a good witness for Claire, it is absolutely privileged. This portion of the memorandum is made up of Luke's mental impressions and opinions. The court should absolutely not compel Luke to produce this portion of the memorandum. It is worth noting that the mere presence of an absolutely protected mental impression or opinion in a document does not make the entire document or the information contained therein absolutely privileged. If the court did determine there was substantial need and unavailability, and chose to compel Luke to produce the memorandum to the extent it recounts his interview with Wendy, then it could redact or eliminate the portions of the memorandum that are absolutely privileged.

3. What ethical violations, if any, has Luke committed?

Fee Agreement--Financial Duties

In California, fee agreements must be in writing unless the amount is less than $1,000, the work is for a corporation, the client agrees to forego a written agreement, the work is routine, or there is an emergency. Here, Don entered into a valid retainer agreement. Thus, there is an assumption that this requirement is satisfied. But if the retainer agreement was not in writing, it would likely be a violation of California ethical rules because none of the exceptions appear applicable. The ABA does not have a similar requirement for non-contingent fee agreements--they do not have to be in writing, although it is encouraged. Consequently, there is no ABA violation regardless of whether the fee agreement is in writing.

Luke's Decision to Tell Wendy about the Fraud--Duty of Confidentiality

The duty of confidentiality requires a lawyer not to disclose information learned in the course of representation. It attaches even when no attorney-client relationship is

formed, unless there is a disclaimer in plain English, so long as the information is related to legal representation. It survives the representation and the client.

Here, Luke violated the duty of confidentiality by telling Wendy that Don had admitted to defrauding Claire. Luke learned of this information in the course of representing Don, thereby making the information confidential. Luke then failed to safeguard this information by actively revealing it to Wendy.

California and ABA authorities provide exceptions to the duty of confidentiality when a client makes a claim against a lawyer, when the information relates to the services provided by the attorney, when disclosure is required by the court, and when the lawyer learns information relating to imminent death or substantial bodily injury of a third-party. An attorney is also allowed to reveal information that is necessary to represent the client or that the client consents to him revealing. The ABA permits disclosure when a client is using the lawyer's services to perpetrate fraud or commit a crime that is likely to result in substantial financial loss. It also permits disclosure when seeking an ethical opinion on a matter. California does not have an exception for financial loss. Here, none of these exceptions seem applicable. It does not appear that Don consented to Luke telling Wendy that Don had defrauded Claire, nor does it appear that such an admission to Wendy was necessary for Luke's representation of Don. Luke may argue that there was implied consent because Wendy told him that Don had admitted the fraud to her, but it does not appear that Don ever instructed Luke to share this information prior to the interview. Under ABA authorities, Luke could argue that his disclosure was necessary to prevent financial loss, but this argument would not prevail because Don was not using Luke's services to defraud anyone and, since the fraud had already occurred, there was no imminent, substantial financial loss to any party. Moreover, this exception is inapplicable in California.

Consequently, Don likely breached his duty of confidentiality by telling Wendy about the fraud.

Luke Testifying at Trial--Duty of Fairness

Under ABA authorities, a witness may not represent a client if he is likely to have to testify at trial. A client generally may not testify at his client's trial unless his testimony relates to his services, a breach of his duties, or his testimony is necessary to prevent undue hardship. In California, an attorney may testify at a bench trial and may testify if his client consents at a jury trial. Here, Luke would not breach his duty by testifying in the suit against Home Inc. because it was not his client.

Duty of Competence

An attorney owes a duty of competence to his clients. He must have the necessary skill, thoroughness, and preparation required for competent representation. The duty requires the attorney to communicate with the client about important matters. Here, Don fired Luke shortly before trial. Although these facts do not themselves implicate the duty of competence, it suggests that Luke may not have been acting competently in his representation of Don, leading Don to fire him from the case. Moreover, the fact that Luke chose to reveal confidential information, apparently without consulting with Don, further suggests a violation of the duty of competence. California punishes intentional, repeated, or reckless violations of the duty of competence. Here, the facts do not suggest one way or another whether Luke intentionally, repeatedly, or recklessly violated his duty of competence. Thus, it is unclear whether he would be subject to any discipline even if he did act incompetently according to ABA authorities.

Duty of Loyalty

The duty of loyalty requires an attorney not to use non-public information against a client in a subsequent proceeding. According to ABA authorities, if there is a significant likelihood that an attorney will be materially limited in his representation of a client by professional or personal interest, the attorney can only take on the representation if: he reasonably believes he can provide representation unaffected by the conflict, he informs

the client, and he receives consent. The informed consent must be memorialized in writing. In California, there is no reasonable belief requirement, both potential and actual conflicts require disclosure, and consent must be in writing unless it is based on an attorney's past representations or personal conflicts. Here, Luke took on the representation of Don, independent of Home Inc. If Luke had tried to represent both Home and Don, then he would have had a significant risk of material limitation and a potential conflict, which would have required informed written consent under the ABA and consent in writing in CA. Given that he did not appear to have any conflicts here, he is likely not in violation. However, if he testifies at Home Inc.'s trial, he may violate his continuing duty of loyalty if he reveals any non-public information he learned in the course of representing Don.

Duties on Withdrawal

When an attorney is fired, he must return all unspent retainer money as well as the client's papers and documents necessary for representation. California authorities specifically prohibit holding on to client documents for the purpose of getting paid. Here, so long as Luke returned Don's papers and any unspent retainer money, he likely did not commit a breach of his duties upon withdrawal from representation.

QUESTION 2: SELECTED ANSWER B

1. LUKE'S TESTIMONY ABOUT WENDY'S STATEMENT

Protection by Attorney Client Privilege

At issue is whether Luke's interview of Wendy is protected by the attorney-client privilege.

In California, the attorney-client privilege attaches to a communication made in confidence between a client and his lawyer in the course of the representation. The client, the sole holder of the privilege, can bar the lawyer from testifying as to the content of the communication. However, the privilege does not survive the death of the client after the client's executor has finished distributing his estate. There are certain exceptions to the attorney-client privilege, including when the lawyer reasonably believes that disclosure would be necessary to avert serious bodily harm to others, and when the client is attempting to use the lawyer's services to perpetrate a crime or fraud.

Here, as part of his preparation for trial, Luke interviewed Don's sister, Wendy. Wendy told Luke that Don had admitted to her that he had defrauded Claire, but never anyone else. Nothing in the facts indicates that Wendy did not tell Luke this information in confidence. Her statement, however, was not a communication between a lawyer and client, but between a lawyer and a third party. It therefore falls outside the scope of the attorney-client privilege. Moreover, by the time Claire was attempting to compel Luke to testify at trial, Don had died. We also know that his executor had closed his estate, since the executor had settled Claire's claim against Don. Therefore, Don's ability to invoke the privilege died along with him, and there is no bar under the attorney client privilege to Luke's testimony. The court should compel Luke to testify.

2. LUKE'S MEMORANDUM

Attorney-Client Privilege with Regard to Wendy's Statement and Luke's Belief

At issue is whether Luke's description of Wendy's statement or Luke's belief about Wendy's suitability as a witness is protected by the attorney-client privilege.

As noted above, the attorney client privilege only attaches to confidential communications between lawyers and clients, and it does not survive the death of the client. Here, Luke wrote a memorandum after interviewing Wendy that contains two components: Wendy's statements, described above, that Don had admitted he had defrauded Claire; and Luke's belief that Wendy would make a good witness for Claire. Neither of these is a communication between Don, the client, and Luke, the lawyer. Moreover, because Don is deceased and his estate has been closed, no one survives to invoke the privilege. The attorney-client privilege does not provide a justification for Luke to refuse to produce the memorandum.

Work Product Doctrine with Regard to Wendy's Statement

At issue is whether Luke's memorandum, to the extent that it recounts Wendy's statement, is protected by the work product doctrine. California law privileges from discovery documents produced in anticipation of litigation. It also draws a distinction between a qualified privilege, which attaches to statements of fact recounted in work product, and an absolute privilege, which attaches to statements of belief or opinion by an attorney contained in work product. The qualified privilege may be overcome by a showing that there is a substantial need for the facts contained in the work product and that they are unavailable through other means, whereas the absolute privilege cannot be overcome. The work product doctrine survives the death of the client.

Here, Luke's memorandum contains Wendy's statement that Luke had defrauded Claire. Luke prepared this memorandum after Don retained him to defend him in the fraud action, causing him to interview Wendy. It was therefore made in anticipation of litigation, placing it within the scope of the work product doctrine. The description of what Wendy told Luke, however, is a factual one. It is therefore subject only to a qualified privilege, and Claire may be able to overcome it. Don's admission that he defrauded Luke would be damning evidence against Home Inc., the remaining defendant at trial. Claire can likely show that there is a substantial need for the testimony. However, it does not appear on these facts that Claire would not be able to

obtain this testimony by other means. She could simply subpoena Wendy, or she could have noticed Wendy's deposition during discovery, to obtain Don's admission from Wendy herself. If Wendy is for some reason unavailable, then Claire may be able to compel production.

Therefore, the qualified privilege that attaches to Wendy's statement likely protects the memorandum from discovery.

Work Product Doctrine with Regard to Luke's Belief

At issue is whether Luke's belief about Wendy's suitability as a witness is protected by the work product doctrine. As noted above, this belief is expressed in a memorandum that Luke prepared in anticipation of litigation; indeed, there would be no other reason to speculate as to whether Wendy would make a good witness. Luke's belief, however, is absolutely protected by the work product doctrine, since it expresses a lawyer's beliefs and opinions about the proper strategy for trial. Therefore, regardless of what showing Claire makes at trial, it is protected, and the court should not compel production.

Overall Conclusion

Neither Wendy's statement nor Luke's belief is protected by the attorney-client privilege, but both are likely protected by the work product doctrine. The court should deny the motion to compel.

3. LUKE'S ETHICAL VIOLATIONS

Duty of Confidentiality

At issue is whether Luke breached his duty of confidentiality to Don.

Under the ABA and California rules, a lawyer owes his client a duty of confidentiality. This duty prohibits a lawyer from revealing to any third party information learned from or about the client in the course of the representation, unless an exception applies. It attaches as soon as a lawyer-client relationship begins. Here, Luke and Don entered into a lawyer client relationship when they executed a valid retainer agreement. Luke

then interviewed Don and learned that Don had defrauded Claire-a fact learned about Don during the course of the representation. Luke then, in his conversation with Wendy, revealed this fact to Wendy. This was thus a disclosure of a client's confidential information, so unless an exception applies, Luke is subject to discipline under both the ABA and California rules.

Exceptions to the Duty of Confidentiality

i. Implied consent

A client may impliedly consent to a lawyer's use of his confidential information, when such disclosure would be a natural and necessary feature of the representation. Here, Luke could argue that Don impliedly consented for him to reveal this information to Wendy, since Wendy was Don's sister and Luke might need the information to build a rapport with her. However, especially since Luke only revealed the information after Wendy had told him what Don had told her, this exception does not apply.

ii. Averting physical harm

A lawyer may reveal a client's confidential information under the ABA and California rules if he reasonably believes that disclosure is necessary to avoid imminent bodily harm to a third person. In California, the harm must arise out of a criminal act, and the lawyer must first attempt to dissuade the client and inform him of the lawyer's intent to reveal. Here, Don admitted to past fraud, which seems to pose no risk of bodily harm-criminal or otherwise-to anyone. Therefore, this exception does not apply.

iii. Serious financial harm using the lawyer's services

The ABA, but not California authorities, allow disclosure if the lawyer believes it to be reasonably necessary to avoid serious financial harm to a third party, and the harm would be perpetrated using the lawyer's services. Here, Don admitted to fraud in the past, but said he had not defrauded anyone else since. Nor does he appear to have sought Luke's help in perpetrating any such fraud. Therefore, this exception does not apply.

iv. Fact has become generally known

Under both ABA and California rules, a lawyer may reveal a client's confidential information if that information is no longer confidential because it has become generally known. Here, Luke can argue that because Wendy already knew that Don had admitted to defrauding Claire, there was no breach of confidence by revealing what Don had told Luke. However, although this fact might have been known to Wendy, it was not *generally* known in the world. Therefore, this exception does not apply.

Conclusion

Luke is subject to discipline because he breached his duty of confidentiality and no exception applies.

Safeguarding the Client's Property

At issue is whether Luke violated any ethical rules by not returning the memorandum to Don when Don fired him.

A lawyer owes his client a duty to safeguard the client's property under both ABA and California law. This includes a duty to return to the client all materials related to the representation upon the end of representation. A lawyer may not retain a client's case file, including for the purposes of recovering his fee. Here, Don fired Luke before trial, but Luke appears to have kept possession of the memorandum recounting his meeting with Wendy until the time of trial. Therefore, by failing to return the memorandum to Don or his estate, Luke breached his duty to safeguard client property.

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2018

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the July 2018 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Contracts
2.	Evidence
3.	Professional Responsibility
4.	Community Property
5.	Constitutional Law

QUESTION 2

Deb was charged in a California state court with battery of a spouse or live-in companion. Vic, Deb's live-in boyfriend, was beaten when he stepped out of his car in their driveway. Vic called 911 about two minutes after the beating and reported that Deb, his girlfriend, had beaten him.

At trial, the prosecution called Vic as a witness. He reluctantly took the stand. He refused to identify Deb in open court as the perpetrator. He admitted making the 911 call in which he reported that Deb had beaten him. The parties stipulated that the 911 recording was a business record of the police department, but that Vic's statements on it were specifically not covered by the stipulation. The prosecution properly authenticated the 911 tape, moved the tape into evidence, and played it for the jury.

The prosecution also called Sam, a man who had been Deb's live-in boyfriend eight years earlier. All evidence pertaining to Sam's testimony had been properly disclosed to the defense before trial. Sam testified that Deb had threatened to choke him to death if he left her, and that she had beaten him several times during the time they lived together.

Deb took the stand in her own defense. She testified that she was working at her desktop computer in her office at the time of the assault, 20 miles away. She offered a print-out of a list of file names, which contained the dates and times they were created, indicating they were created on her computer at the time of the beating. She testified that her computer clock was set to the correct time and keeping time accurately on the day of the beating.

Assuming all appropriate objections were timely made, should the court have admitted:

1. The 911 tape? Discuss.

2. Sam's testimony? Discuss.

3. The computer print-out? Discuss.

Answer according to California law.

QUESTION 2: SELECTED ANSWER A

Battery

Battery is unlawful touching of the victim's person which results in harm or offense.

Proposition 8

As a preliminary matter, in California, Proposition 8 permits the admission of all relevant evidence in criminal cases, subject to certain exceptions. Hearsay rules and exceptions still apply, as do Constitutional requirements. To be relevant, evidence must be: 1) factually relevant, or make a material element of the case more or less likely, and 2) legally relevant, in that the probative value of a piece of evidence outweighs its prejudicial effect.

911 Call

The first issue is whether the 911 tape recording of Vic's statement is admissible.

Relevance & Authentication

The 911 call is likely relevant because Vic's statement on the 911 call claiming that Deb battered him, if true, makes it more likely that Deb is actually guilty of battery. The probative effect of such evidence would far outweigh its prejudicial value. Additionally, the facts state the recording has been properly authenticated.

Confrontation Clause

We must next determine whether admission of the 911 tape violates Deb's rights under

the Confrontation Clause. The Confrontation Clause is a federal Constitutional requirement which requires all criminal defendants the opportunity to confront witnesses against them. It applies only to the admission of testimonial evidence. Testimonial evidence is generally determined under the "primary purpose" test, in which a statement is adjudged testimonial if the primary purpose of the statement is to assist law enforcement or give testimony. 911 recordings are generally not considered testimonial.

Here, Vic's primary purpose in calling 911 was to seek help, rather than to aid law enforcement. He did not intend to give testimony in his communications to the dispatcher. Thus, the call was likely not testimonial. Further, Vic has taken the stand as a witness, giving Deb the opportunity to cross-examine him as to the contents of the recording. Thus, regardless of whether the tape was testimonial, its admission does not violate Deb's Confrontation Clause rights.

Hearsay within Hearsay

The next issue is whether the tape presents a double hearsay problem. Hearsay is an out-of-court statement offered for its truth. It is generally inadmissible, subject to certain exceptions. When an item of evidence presents two levels of hearsay (as is the case with a recording), both levels must be subject to an exception to be admissible.

Here, the prosecution is trying to admit an out-of-court statement by Vic. The tape is a recording of his voice, which is itself another level of hearsay (Vic's statement is level 1, and the recording of his statement is level 2). Thus, the recording presents a hearsay within hearsay problem.

Level 1: Vic's Statement

Now we must determine whether Vic's statement falls under a hearsay exception.

i. Spontaneous Statement

In California, a spontaneous statement (under the FRE, an excited utterance) occurs when a speaker becomes frightened or excited by a startling event, and speaks during or shortly after that event while still experiencing the excitement. This type of statement is admissible as an exception to the hearsay bar, regardless of whether or not a declarant is available.

Here, Vic called the police two minutes after he was allegedly beaten by Deb. Though there are no facts which indicate Vic's mental state at the time of the call, being beaten is likely considered a startling event. The prosecution will likely successfully argue that two minutes is not enough time to recover from the stress or shock of such an experience, considering the physical and emotional ramifications. Thus, the first level of hearsay is likely admissible under the spontaneous statement rule.

ii. Contemporaneous Statement

A contemporaneous statement (under the FRE, a present sense impression) occurs when a speaker is describing events he is witnessing after they occur. This is broader than the federal rule, which permits a description shortly after the events occur. Such a statement is an exception to the hearsay bar, regardless of whether or not a declarant is available.

Given the narrowness of the rule, it is likely not satisfied by Vic's statement. He called the police two minutes after the alleged beating, and was thus not describing events as they occurred. Therefore, his statement is likely inadmissible as a contemporaneous statement.

Description of Past Physical Harm or Threat of Harm

California provides a hearsay exception which permits the admission of a statement describing past physical harm or threat of physical harm by a declarant who is unavailable. The statement must be made: 1) at or near the time the harm/threat occurred; 2) with circumstances suggesting reliability; and 3) be made to a police or medical professional, written, or recorded. In California, unlike under the FRE, a declarant is not "unavailable" merely because he refuses to testify.

Here, Vic is available because he has taken the stand. His refusal to identify Deb in open court is not sufficient to make him "unavailable" for purposes of the above hearsay exception. Thus, the exception likely does not apply

iii. Statement of Past Physical Condition

California also permits a hearsay exception when a declarant is making a statement describing a past physical condition, if it is at issue in the case. The statement need not be made for medical assistance; however, the declarant must be unavailable.

Because Vic is available, as discussed, his statement will not be admissible under this exception. Furthermore, Deb would likely argue that, even though the case concerns domestic violence, Vic's physical condition is not "at issue" in the case. Instead, she would likely be successful in arguing that her actions towards Vic are what is at issue.

In sum, the first level of hearsay - Vic's statement on the 911 call - is likely admissible as a spontaneous statement.

Level 2: 911 Recording

The next issue is whether the second level of hearsay is admissible under any exception.

i. Business Records Exception

A business record is admissible if: 1) it is not made in preparation for litigation; 2) it is made in the normal course of business; 3) it is made by someone with a duty to records; and 4) the recording party has personal knowledge or is transcribing on behalf of someone with personal knowledge.

Here, the recording 1) was not made in preparation for litigation; 2) was made in the normal course of police business; 3) recorded by one with a duty to record (here, the dispatcher); and 4) recorded on behalf of one with personal knowledge (here, Vic). The parties have furthermore stipulated that the 911 recording itself is admissible as a business record. Thus, the recording is likely acceptable under the business records exception to the hearsay rule.

The 911 call will likely be admitted if Vic's statement is considered a spontaneous statement, since the second level (the recording itself) has been stipulated admissible by the parties.

Sam's Testimony

The next issue is whether Sam's testimony is admissible.

Relevance

Sam's testimony is relevant because the fact that Deb has battered a partner in the past makes it more likely she would continue that pattern of behavior in the future. This is true even though the alleged battery occurred eight years prior. Domestic violence is a special exception to the presumption that past bad acts do not predict future behavior, likely due to the habitual behavior of domestic abusers. Though such testimony is also prejudicial, a court would likely find that its probative value outweighs its prejudicial effect, notwithstanding the time that has passed.

Character Evidence

Character evidence can take three forms: opinion testimony, reputation testimony, and prior bad acts. In a criminal case, character evidence of the defendant is typically not admissible unless the defendant first "opens the door" to such evidence by presenting testimony of her good character. However, California provides a special exception for character evidence in domestic violence cases: the prosecution may present evidence of opinion, reputation, and specific bad acts testimony to show a defendant's character for domestic violence.

Here, Sam lived with Deb as her boyfriend eight years prior. He testified that Deb had threatened to choke him to death if he left her, and that she had beaten him several times during the time they lived together. This is adequate "bad acts" testimony which is admissible as character evidence under California's rule pertaining to domestic violence. From Sam's testimony, a factfinder may infer that Deb is more likely to batter Vic, if they accept Sam's testimony as credible.

Deb's Statement

Statements of a criminal defendant, or a party admission, is admissible as a hearsay exception.

Here, part of Sam's testimony covers what Sam said in the past (that she would choke him to death). Since it is an out of court statement, it is hearsay. However, it is admissible, notwithstanding the above character evidence rule, as a party admission.

Computer Print-Out

The final issue is whether Deb's computer printout should be admissible. The computer print-out is not hearsay because it is generated by a machine (here, a computer). Hearsay only occurs if made by a person.

Relevance

Whether the computer printout is relevant is a close call. Evidence is likely inadmissible if it is likely to cause delay or confuse the issues of the case.

Here, a print-out would show that *someone* used Deb's computer at the time stated. There are no assurances that the person was Deb. However, such a fact likely goes to the weight of the evidence and not admissibility. Furthermore, the evidence is unlikely to be particularly prejudicial; thus, it is likely relevant to show that Deb might not have been near Vic at the time of the alleged battery.

Authentication

An item may only be admitted to evidence if the moving party presents enough circumstantial evidence to allow a jury to find that the evidence is what it purports to be. Here, Sam is testifying that a print-out list of file names, containing the dates and times they were created, is evidence of the state of her office computer on the day of the battery. Some documents are "self-authenticating."

Here, Deb has testified to the nature of the list, where she obtained it, and that her computer clock was accurate. Whether Deb's testimony is sufficient to authenticate will likely depend on the level of expertise required to create and identify such a list. If any person could create a printout of file dates/times, then it is likely common knowledge and able to be authenticated by a layperson. However, if obtaining such a list is complicated, authentication may require a computer expert to testify that the list is what it purports to be. Thus, the document's admissibility will depend on proper authentication. Furthermore, the document is likely not considered "self-authenticating."

Secondary Evidence Rule

California's secondary evidence rule (the FRE "best evidence" rule) requires that when a

document is admitted to prove its contents, an original must be provided. This includes duplicates or written copies.

Here, Deb is attempting to admit a file list from her computer at the time in question. A print-out of the list is likely adequate to be considered a "copy" that will satisfy the secondary evidence rule.

Given that the printout is not hearsay and will likely satisfy the secondary evidence rule, it will be admissible to the extent it can be properly authenticated.

In sum, the 911 tape and Sam's testimony are likely admissible against Deb. Her computer print-out is likely inadmissible.

QUESTION 2: SELECTED ANSWER B

RELEVANCE

Logical Relevance

Evidence must be logically and legally relevant. Under the California Evidence Code (CEC), logical relevance means that the evidence has any tendency to make a disputed fact of consequence to the determination of the action more or less probable.

Legal Relevance

Evidence must be legally relevant. Under CEC section 352, evidence is legally relevant when its probative value is not substantially outweighed by the danger of unfair prejudice, waste of time, misleading the jury, or needless presentation of cumulative evidence.

PROPOSITION 8

Under California's Proposition 8, in a criminal case, all relevant evidence must be admitted, subject to the court's balancing power under section 352, and subject to additional exceptions noted in my answer below. Because Deb (D) is charged with the crime of battery in California state court, Proposition 8 applies.

I. <u>THE 911 TAPE</u>

Relevance

The 911 tape is both logically and legally relevant. The tape has logical relevance because it is highly probative of whether D committed the battery. The tape has legal relevance because it has high probative value that is not substantially outweighed by the

risk of any unfair prejudice or misleading the jury. Although any evidence tends to prejudice the D when it demonstrates guilt, that does not make the prejudice unfair. The 911 tape is also logically relevant to impeach V by a prior inconsistent statement (discussed below).

Authentication

All evidence must be properly authenticated, meaning that there must be enough evidence to support a jury finding that the evidence is what the proponent says it is. Here, the tape was properly authenticated.

Personal Knowledge

Testifying witnesses must have personal knowledge of what they are testifying about. Here, Vic (V) had personal knowledge of what D did to him and what he conveyed on the 911 call.

Secondary Evidence Rule

Any writing, tangible collection of data, or recording must satisfy the Secondary Evidence Rule when offered to prove its contents. In California, the original or a duplicate (including carbon copies, photocopies, and handwritten notes) must be admitted into evidence, unless it is reasonably unavailable (then testimony is allowed). Here, the actual tape of the 911 call was admitted into evidence, and it appears to be an original (or at least, an exact duplicate).

Hearsay

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Hearsay is generally excluded unless an exception warrants admissibility. Proposition 8 does not apply to or alter the hearsay rules.

Multiple Hearsay

The tape presents the problem of multiple hearsay. The recording itself is hearsay (the outer layer), and the statements contained within it, including V's statements, are also hearsay (the inner layer of hearsay). Both layers must fall within an exception to be admissible.

Outer Layer of Hearsay

The parties have stipulated that the 911 tape is a business record of the police department. The CEC recognizes an exception for business records. Thus, the outer layer of hearsay (the tape itself) is admissible under this exception.

Inner Layer of Hearsay

V's statements are hearsay because they are being offered to prove the truth of the matter asserted, i.e. that D battered V. To be admissible, V's statements must be admissible under a hearsay exception. (They may also be admissible nonsubstantively as impeachment of V's credibility, as noted below).

Hearsay Exceptions

Prior Inconsistent Statement

The prosecution's best argument is that V's statement was a prior inconsistent statement of a testifying witness. Under the CEC, a prior inconsistent statement is admissible as a hearsay exception even when it was not made under oath at a prior proceeding. Here, V is the prosecution's testifying witness, and he refuses to identify D on the stand. Thus, the statements are admissible as a prior inconsistent statement. Moreover, these statements are admissible both substantively and as impeachment evidence.

Spontaneous Statement (Excited Utterance)

The prosecution will also succeed in showing that V's statement was a spontaneous statement. A spontaneous statement is one that describes a startling or exciting event and that is made when the declarant is still under the stress of that exciting event. Here, V was allegedly beaten by D as he stepped out of his car. He called 911 "about two minutes after the beating." Unexpected physical violence would constitute a startling or exciting event, and it is very likely that V was still under the stress of excitement of that event when he called 911 a mere two minutes later to report D as the perpetrator. Thus, V's statements are likely admissible as a spontaneous statement.

Contemporaneous Statement (Present Sense Impression)

The prosecution will argue that V's statements are admissible as a contemporaneous statement, but this argument will fail. Under the CEC, this exception only applies when the declarant is describing or making understandable his own conduct while engaged in that conduct. V's statements identified D's conduct. Thus, this exception does not apply.

Statement of Infliction of Violence

The CEC recognizes an exception for a statement made by a declarant that describes, narrates, or makes understandable an infliction of physical violence or a threat of physical violence. The statement must have been made at or near the time of the event; must be made under circumstances indicating trustworthiness; and must be in writing, recorded, or given to emergency personnel. The declarant, however, must also be unavailable at trial. Here, V's statement would likely meet all of the requirements for this exception (his statements were made 2 minutes after the beating, were recorded, and were communicated to 911), but V is a testifying witness at trial. Thus, because V is not unavailable at trial to testify, this exception does not apply.

Dying Declaration

The CEC recognizes an exception for a dying declaration. This exception applies in all cases (not just homicide cases or civil trials, as the Federal Rules require) when the declarant is dead and when the statement concerns the cause of death. Here, V is alive and testifying at trial. Thus, this exception does not apply.

Business Record

V's statements are not admissible under the business records exception. For the exception to apply, the statement must relate to an event or condition (not opinions or diagnoses under the CEC, but courts allow simple ones); must be made in the regular course of business; must be made at or near the time of the matter described; must be made by a person with personal knowledge or transmitted by a person with a duty to transmit the information; and must be authenticated by a custodian or record. It must also be a regular practice of the business to make such records. Here, V was not under any duty to transmit the information to 911. Thus, this exception does not apply to V's statements, the inner layer of hearsay.

No Marital Privileges

V is a live-in boyfriend of D. Thus, V could not invoke any spousal immunity, which is a privilege held by a non-defendant spouse in which that spouse can refuse to testify in any civil or criminal proceeding against the defendant spouse.

No Confrontation Clause Problem

The Confrontation Clause in the Sixth Amendment bars testimonial out-of-court statements by an unavailable witness when the criminal defendant had no opportunity to cross-examine the statement when made. Here, V testified at trial, and his statements

were arguably in response to an emergency. So, they were likely not testimonial.

Conclusion

The 911 tape of V's statements are admissible.

II. SAM'S TESTIMONY

Relevance

Sam's testimony is legally relevant because it makes it more probable that D committed the battery. By showing that D committed a similar battery against a former live-in boyfriend 8 years before V's battery *and* that she committed several batteries during the time Sam and D lived together, this evidence would make it more probable that D has a violent nature and propensity to commit batteries against boyfriends, which in turn, would make it more probable that she battered V. The testimony, however, likely poses a risk of unfair prejudice because it is improper character evidence, as discussed below.

Character Evidence

Evidence of a person's character trait to prove that the defendant acted in conformity with that character on a given occasion, or that the person has a propensity to act in conformity, is referred to as character evidence. Proposition 8 does not apply to character evidence rules. Here, Sam's testimony is likely being offered by the prosecution to show that D has a character for violence and propensity to commit battery against boyfriends. Thus, this evidence is character evidence.

Defense Must Open the Door

In a criminal case, evidence of a defendant's character is not admissible in a prosecution's case in chief. The defendant, however, may present evidence of the defendant's pertinent good character, which the prosecution may rebut. Here, there is

no indication that D had offered any evidence as to her peaceful nature or as to any other good character trait. Thus, Sam's testimony was inadmissible to prove D's character based on that justification.

However, the CEC recognizes an exception for character evidence in cases of sexual assault, child molestation, elder abuse, and domestic violence. Here, D is charged with battering her live-in boyfriend, which likely qualifies as domestic violence. Thus, under this exception, Sam's testimony should have been admitted.

Not Independently Admissible

At issue is whether Sam's testimony is offered for a non-character purpose. Evidence of a defendant's past acts may also be independently admissible if not offered to prove character or propensity. Evidence of past acts, for example, are admissible to prove motive, identity, absence of mistake, and a common plan or scheme. Here, the prosecution could argue that Sam's testimony is being offered to prove the identity of the assailant (Deb) or to prove that D has a common plane or scheme of using battery to prevent boyfriends from leaving her. Sam testified that D threatened to choke him to death "if he left her." As the prosecution would argue, this shows a common plan of D to coerce boyfriends into staying. Neither of these arguments are persuasive. First, evidence is usually allowed to prove identity when there is a unique modus operandi of the defendant. Here, the fact that someone committed battery in the past is indistinguishable from character evidence. Second, it is unlikely that a court, based only on D's threat to S, would find that D had a "common plan or scheme" to entrap boyfriends unless there is other evidence that could prove such a plan. Unfortunately, many people threaten significant others if they attempt to leave, and this by itself is not sufficient to show a scheme.

Impeachment of Deb

The prosecution may also argue that Sam's testimony is offered to impeach Deb's

credibility, given that Deb has testified in the case. Under Proposition 8, prior acts of moral turpitude are admissible, subject to 352 balancing, as impeachment. Moral turpitude includes violence and would likely include these batteries against Sam. However, the court would likely exclude the evidence under its section 352 balancing power because of the high risk of unfair prejudice. Even with a limiting instruction, a jury would be hard-pressed not to view these past batteries as a form of character evidence.

Conclusion

Sam's testimony is likely admissible given that it is character evidence in a case involving domestic violence. However, if this exception did not apply it would otherwise be inadmissible for character purposes and would likely be inadmissible as impeachment evidence because of the high risk of unfair prejudice.

III. COMPUTER PRINT-OUT

Relevance

The computer print-out is legally relevant because it supports D's alibi, i.e. that she could not have committed the assault because she was working at her office 20 miles away. The evidence is legally relevant because of its high probative value and because it does not present a risk of unfair prejudice, waste of time, or misleading the jury.

Authentication

As noted above, evidence must be authenticated. In other words, there must be enough evidence to support a jury finding that the evidence is what the proponent says it is. Here, D testified that her computer clock was set to the correct time and that it was keeping time accurately on the day of the beating. This may be at least sufficient to show that a bona fide print-out of the activity from D's computer for that day would be accurate in terms of its time entries. But D's testimony does not actually provide any other

evidence that the print-out came from D's computer (after all, many computers have accurate time-keeping) or that it was unaltered or unmodified. To reach a definitive conclusion, the court would need more evidence on what the print-out specifically entails (e.g. if it indicates D's user ID) and what other testimony is offered.

Secondary Evidence Rule

As noted above, the Secondary Evidence Rule would apply to such writings and tangible collections of data. A computer print-out of an original would suffice.

Not Hearsay

The computer print-out is not hearsay. Hearsay does not include print-outs of machine-created data that was not a result of human assertions. But hearsay would include a declarant's out-of-court statements even if recorded or transcribed on a computer. Here, D's computer likely automatically generated these time stamps and records of the activity and file names. Thus, these were not assertions by a human declarant, so the hearsay exclusion rules would not apply.

Conclusion

Assuming that authenticity objections can be overcome, the computer print-out should be admitted.

The State Bar Of California
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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2019

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the February 2019 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Wills and Trusts / Community Property
2.	Torts
3.	Real Property
4.	Evidence / Civil Procedure
5.	Professional Responsibility

QUESTION 4

Dave is domiciled and owns a house in California on the state line adjacent to Petra's house in Nevada. Petra is domiciled in Nevada.

Dave installed a large rainwater tank near the property line, which leaked. One day, the water tank fell over onto Petra's property, landing on her retaining wall, which buckled. Petra sued Dave for negligence in federal court seeking $100,000 to replace the retaining wall, claiming it failed because the water tank, weakened by leaks, landed on it.

At the jury trial, Petra testified that she had complained to Dave several times over the prior decade that the water tank leaked and that he had done nothing. She also testified that the retaining wall was only a couple of years old.

Petra then called Walt, a water tank repairman, who testified that when he repaired Dave's water tank after it fell over, Dave instructed him to caulk all the joints so that it wouldn't leak. Petra rested her case.

Dave called Gwen, Petra's gardener, who testified that she had met with Petra the day before the water tank fell and, while they inspected the retaining wall at issue, she saw it was old and had structural cracks that could cause it to fail, pointed this out to Petra, and told her that it would cost at least $100,000 to replace it. Gwen testified that Petra had replied, "You're right. It's at least 30 years old."

The jury returned a verdict in favor of Petra and awarded her $20,000 in damages. Dave filed a motion to dismiss based on lack of subject matter jurisdiction, which was denied. Dave properly appealed the verdict.

Assume all appropriate objections and motions were timely made.

1. Should the court have admitted:

    A. Petra's testimony about her complaints to Dave about the leaks? Discuss.

    B. Walt's testimony that Dave instructed him to caulk all the joints so that the water tank wouldn't leak? Discuss.

C. Gwen's testimony

i) That the retaining wall was old? Discuss.

ii) That the retaining wall had structural cracks that could cause it to fail and that it would cost $100,000 to replace it? Discuss.

D. Gwen's testimony about Petra's reply, "You're right. It's at least 30 years old." Discuss.

2. Did the court properly deny Dave's motion to dismiss based on lack of subject matter jurisdiction? Discuss.

Answer all questions according to federal law.

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QUESTION 4: SELECTED ANSWER A

A.) PETRA'S TESTIMONY ABOUT HER COMPLAINTS TO DAVE

In order to be properly admitted all evidence must be relevant and not be excluded under the Federal Rules of Evidence.

RELEVANCE

All evidence must be logically and legally relevant. Logical relevance means that the evidence tends to make a material fact more or less likely. Legal relevance refers to a judge's discretion to exclude evidence if its probative value substantially outweighed by the risk of unfair prejudice, confusion to the jury, or unreasonable delay.

Here, the evidence is relevant because the issue in the case is whether Dave was negligent in maintaining the water tank that landed on Petra's retaining wall. Petra also contends that the failure of the water tank was due to leaks. The fact that she notified him of the leaking would tend to make it more likely that Dave was negligent in not repairing the tank before it fell. Thus, the evidence is logically relevant. There also does not appear to be any obvious risk of unfair prejudice to the defendant, so it would not be excluded under legal relevance balancing.

HEARSAY

Hearsay is an out of court statement offered to prove the truth of the matter asserted. This applies even to the testifying witness's own statements if they were made out of court. If a statement offered by a witness is offered to prove something other than the truth of the matter asserted, it will be admitted as non hearsay. Otherwise, if it is hearsay, it must fall within an exception to be admissible.

Here, Petra is testifying that she had complained to Dave several times over a decade that the water tank leaked. If offered to prove that the tank did in fact leak, then it would be hearsay and would need to fall under an exception. However, if it is not offered for that purpose, it may be admissible for the other limited purpose.

EFFECT ON THE LISTENER

Statements offered to show the effect on the listener are classified as non hearsay under the FRE. However, the defendant has a right to request a limiting instruction so that the jury does not use the statement to prove the truth of the matter asserted (i.e. inadmissible hearsay).

Here, Petra's complaints can be offered to show that Dave knew about something and did not act in response; thus it is offered to show the effect it had on Dave.

CONCLUSION

Therefore, the testimony is admissible for this purpose and if Dave requested a limiting instruction, it should have been granted. The court did not err in admitting this testimony.

B.) WALT'S TESTIMONY THAT DAVE INSTRUCTED HIM TO CAULK THE JOINTS SO THAT THE WATER WOULDN'T LEAK

RELEVANCE

See rule above. Here the testimony is relevant because it tends to make it more likely that there was problems with the water tank and that Dave requested to have the leaking joints repaired. There also does not appear to be any significant risk of unfair prejudice here. Thus, the evidence is relevant.

HEARSAY

See rule above. Here, Walt is testifying regarding what Dave said to him in requesting repair of the water tank after it fell over. It is being offered to prove that the water tank was in fact leaking, which is at issue in the case. Therefore, it is hearsay and must fall within an exception.

PARTY ADMISSION

A statement by a party opponent is admissible as a hearsay exemption when offered against that party. Here, Dave is a party opponent and his statements are being used against him in this testimony. Thus, the party admission exemption would apply.

SUBSEQUENT REMEDIAL MEASURES

There is a public policy exclusion for evidence of subsequent remedial measures taken when offered to show fault. Here, Dave's statements ordering Walt to caulk the joints so that it wouldn't leak after the water tank fell over onto Petra's property is evidence of a subsequent remedial measure taken in order to show fault. Thus, it should be excluded under the public policy exclusion.

CONCLUSION

The court erred in allowing Walt's testimony, as it should have been excluded as evidence of a subsequent remedial measure.

C.) GWENS TESTIMONY

i) TESTIMONY THAT THE RETAINING WALL WAS OLD

RELEVANCE

See rule above. Here the evidence is relevant because it tends to make show that the wall was old and fell due to that, rather than due to Dave's negligence. As with the previous evidence, there does not appear to be a risk of unfair prejudice that the judge should have determined inadmissibility based on those grounds.

EXPERT WITNESS TESTIMONY

In order to properly admit testimony as expert witness testimony, the following must be met: (i) it must be helpful to the jury, (ii) the expert must be qualified in the field, (iii) the

expert must have a proper factual basis, (iv) and the expert must have used reliable methods and applied them reliably.

Here, Gwen is a gardener who is testifying about her inspection of the retaining wall with Petra. While the testimony would be helpful to the jury in determining whether the wall fell due to its age, it is unlikely that Gwen can meet the other requirements to qualify as an expert witness. There is no evidence offered that shows that Gwen had a proper factual basis for her testimony, nor that she is qualified in determining the age of the wall. Thus, the testimony would not be properly admitted as expert witness testimony.

LAY WITNESS TESTIMONY

In order for a witnesses testimony to qualify as lay witness opinion testimony, it must be (i) helpful to the jury, (ii) be reasonably ascertainable based on the perceptions of a layperson, and (iii) not based on any scientific fact or specialized knowledge.

Here, Gwen is stating that she saw the wall was old. This is helpful for determining the quality of the wall and whether the wall fell due to its age or Dave's negligence. The age of a wall would be reasonably ascertainable by an average person, as plenty of signs can signal a wall's age, such as cracks, or growth of ivy, and the like. The opinion does not appear to be based on any specialized knowledge. Thus, it is lay witness testimony.

CONCLUSION

The court properly admitted the testimony regarding the wall's age as lay witness testimony.

ii) TESTIMONY THAT THE WALL HAD STRUCTURAL CRACKS AND IT WOULD CAUSE $100,000 TO REPLACE IT

RELEVANCE

See rule above. Here, the testimony is relevant for the same reasons as the testimony regarding the age of the wall above. Thus, it is relevant.

EXPERT WITNESS TESTIMONY

See rule above. Here, again, Gwen does not appear to have the qualifications to be able to speak authoritatively on the structural soundness of the wall or the price to repair it. If Gwen was in fact a builder of retaining walls, then she would be qualified. However, this qualification was not established in the facts given.

Therefore, Gwen likely doesn't qualify as a proper expert witness on these issues.

LAY WITNESS TESTIMONY

See rule above. Here, Gwen's testimony is helpful for the same reasons as the age of the wall. However, the structural soundness of the wall and the cost to replace it are not matters that would be reasonably ascertainable by a layperson. If this perception was in fact based on some kind of specialized knowledge, that it definitely does not qualify as lay witness testimony.

CONCLUSION

The court erred in admitting the testimony regarding that structural cracks and cost to replace the wall, as a proper factual and qualification basis was not established for expert testimony and it does not qualify as admissible lay witness testimony.

D. GWEN'S TESTIMONY ABOUT PETRA'S REPLY TO HER

RELEVANCE

See rule above. Here, the testimony is relevant as it tends to discredit Petra as a witness since she claimed in her testimony that the wall was only a couple of years old. It also tends to prove that the wall was in fact old, which could have led to its collapse and would reduce Dave's liability in negligence. There does not appear to be any risk of unfair prejudice. Thus, the evidence is relevant.

HEARSAY

See rule above. Here, the testimony regarding Petra's statement, if offered to prove both the age of the wall and that Petra knew the wall was old and needed replacing,

would be hearsay as it would be offered to prove the matter asserted. Thus, it must fall under an exemption or exception, or be used for a non hearsay purpose.

PARTY ADMISSION

See rule above. Here, Petra admitting that the wall was old is being offered against her by the defendant. Thus, it would be admissible under this exemption to hearsay.

PRIOR INCONSISTENT STATEMENT

A witness can be impeached based on prior inconsistent statements, however, the witness must be available and they must be given a chance to explain the statement.

Here, Petra is an available witness who testified that the water tank was only a couple of years old. The statement she said to Gwen is inconsistent with this statement. However, since the other statement was not given under oath, it cannot be used for substantive purposes. It can only be offered for the limited purpose of impeachment. However, the statement falls under a party admission, so it can be admissible for both.

CONCLUSION

The court properly admitted the testimony regarding Petra's statement as a party admission and an impeachment based on a prior inconsistent statement.

2) MOTION TO DISMISS BASED ON LACK OF SUBJECT MATTER JURISDICTION

A party can file a motion to dismiss for lack of subject matter jurisdiction at any time. In order to determine whether the motion was denied improperly, it must be determined whether the court, in fact, had subject matter jurisdiction over the case at issue.

SUBJECT MATTER JURISDICTION

In order for a federal court to have subject matter jurisdiction, it must either have federal question jurisdiction or diversity jurisdiction.

Federal Question Jurisdiction

Federal question jurisdiction exists when the claim arises out of federal law, including Constitutional rights, treaties, and the like. Here, the claim is based on negligence which is based on state tort law. Thus, federal question jurisdiction is not present and there must be diversity jurisdiction in order to hear the case.

Diversity Jurisdiction

Diversity jurisdiction requires (i) complete diversity between the plaintiffs and the defendants, and (ii) an amount in controversy exceeding $75,000.

Complete Diversity

Complete diversity means that each plaintiff is a resident of a different state than each defendant. Residency is determined by domicile which is shown by a physical presence in a state and an intent to remain there.

Here, Dave is domiciled and owns a house in California. Although it is on the state line, the facts state that it is in fact in California, thus he is a California resident for the purposes of diversity. Petra is domiciled in Nevada.

Thus, there is complete diversity between the plaintiff and the defendant.

Amount in Controversy

The amount in controversy must exceed $75,000. This only requires that it be legally plausible that the defendant could receive those damages based on the injury. The actual amount of damages awarded has no bearing on whether the amount in controversy is satisfied for purposes of diversity jurisdiction.

Here, the amount in controversy is $100,000. There appears to be evidence supporting the legal plausibility of this claim, given that Petra's gardener stated that it would cause $100,000 to replace to retaining wall when called by Dave on the stand. Given that there is no reason to doubt that there is a legal plausibility of Petra's claim, the amount in controversy is also satisfied.

CONCLUSION

The court properly denied Dave's motion to dismiss based on lack of subject matter jurisdiction, as the federal court had diversity jurisdiction over the claim.

QUESTION 4: SELECTED ANSWER B

1A. PETRA'S TESTIMONY

Relevance

All evidence must be logically and legally relevant to be admissible. Evidence is logically relevant if it has any tendency to prove or disprove a material fact. Otherwise relevant evidence may be excluded for lack of legal relevance, where its probative value is substantially outweighed by the danger of unfair prejudice, waste of time, or confusing the jury. Here, Petra's testimony that she had complained to Dave several times over the prior decade that the water tank had leaked and that he had not done anything is relevant because it makes it more likely that Dave was negligent in not repairing the water tank. Therefore, the testimony is relevant.

Personal Knowledge

A witness must have personal knowledge regarding what the witness wishes to testify to. Here, Petra has personal knowledge because she is testifying to what she has observed and commented on to her neighbor, Dave. Thus she has sufficient personal knowledge.

Hearsay

Hearsay is an out of court statement made by a declarant, and offered in court to prove the truth of the matter asserted. Generally, hearsay is inadmissible, unless it is not offered for its truth, qualifies for an exemption, or an exception. Here, Petra is offering evidence that she had "complained" to Dave several times over the prior decade. If offered to show the truth of the matter asserted, namely that she did in fact complain to Dave, then the testimony is hearsay and will not be admissible, unless an exception applies.

Non-Hearsay Purpose - Notice

An otherwise hearsay statement may qualify as non-hearsay if offered to show the effect on the listener or the declarant's state of mind. Here, Petra will argue that she is offered the evidence to show the effect on Dave, namely that he had notice that the water tank had been leaking. As such, the evidence is admissible as non-hearsay to show the effect on the listener.

Admission

An admission constitutes an exemption to the hearsay rule and is considered non-hearsay. An admission is a statement by a party and offered in court against that party. Here, Petra may argue that the statement is an admission. However, Petra is the declarant and the evidence is not being offered against her. Therefore, the statement would not constitute an admission.

Conclusion

Petra's testimony is likely admissible as non-hearsay to show the effect on the listener.

1B. WALT'S TESTIMONY

Relevance

Walt's testimony is relevant because it has a tendency to prove that Dave's water tank did in fact fall over, and that it had previously leaked. Therefore, the testimony is relevant.

Personal Knowledge

Walt has personal knowledge because he is testifying to what Dave told him. Therefore, he has sufficient personal knowledge.

Public Policy - Subsequent Remedial Measure

As public policy, generally evidence of subsequent remedial measures are not permitted, except to show ownership or where the defendant has claimed that there was no way to make something more safe. Here, Petra would like to admit into evidence Dave's instruction for Walt to caulk all the joints so that it wouldn't leak, which is likely evidence of a subsequent remedial measure showing that it did in fact leak before. There is no dispute that Dave owned the water tank. Additionally, there is no evidence that Dave has testified or asserted that the water tank was as safe as possible. As such, none of the exception would apply and Walt's testimony that Dave instructed him to caulk the joints would be inadmissible for public policy reasons.

Hearsay

This testimony constitutes hearsay because Walt is testifying to what Dave told him when he was repairing the water tank. The testimony is likely offered to show that Dave did in fact instruct Walt to caulk all the joints, so therefore, unless an exemption or exception applies, this testimony will be inadmissible.

Admission

An admission constitutes an exemption to the hearsay rule and is considered non-hearsay. An admission is a statement by a party and offered in court against that party. Here, Walt is testifying as to what Dave - the declarant and defendant - said outside of court. Petra is offering the statement against Dave in court. Thus, the statement would be permitted as an admission of a party opponent.

Conclusion

While the statement qualifies as an admission, since it constitutes a subsequent remedial measure, the court would not admit Walt's testimony.

1C. GWEN'S TESTIMONY

Retaining Wall Was Old

Relevance

Gwen's testimony that the retaining wall was old is relevant because it has a tendency to prove that the wall was not only a couple years old, and that it is possible that the water tank was not the reason for the wall failing. Thus, the evidence is relevant.

Personal Knowledge

Gwen has personal knowledge because she is testifying as to what she told Petra, and what she observed when she was at Petra's house. Therefore, Gwen has sufficient personal knowledge.

Lay Opinion

A lay witness is permitted to give opinion testimony which is helpful to the trier of fact, and not based on scientific or specialized knowledge. Here, Gwen seeks to testify that she noted that the retaining wall was old. This is helpful to the trier of fact because it would help the trier determine whether the falling of the water tank was the cause in fact of the failure of the retaining wall. Additionally, an observation that a wall is old, while an opinion, is not based on scientific or specialized knowledge because it is simply an observation that any person could make. As such, Gwen will be permitted to testify that the wall was old.

Retaining Wall Structural Cracks

Relevance

Gwen's testimony regarding the retaining wall having structural cracks is relevant because it has a tendency to prove that the wall did not fail simply because the water tank fell on it. Therefore, the testimony is relevant.

Personal Knowledge

As discussed above, Gwen has personal knowledge because she is testifying to what she observed and what she told Petra. Therefore, she has sufficient personal knowledge.

Lay Opinion Testimony

A lay witness may give opinion testimony where it is helpful to the trier of fact, and not based on scientific or specialized knowledge. Here, the testimony that the wall had "structural cracks" that could cause it to fall and that it would cost $100,000 to replace, is not something a lay witness would be permitted to testify to because whether a retaining wall has structural cracks, and the amount to replace is based on specialized knowledge. Therefore, for this testimony to be admissible, Gwen would need to be qualified as an expert witness.

Expert Witness Testimony

To qualify expert witnesses, the federal courts use the *Daubert* standard, which requires that the expert have sufficient expertise and training, rely on commonly used treatises and materials relied on in that field, and that the expert's opinion is based on such knowledge. Here, Gwen is a gardener and therefore, it is unlikely that Gwen would be qualified as an expert to render an opinion on structural integrity of retaining walls and the cost to replace them because that is outside of the knowledge and purview of a gardener. While a gardener may have a working knowledge of retaining walls based working around them or with them, it is unlikely such experience would qualify Gwen as an expert witness. Thus, Gwen would not be qualified as an expert witness.

Conclusion

Since Gwen does not qualify as an expert witness, she will not be permitted to testify as to her opinion that the retaining wall had structural cracks and would cost $100,000 to replace. As such, Gwen's testimony regarding those issues would be inadmissible.

1D. GWEN'S TESTIMONY ABOUT PETRA'S REPLY

Relevance

Gwen's testimony that the Petra said the retaining wall was 30 years old is relevant because it has a tendency to prove that the wall was not only a few years old, as Gwen had testified, and that it was susceptible to damage because it was old. Thus, the testimony is relevant.

Personal Knowledge

Gwen has personal knowledge because she is testifying as to what Petra said to her. Therefore, Gwen has sufficient personal knowledge.

Hearsay

Gwen seeks to testify as to what Petra told her, which is hearsay, and is likely offered to prove the truth of the matter asserted, namely that the wall is in fact old. Thus, to be admissible, the statement must qualify for an exemption or an exception.

Admission

Here, the statement was made by Petra, a party, and is being offered against Petra in court. Therefore, the statement qualifies as an admission of a party opponent and will be admissible substantively.

Impeachment - Prior Inconsistent Statement

A party may be impeached with a prior inconsistent statement. Here, Petra had testified in court that the wall was only a couple of years old. Thus, Gwen's testimony that Petra told her it was at least 30 years old, is admissible as a prior inconsistent statement to impeach Petra's testimony.

Conclusion

Gwen's testimony regarding Petra's statement will be admitted to impeach and substantively to prove the truth of the matter asserted.

2. DAVE'S MOTION TO DISMISS BASED ON LACK OF SUBJECT MATTER JURISDICTION

The issue is whether the court properly denied Dave's motion to dismiss based on lack of subject matter jurisdiction. A motion to dismiss for lack of subject matter jurisdiction should be granted where the court lacks subject matter jurisdiction. A federal court must have subject matter jurisdiction to hear a case. Federal courts are courts of limited subject matter jurisdiction, and are authorized to hear federal questions, or diversity of citizenship cases. A federal question is a cause of action which arises under federal law. A diversity of citizenship case is where the plaintiff is completely diverse from all defendants, and the amount of controversy exceeds $75,000, exclusive of interests and costs. An individual's citizenship for diversity purposes is based on their domicile, or where the individual is physically present with the subjective intent to remain.

Timing

A motion to dismiss for lack of subject matter jurisdiction can be brought at any time, including for the first time on appeal. Here, Dave brought the motion after the jury rendered the verdict. While a claim of lack of subject matter jurisdiction is not barred, the proper remedy would be to base the appeal on lack of subject matter jurisdiction, since the jury had already rendered the verdict. However, as discussed below, the court had proper subject matter jurisdiction, so the motion to dismiss was properly denied, regardless.

Federal Question

Here, the claim is for negligence, so there is no federal question.

Diversity of Citizenship

As noted, all plaintiffs must be diverse, or of different domiciles, from all defendants. Here, Petra is domiciled in Nevada. Dave is domiciled in California. Therefore, Petra and Dave are of different domiciles and are completely diverse.

Amount in Controversy

The amount in controversy must exceed $75,000, exclusive of interests and costs, based on the plaintiff's well-pleaded complaint. Here, Petra has plead $100,000 in damages, which exceeds $75,000. It does not affect the amount in controversy where the recovery is less than $75,000, as long as the amount was plead in good faith. Therefore, the amount in controversy element has been met.

Since Petra and Dave are completely diverse, and the amount in controversy is met, the action qualifies for diversity of citizenship jurisdiction. As such, the federal court had proper subject matter jurisdiction and the court properly denied Dave's motion to dismiss based on lack of subject matter jurisdiction.

The State Bar of California

COMMITTEE OF BAR EXAMINERS
OFFICE OF ADMISSIONS

CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS
February 2020

This publication contains the five essay questions from the February 2020 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Torts
2.	Professional Responsibility
3.	Contracts
4.	Evidence
5.	Business Associations

QUESTION 4

Des is on trial in a California superior court for possession with intent to distribute hundreds of pounds of cocaine from January through October in 2019.

At trial the prosecution called Carol, a severed co-defendant, who had pleaded guilty to reduced charges in exchange for testifying against Des. Carol testified that through 2019, she had acted as a "distributor" for a ring of cocaine dealers. In that role, Carol had sold hundreds of pounds of cocaine to many people, including Des, during the period of the charged crime. Carol further testified that all her customers agreed to sell cocaine. The prosecutor asked Carol to identify a notebook, which Carol testified was hers, and which she used to keep track of income and expenses related to the cocaine sales as each occurred. Carol testified that on pages 1–2 of the notebook were notations of sales of cocaine from January through April of 2019 by Carol to various people other than Des. She further testified that on pages 3–4 were notations of sales from May through October in 2019 to various people, including Des. The court admitted pages 1–4 into evidence.

On cross-examination, Des's attorney asked Carol if the prosecutor, Pete, had offered her a reduced sentence in exchange for her testimony. Carol answered, "No." Des's attorney then called Carol's attorney, Abe, to the stand and asked him the same question. Pete asserted attorney-client privilege. The court denied the assertion of privilege, and Abe testified that the reduction of charges against Carol had been in exchange for Carol agreeing to testify against Des.

Des took the stand and denied the charge. On cross-examination, Pete asked Des if it was true that eleven years earlier he had been convicted of forgery, a felony. Des answered, "Yes."

1. Assuming all credible objections were timely made, did the court properly admit:

    a. Pages 1–4 of the notes? Discuss.

    b. Evidence of Des's conviction for forgery? Discuss.

2. Did the court properly deny the assertion of attorney-client privilege? Discuss.

Answer according to California law.

QUESTION 4: SELECTED ANSWER A

To be admissible, all evidence must first be relevant. Evidence is relevant if it has any tendency to make a fact of consequence, which is in dispute, more or less likely.

Furthermore, the court has discretion to exclude evidence under CEC 352 if the unfair prejudice, confusion, or waste of time it would create, substantially outweighs its probative value.

In California, Prop 8 amended the California Constitution and makes all relevant evidence admissible in criminal cases. Prop 8 did not change, however, the rules of evidence relating to: (1) the U.S. Constitution; (2) hearsay; (3) character evidence; (4) the secondary evidence rule; and (5) CEC 352.

(1(a))

Relevance

The threshold question is whether this evidence is relevant. These pages are relevant because they show that Carol has knowledge of the ring of cocaine dealers, Des was involved in this ring and purchased cocaine from her. It also shows that Carol's oral testimony is more likely to be true, because it supports it.

Authentication

Nontestimonial evidence must be authenticated. Authentication requires the evidence's proponent to adduce sufficient evidence for the trier of fact to conclude that the nontestimonial evidence is what it purports to be.

These pages are nontestimonial evidence and thus, for them to be admitted, they have to be authenticated.

Here, Carol testified that the notebook the prosecutor showed her was her notebook and that it was the notebook she used to keep track of her cocaine business. This is sufficient evidence for the trier of fact to conclude that this notebook is, in fact, Carol's record of her cocaine sales and, thus, it has been properly authenticated.

Hearsay

Hearsay is an out-of-court statement offered for the truth of the matter asserted. Hearsay is inadmissible unless a hearsay exception applies. It does not matter whether a person is currently testifying at trial; what matters is whether the statement was made in or out of court. Thus if a witness seeks to testify about something she said earlier, out-of-court, for the purposes of proving the truth of that statement, it is hearsay.

Here, Carol's notations of sales in pp 1–4 of the notebook are hearsay. They are out-of-court statements: Carol wrote them in the book out-of-court and now the prosecutor is seeking to introduce them in-court. Moreover, the prosecution is introducing them to show that Carol sold the amount of cocaine to the people as she described in the notations. Thus, they are being offered for the truth of the matter asserted.

These statements, therefore, must fall within a hearsay exception to be admissible.

Statement of a Co-Conspirator

Des is accused of possessing cocaine with the intent to distribute from January through October 2019. In pp 1–2 of Carol's notebook, she notes sales to people other than Des from January through April 2019. In pp 3–4 of the other notebook, she makes notes of sales from May to October 2019, including to Des.

Statements made by a co-conspirator in furtherance of the conspiracy, offered against the opposing party, are exceptions to hearsay. The proponent of the hearsay must show by a preponderance of the evidence that there was a conspiracy between the hearsay declarant and the opposing party and that the statements offered were made in furtherance of that conspiracy. The hearsay itself can be used to show the conspiracy. (A conspiracy is an agreement between at least two people to commit a crime and at least one overt act in furtherance of that intent.)

Here, the notations in Carol's notebook are in furtherance of the conspiracy between her and the ring of cocaine dealers, including Des, to distribute drugs. She did not make these statements when she was cooperating with the police, but rather beforehand when she was working to further the conspiracy's goal of cocaine distribution.

The prosecution will be able to show sufficient evidence to establish that between May and October 2019, Des and Carol were co-conspirators. Carol's testimony about the ring of cocaine dealers, Des's involvement in the scheme, and everyone's agreement to sell cocaine, as well as the notes on pp 3–4 show that the two of them were part of a conspiracy to distribute cocaine. Thus, the notes on pp 3–4 fall within this co-conspirator exception to hearsay.

It is a closer call whether the notes on pp 1–2, which cover the time period from January to April 2019, fall within this exception. They do not mention Des and so cannot be used to show a conspiracy standing alone. However, Carol testified that she sold cocaine to many people including Des "during the period of the charged crime," i.e. starting in January 2019. This testimony may suffice to show a conspiracy existed between Des and Carol beginning in January, 2019. On the other hand, Des can argue that the fact Carol did not record any sale of drugs to him until May shows that they were not co-conspirators until that time (if at all), and thus this is a not a statement made by a co-conspirator falling within an exception to hearsay. Absent other evidence showing that Des entered into a conspiracy with Carol prior to April 2019, or Carol's explicit testimony about when she sold cocaine to Des or when he agreed to sell cocaine, the statements in pp 1–2 were not made in furtherance of the conspiracy between Carol and Des and therefore are inadmissible hearsay.

Business Records

These notes may also fall within another hearsay exception: business records.

Business records are excepted from the prohibition against hearsay. A business record is: (1) a record of facts, events, and/or activities of the business; (2) regularly recorded as part of the business's ordinary course; (3) by an employee with personal knowledge, or by an employee who learned of the information by an employee who had a duty to report this information; (4) is certified the business; and (5) there are no indications of untrustworthiness.

Arguably, Carol recorded the notations in her notebook as part of her business: selling cocaine. She did so based on personal knowledge and as a regular part of her business activities.

This exception will probably not work, however, because there is no indication the notebook was certified as accurate and there are indications of untrustworthiness: it is a record of an illegal enterprise and thus there is a strong incentive not to accurately record everything incriminating.

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In sum, pp 3–4 are not hearsay because they fall within an exception but pp 1–2 most likely are inadmissible hearsay not falling within an exception.

CEC 352

Finally, the court must decide if the unfair prejudice, confusion, or waste of time caused by this evidence substantially outweighs its probative value.

With respect to pp 3–4, this evidence is highly probative of Des's involvement in this ring of cocaine dealers and therefore intent to distribute, and thus the prejudice arising out of it is not even unfairly prejudicial, let alone substantially outweighed by unfair prejudice. All evidence is prejudicial to some degree, but just because evidence shows that a defendant is more likely to have committed the charged crime does not make it *unfairly* prejudicial.

If pp 1–2 do fall within the co-conspirator exception, they should probably have been excluded as unfairly prejudicial. They are about sales to people other than Des and thus they may cause the jury to believe unfairly that this evidence shows that Des distributed more cocaine that he bought from Carol than he actually did. Furthermore, it may cause confusion about the conduct of these other dealers, who are not even defendants in this case, and Des's case.

Thus, the court correctly admitted pp 3–4 of the notes, but erred in admitting pp 1–2.

(1(b))

Relevance

Des's conviction was for forgery. Forgery is a crime of moral turpitude because it is a crime reflecting on the dishonesty of the defendant. Here, Des is being charged with intent to distribute cocaine. He has also testified in his own defense.

Thus, this evidence is relevant for two purposes. First, it shows that he is a convicted criminal and it thus has a tendency to show that he may have been more likely to have convicted another crime. Second, this evidence is relevant because it tends to show that Des is untruthful and, because he is testifying, his truthfulness is relevant.

This first potential relevance is impermissible, as discussed below. But the threshold question of whether this evidence is relevant is satisfied.

Character Evidence

Character evidence is evidence of a person's character that is being used to show that the defendant acted in conformity with this character in the present case. If the conviction forgery is admitted for the purposes of showing that Des committed this crime because he acted in conformity with his "criminal tendencies," then it is character evidence.

In a criminal case, a prosecutor generally cannot introduce evidence of a defendant's character unless the defendant opens the door. California recognizes several exceptions: (1) in a sexual assault/child molestation case; (2) in a domestic violence case; (3) in an elder abuse case; and (4) where the defendant has put on evidence of the victim's violent character, the prosecution can put on evidence of the defendant's violent character.

Here, Des has not opened the door to character evidence because he has not testified that he has any particular character trait, let alone one for being law-abiding. Furthermore, none of the exceptions apply.

Thus, this evidence is not admissible for the purposes of showing that, because Des was previously convicted of forgery, it is more likely he committed this crime.

Impeachment Evidence

The second purpose for which this evidence may be admitted, however, is to show that Des is a liar.

If someone testifies, then the opposing party can impeach the witness's testimony and show there is a reason for the jury not to trust his testimony.

Impeachment by conviction is permissible under certain circumstances. First, a party may introduce evidence of a prior felony conviction for a crime of moral turpitude. Additionally,

under Prop 8, the prosecutor may also introduce evidence of a prior misdemeanor conviction for a crime of moral turpitude in a criminal case. Unlike under the Federal Rules of Evidence, California does not impose a specific time limit for determining remoteness.

Here, Des testified and thus exposed himself to impeachment. The prosecutor then was able to introduce evidence of Des's prior felony conviction for forgery, which is a crime of moral turpitude, by asking Des whether he had committed the crime. (The prosecutor could have introduced extrinsic evidence instead of asking Des, but did not have to). This was proper impeachment evidence.

In addition, this was also proper impeachment via evidence of a prior bad act. In a criminal case, a prosecutor can ask a defendant if he previously committed a prior bad act in the past, that reflected the defendant's moral turpitude, if the prosecutor has a good faith basis for doing so. Prop 8 also allows the prosecutor to admit extrinsic evidence of this prior bad act. Here, Des's conviction for forgery is evidence of his prior bad act that reflects his moral turpitude, and thus was improper impeachment evidence under this rule as well.

CEC 352

Thus, this evidence was admissible to impeach Des and show that he was not a credible witness. The final gatekeeping question for the court was whether the unfair prejudice of this evidence substantially outweighed its probative value.

The age of the conviction–eleven years–weighs against admission because it is remote. However, it is quite probative of Des's credibility and he is denying the charge on the stand.

Thus, on balance, the unfair prejudice does not substantially outweigh its probative value and the court properly admitted the evidence.

(2)

Attorney-client privilege protects confidential discussions between a client and her attorney for the purposes of providing the client legal advice. If the privilege applies, absent waiver by the client, the attorney cannot reveal communications protected by this privilege. There are some exceptions to the privilege: (1) the client was using the attorney's services as part of criminal or fraudulent activity; (2) the client was in a joint representation with another client and the two clients are now suing each other over the subject matter of the joint representation; (3) the client and attorney are involved in a malpractice suit against one another about the representation; and (4) the attorney reasonably believes that the client is going to commit a criminal act resulting in death or serious bodily injury and the attorney could not talk the client out of it and told the client that she would reveal this privileged communication.

Here, Des's attorney asked Carol if the prosecutor had offered her a reduced sentence in exchange for her testimony. Carol said no (which was a lie).

Abe, Carol's attorney, was required to testify about the reduction of charges and the court

denied his assertion of attorney-client privilege. This reduction was offered by Pete the prosecutor. Pete's offer to reduce the proposed sentence in exchange for her testimony and Carol's acceptance of the deal would not be covered by the attorney-client privilege.

First, Pete is not Abe's client or an agent of Carol, so his statement does not fall within the privilege. Second, Carol's response was presumably communicated to Pete because the deal was reached. Thus her acceptance was not confidential or for seeking the provision of legal services. Thus, her acceptance of Pete's offer is not protected by the privilege either. In sum, the attorney-client privilege does not protect the fact that Carol and Pete entered into an agreement.

Carol's discussions with Abe in confidence about whether to accept this deal would fall within this privilege, but Abe was not required to testify about this. The question was whether Pete had offered Carol a reduced sentence and not about Carol and Abe's confidential discussions.

Thus, the court did not err in denying the assertion of attorney-client privilege.

QUESTION 4: SELECTED ANSWER B

1. Admission of Evidence

Relevance. As a starting point, all relevant evidence is admissible in a criminal trial, subject to certain exclusions and privileges. Relevant evidence is that which has a tendency to make any fact at issue in the case more or less likely to be true.

Authentication. For documentary evidence, in order to be admissible the party offering the evidence must make a showing that the document is authentic–that it is in fact what it purports to be.

Here, Carol's notes were properly authenticated by the prosecutor before they were offered into evidence. It appears the prosecutor showed Carol the notebook and inquired whether she recognized it; Carol testified that she did, and that it was her own notebook, thus establishing Carol's basis of knowledge for authenticating the notebook.

Prop 8. In criminal trials in California state court, the law known as Prop 8 acts as a victim's bill of rights, and provides that all relevant evidence shall be admitted, subject to certain restrictions and exclusions, including hearsay rules, constitutional principles, evidentiary exclusions in place before 1982, and any exclusions adopted after 1982 that were ratified by a 2/3 vote of the legislature. Absent an applicable exclusion under Prop 8, evidence that is relevant will be admitted.

a. Pages 1–4 of Carol's Notes

Relevance. Pages 1–2 of Carol's notes are arguably not relevant to Des, because, as we are told, they reflect records of cocaine sales by Carol to various people other than Des. The sales do fit the time period with which Des is charged, however, including January through April of 2019. And the standard of relevance is fairly low. Does the fact that Carol sold drugs to many other people in a pattern that likely fits the later period, in which her records do reflect sales to Des, make any aspect of her narrative more probable? A jury could logically infer that laying a foundation of Carol's earlier sales makes it more likely that the pattern continued into the period in which she has records that include Des. By the same token, Des could well argue that because Carol's notes do not reflect any sales to him during this period, that there were none. (This strategy likely wouldn't do much good for Des, as it would tacitly acknowledge the potential credibility of the later sales records.) On balance, these records likely have some minimal relevance, although their probative value is not particularly strong, and will be subject to balancing under Section 352, as discussed below.

Pages 3–4 of the notebook are more clearly relevant to Des's alleged criminal conduct. They purport to reflect cocaine sales by Carol to him within the charged timeframe, and the sales from Carol to Des would show his possession of the cocaine. Carol's testimony further provided that those to whom she sold possessed the cocaine with intent to sell it themselves. Thus,

pages 3–4 of the records would be highly relevant evidence, and would be important to corroborate the testimony of the cooperating witness, Carol.

Hearsay. The notebook, however, remains subject to a hearsay objection. Hearsay is an out of court statement offered to prove the truth of the matter asserted. Here, the statements made in the notebook by the declarant, Carol, are offered as proof of what they purport to show–that Carol made cocaine sales in certain amounts and on certain dates to the defendant, Des. Thus, the statements are hearsay, and unless an exception applies, they will be excluded. As noted, the hearsay rules are an exception to Prop 8 and still apply.

Two primary hearsay exceptions are potentially applicable here. First, the statements may be deemed statements of a co-conspirator made during and in furtherance of a conspiracy. It bears mention that Des is not charged with the crime of conspiracy. That is no impediment to use of the evidentiary hearsay exception, however, so long as an adequate factual predicate for the exception is supplied. Here, Carol's testimony appears to have done so. She does not explicitly testify to an express agreement between the various retail drug dealers to whom she sold cocaine as a wholesaler. Therefore one could argue that no such agreement existed. More likely, however, a court could logically infer an implied conspiracy among the entire group, in which Carol acts as the hub of the conspiracy and the various retail dealers are the spokes. Courts have long acknowledged this type of hub and spoke conspiracy can exist, even when the individual spokes do not know each other directly and have their explicit understanding individually with the central hub, here Carol.

Were the statements during and in furtherance of the conspiracy? It appears that they were. Carol made the records to aid her in operating and keeping track of the business, and for the efficiency and effectiveness of the overall operation. Therefore they were likely "in furtherance" of the conspiracy's aims. And they reflect the time period for which Des is charged, and appear to have been contemporaneously made at the time of the events. For these reasons, if relevant, the pages are likely admissible as co-conspirator statements. As noted, the claim of relevance is stronger for pages 3–4, although the low standard of relevance may be met for pages 1–2 as well.

The pages could also potentially be admitted as records of regularly conducted business activity. This exception applies when records are made in the ordinary course of business, by one with personal knowledge, at our about the time of the recorded activity, and maintained by the business for a business purpose. Here, although Carol's business is unlawful, the requirements appear to be met here for the drug ledger, and therefore the records could properly be admitted as business records.

The records are likely not subject to exclusion under the Confrontation Clause of the Sixth Amendment. The records are not testimonial–they were not offered to law enforcement to assist them or in their effort to solve the crime–and hence they are not subject to exclusion and do not violate Des's right to confrontation.

The evidence is still subject to the overall balancing test that evidence can be excluded when the danger for unfair prejudice substantially outweighs its probative value. Here, the relevance

of pages 1–2 is slight, and potentially it's prejudicial to Des in that it paints Des as being part of a large drug organization. But not unfairly so. On balance, the evidence is likely still admissible as more probative than prejudicial.

Because the evidence is admissible, Prop 8 would not need to be reviewed here.

b. Des's Prior Forgery Conviction

Under the CEC, Des's prior conviction for forgery was likely properly admitted. Forgery is likely considered a crime of dishonesty or moral turpitude. Des has placed his credibility at issue by testifying in the case, and therefore his credibility is something jury will need to assess. Admission of a prior conviction in this way, when the prior conviction is for a crime of moral turpitude in California, will likely be admitted, subject to balancing its probative value against its danger of unfair prejudice.

Under the FRE, a question would arise as to whether the conviction is too old to be admitted, given that it is more than ten years old. The time period would run from Des's release from any prison term he served. However, there is no similar time limitation under the CEC. The purpose of the federal rule, however, does point to a potential issue that the probative value of a prior conviction is slight after so much time has passed. Thus, a court could potentially decide to exclude the prior conviction if it found that the danger that the jury would give undue weight to the prior conviction–in effect, branding Des as a convicted criminal and not paying careful enough attention to the more direct evidence at hand. Indeed, the evidence is relevant for the limited purpose of Des's truthfulness, and not his propensity to engage in criminal conduct generally. The danger of the propensity inference would provide a sound basis for excluding the conviction here. Any such ruling, however, would likely be reviewed for abuse of discretion, and this is a close enough call that the judge likely did not abuse her discretion in admitting the evidence.

The balancing test discussed above is one of the recognized exceptions to Prop 8, so that would not become an issue in this circumstance either.

2. Attorney-Client Privilege

The attorney-client privilege is owned by the client, and protects from disclosure confidential communications between an attorney and a client made for the purpose of seeking or providing legal advice, and that are kept confidential (i.e., not disclosed to third parties).

Here, although Abe and his client Carol have likely had many privileged conversations, the communications between Carol and the prosecutor, or between Carol, Abe and the prosecutor, are not privileged, because the presence of the third party (the prosecutor) destroys the confidential nature of the communications.

Here, even if the conversation were privileged, the "crime/fraud" exception" may well apply. It appears that Carol has given testimony that is false, and that the attorney would know is false, by stating that the prosecutor did not offer her a reduced sentence in exchange for testifying

against Des. It is possible, however, that as a result of privileged conversations with Carol, the attorney believes that Carol misunderstood this state of affairs, but under all the circumstances here that seems unlikely.

The duty of attorney-client confidentiality duty is broader than the attorney-client privilege. It is possible that if Abe had raised his professional duty of confidentiality to his client as an objection, and refused to testify on that basis, that the court would have viewed the matter differently. In California, Abe would not have been permitted to reveal client confidences unless the matter presented an imminent danger of serious bodily harm or death, circumstances not present here. But again, the conversations with the prosecutor are not privileged, and for the same reason not confidential–they took place with a third party present, and therefore it was likely Abe's obligation to testify truthfully to them after he had made the best valid objections he could. It does still raise the advocate-witness problem–by putting Abe in the position of being a witness and a lawyer in the same case–and unfortunately puts Abe in the difficult position of having to truthfully answer a question that will potentially be damaging to his client. For all these reasons, Abe should seek to withdraw from the representation, although he should do so in the way that is likely to be the least damaging to Carol's interests.

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ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2021 CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the February 2021 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Evidence
2.	Contracts/Remedies
3.	Community Property
4.	Professional Responsibility

QUESTION 1

On January 15, Paul fell down the stairwell of Dell's Department Store ("Dell"). Paul sued Dell for personal injuries, alleging he fell because one of the steps was broken. The following occurred at a jury trial in the California Superior Court while Dell's manager, Mark, was being examined by Dell's attorney:

QUESTION: Where were you when Paul fell down the stairs?

ANSWER: I was standing nearby with my back to the stairs talking to Carol, a store customer, when I heard the noise of the fall.

(1) QUESTION: Has Paul sued Dell before?

ANSWER: Yes, five times that I personally know about.

(2) QUESTION: No one saw the accident. Right?

ANSWER: That's right. A thorough investigation was unable to find anyone who saw Paul fall on the stairs.

Mark was then cross-examined by Paul's attorney as follows:

(3) QUESTION: Isn't it true that you used to be employed by Paul as a cashier in his grocery store and that he fired you for stealing money from the cash register?

ANSWER: That is what he claimed.

(4) QUESTION: The stairs were repaired the day after Paul fell. Weren't they?

ANSWER: Yes.

(5) QUESTION: Didn't Carol, the store customer, exclaim at the time of the accident: "Oh no! A man just fell on that broken step"?

ANSWER: So, what?

QUESTION: Is this the report that Dell's insurance company prepared following an investigation of the accident?

ANSWER: Yes. That is the report the insurance company gave me. They always prepare a report in case we get sued.

Paul's attorney then moved to enter into evidence the insurance company's report. The report states: "Steps on the stairs at the store are in very poor condition."

A. What objections could Paul's attorney and Dell's attorney reasonably make to the questions or answers to Mark's testimony numbered **(1)** to **(5)** above, and how should the court rule on each objection? Discuss.

B. What objections could Dell's attorney reasonably make to the motion to enter the insurance company's report into evidence and how should the court rule? Discuss.

Answer according to California law.

QUESTION 1: SELECTED ANSWER A

Relevance

Under California law, evidence is admissible if it is relevant and competent. Evidence is relevant if it pertains to an element of a claim or defense and is probative of that element. Probative means that the evidence has some tendency to prove or disprove a particular element of a claim or defense. Evidence is competent if it is not otherwise barred by some exclusionary rule. A court may nonetheless exclude otherwise relevant and competent evidence if there is a risk of prejudice to the party against which the evidence is being offered and the prejudice substantially outweighs the evidence's probative value.

Question 1

The question is relevant in that it tends to prove that Paul has a prior motive for suing Dell other than the cause of his personal injury. Moreover, Mark is asserting that he has personal knowledge of the prior suits, which means that this testimony is competent, because a witness must generally have personal knowledge of the matters to which they are testifying.

Character Evidence

Paul's attorney should object to this question on the grounds that it is inadmissible character evidence. Character evidence is evidence that tends to establish a particular trait of one party. Character evidence may take the form of reputation testimony about the party's reputation in the community, the testifying witness's opinion of the party's

character, or prior acts of the party. Generally, character evidence is inadmissible unless character is directly in issue. Here, the question appears to be establishing that Paul's prior suits against Dell were frivolous or lacked some sort of sound basis. Moreover, because this is a personal injury tort claim, Paul's character is not directly in evidence. Therefore, under the general rule, the question should be objected to on the basis that it is improper character evidence.

There are several exceptions to the general rule against the introduction of character evidence. These exceptions include (1) establishing motive; (2) establishing the identity of a party; (3) establishing lack of mistake; (4) establishing intent; or (5) demonstrating a common plan or scheme. Here, Dell's attorney should argue against the objection that the question establishes Paul's motive for suing Dell; that it also establishes Paul's intent to sue Dell, thereby undercutting the argument that Dell was negligent in maintaining its stairs; and that Paul's previous suits establish a common plan or scheme against Dell through the use of multiple, potentially frivolous suits. It appears that potentially multiple exceptions to the general rule against character evidence apply to this question, and the court should therefore overrule the objection that this is impermissible character evidence.

The court should also weigh in favor of admitting the evidence because its probative value tends to outweigh its prejudicial conduct. The evidence is clearly prejudicial to Paul, but the fact that Paul has sued this particular store five times in the past is highly probative of Paul's intent to sue the store and perhaps contributory negligence or recklessness. Therefore, the court should overrule this particular objection.

Question 2

Paul's attorney should object to this question on the grounds that it is irrelevant and leading. Paul's attorney should also object to the part of the answer that affirms that "no one" saw the fall actually happen.

Relevance

As noted above, evidence must be relevant to be admissible. Here, while Paul's attorney could argue that the question is not relevant, he likely will fail on this point. The fact that no one else saw the fall happen is not relevant to the issues in a personal tort claim. Dell's attorney, however, should argue that this testimony is relevant because it tends to undercut the validity of Paul's claim, i.e. that there are no corroborating witnesses to the fall.

Leading Questions

An attorney directly examining a witness may not ask leading questions unless the witness is hostile. A leading question tends to assume its answer in the form of the question. Here, the question assumes that no one saw the fall happen and then asks the witness to confirm this. Moreover, Mark is being directly examined by Dell's attorney and is clearly not hostile to Dell's attorney. Therefore, the form of the question was improper. The proper remedy here would be to strike the leading question for Dell's attorney to rephrase the question in a way that is not leading.

Lack of Personal Knowledge

Paul's attorney should object to the portion of the answer that asserts that "no one" saw the fall actually happen. In order for a witness's testimony to be admissible, he must

have personal knowledge of the matter being testified to. Here, it is likely impossible that Mark could identify all possible bystanders in a department store. Therefore, this portion of the answer is outside the scope of Mark's knowledge and therefore should be inadmissible. The proper remedy here would be to strike the offending portion of the statement.

The remaining portion of the statement is admissible, because Mark has personal knowledge of the investigation and can attest that the persons interviewed in the investigation.

Question 3

Dell's attorney should object to this question because it improperly references the consequences of a prior bad act by Mark.

The question is relevant because it tends to undermine Mark's credibility for truthfulness and a possible motive against Paul. The court should not exclude the testimony under the normal balancing test because Mark is a key witness and his truthfulness is probative of the validity of the rest of his testimony.

As noted above, character evidence in the form of prior bad acts is generally inadmissible. A witness's credibility may be impeached, however, by an attorney asking a good-faith question about a prior bad act if the act is probative of the witness's truthfulness. Extrinsic evidence of the prior bad act is not admissible, and the attorney may not reference any consequences of the prior bad act. The act in question here is theft, which is probative of truthfulness. Paul's attorney likely has sufficient grounds to ask the question in good faith, because Paul is his client and likely mentioned Mark's

firing to the attorney. The form of the question, however, is improper, because the attorney references the fact that Mark was fired for stealing from Paul. Dell's attorney should object, and the question should be stricken. Paul's attorney may, however, rephrase the question to remove the reference to the consequence.

As noted above, the form of the question here is not objectionable because Paul's attorney is cross-examining a witness for the opposing party. Therefore, a leading question is permissible.

Answer to Question 3

At issue in Mark's answer is whether his statement constitutes hearsay. Hearsay is an out of court statement that is offered as proof of the matter asserted. Here, Mark is repeating a statement made by Paul ("That's what he says."). The statement is being offered as proof of the matter asserted because the question is whether Mark stole money from the cash register. Therefore, the statement is hearsay under the general rule.

A hearsay statement may be nonetheless admitted under one of the exceptions to the hearsay rule. An admission by a party-opponent is admissible as an exception to the hearsay rule in California. Here, Paul is an opposing party and therefore his statement may be admitted under this exception to the hearsay rule.

Question 4

Dell's attorney should object that this question is impermissible because it includes subsequent remedial measures.

The evidence here is relevant because it tends to show that the stairs were, in fact,

broken, thereby establishing a breach of duty by Dell.

While nonetheless relevant, public policy excludes evidence of subsequent remedial measures, except in cases of products liability. Here, there is no products liability question involved, and the question falls squarely within the subsequent remedial measures rule. Therefore, the question should be objected to and stricken from the record.

Question 5

Hearsay Objection

Dell's attorney should object to this question because it is clearly hearsay. The statement by Carol is an out of court statement and it is being offered as proof that Paul fell and that the stairs were broken. Therefore, under the general hearsay rule, the testimony is not admissible. Note that the statement is relevant because it is probative of both breach (the stairs are broken) and causation (Paul fell down the stairs).

Paul's attorney could potentially argue that the statement constitutes an excited utterance and is therefore admissible as a hearsay exception. An excited utterance is one that is made by a person who is still under the stress of an exciting event and for which there is no time to reflect on the statement. Here, seeing a person fall down broken stairs likely qualifies as a startling event and the statement was made contemporaneously with the event in question. Therefore, the question and its answer are likely proper under this exception to the general rule against hearsay.

Note that Paul's attorney cannot successfully argue that the statement is a present sense impression. In California, a present sense impression is only admissible when

the hearsay declarant makes a statement about her actions while she is performing the act. Here, there is no action by the hearsay declarant and therefore this exception does not apply.

Lay Opinion Objection

Paul's attorney could object to the answer in the question because it constitutes a lay opinion that goes to one of the ultimate issues in the case (whether there was a breach of duty because of the broken stairs). In California, a lay witness may testify to her opinion as to sensory matters, speed of an automobile, whether a person is drunk or insane, or other matters within her personal knowledge. Note that California also allows a lay witness to testify as to scientific or technical knowledge that the lay witness has. Here, it is likely within the lay witness's knowledge that the stairs are broken because Carol can observe that the stairs were broken. Therefore, this objection should likely be overruled.

Insurance Report

Dell's attorney should object that the insurance report is (1) privileged work product; (2) that it is hearsay; (3) that it is improper evidence of liability insurance; and *[sic]*

The first issue is whether the work product privilege would attach. The work product privilege is a qualified privilege that allow documents made in anticipation of litigation to be excluded from discovery and evidence. Here, the work product doctrine likely applies because an insurance company making a report likely anticipates that its insured will be sued because of an accident that happened on the store's premises. Moreover, Mark indicated that the report was prepared "in case we get sued." Paul's attorney could

argue here that the work product doctrine should not apply because there is substantial need for the document. This argument may succeed because the stairs were repaired shortly after the fall, and therefore Paul's attorney could not inspect them or have an expert inspect them.

The second objection would be that the document constitutes hearsay because it is an out of court statement being offered to prove that the stairs were in fact broken. This argument will fail because the report likely constitutes an exception to the hearsay rule known as the business records rule. Where a business normally keeps a particular type of record within the ordinary course of business and the record is made by a person with knowledge of the event and a business duty to record the event, the business record may be admitted under an exception to the hearsay rule. Here, the insurance company always prepares a report when there is an accident and the insurance company likely has a duty to keep such records for when it is required to issue liability payments. Therefore, the business records exception to this evidence applies and the report will not be excluded on the grounds that it is inadmissible hearsay.

Finally, Dell's attorney may attempt to argue that the report is inadmissible evidence of liability insurance. Generally, evidence of liability insurance is not admissible to prove guilt or ability to pay. Here, however, the report is not being offered to prove guilt. Instead, it is likely being offered to show the condition of the stairs at the time of the accident. Therefore, the liability insurance exclusionary rule likely does not apply.

The court should also balance the introduction of the report against unfair prejudice to Dell. While the report is prejudicial to Dell, it does not appear to be unfair to Dell.

Moreover, the insurance company likely has an interest in accurately representing the material in its reports. Therefore, the balancing test weighs admission.

The court may consider excluding the evidence on the grounds that it is protected work product, but should likely rule for its admission on the ground that there is substantial need for the report.

QUESTION 1: SELECTED ANSWER B

Under Proposition 8 of the California Constitution (Prop 8), all relevant evidence is admissible in a criminal trial. Prop 8 makes an exception for California Rules of Evidence Code Section 352, which prohibits the introduction of evidence whose relevance is substantially outweighed by the risk of unfair prejudice, confusion of the issues, or misleading the jury. As this is a civil case, Prop 8 will not apply.

A.1. Prior suits

Logical relevance

To be admissible in CA, evidence must be relevant to an issue in dispute. Here, Paul's previous lawsuits against Dell are relevant because they show potential bad faith by Paul (P) in constantly bringing lawsuits against Dell (D). This fact makes it more likely that the lawsuit is without merit, and may have been brought for the purpose of harassing D.

Legal Relevance

In CA, evidence should be excluded if its relevance is substantially outweighed by the risk of undue prejudice. Here, the evidence is prejudicial in that it does not address the issue here - D's negligence for P's injuries, but instead seeks to introduce extraneous evidence about P's previous actions against D. This must be weighed against the relevant bias that this evidence introduces. In balance, it is likely that the court would find that the relevance would not be substantially outweighed by the prejudice of this statement.

Form of the question

Assumes facts not in evidence

The question states that Paul fell down the stairs. This has not been established in the fact pattern. If there is no basis for the statement, it is improper to include this fact in the question. However, if it has previously been established that P fell down the stairs, then the question is proper.

Personal knowledge

To testify, a witness must have personal knowledge about the facts being described.

Here, although Mark (M) may not have been involved in the previous lawsuits, he has testified that he is personally aware of five previous lawsuits. Therefore, this testimony is based on personal knowledge.

Character evidence

Character evidence is evidence about a party's previous actions or dispositions that are introduced to establish that the party acted in conformity with their purported character. Character evidence is generally inadmissible. Character evidence is inadmissible in civil cases unless a party's character is part of the cause of action.

This case, a negligence suit does not have a party's character at issue. The question and answer introduce evidence about P's previous actions in suing D. This does not relate to the suit, but instead relates to P's previous actions with respect to D. Therefore, it will be inadmissible character evidence, and should be excluded for substantive purposes.

Habit

Although character evidence is inadmissible, habit evidence is admissible. Habit evidence are a party's actions that always occur with respect to certain stimulus. Habit evidence may be introduced to show that a party acted in conformity with the habit.

Here, P's prior suits do not rise to the level of a habit. They are isolated instances of actions that P has taken, but they are not a reaction to a stimulus. Therefore, this evidence is not admissible as habit evidence.

Impeachment

Although character evidence may be inadmissible for substantive purposes, it may be used to impeach a party or witness. Bias may always be raised to impeach a party to a suit.

Here, P's previous suits show a pattern that may indicate bias against D. Therefore, this evidence is admissible to impeach P, but may not be used for substantive purposes.

A.2. No witnesses

Logical relevance

See rule above. This evidence is admissible because it shows that there were no witnesses to the accident. This makes it less likely that the accident occurred since no other person can corroborate P's version of events. Therefore, it is logically relevant.

Legal relevance

See rule above. As stated above, the statement is relevant. It is not unfairly prejudicial to P. P can contradict this testimony by producing a witness.

Form of the question - leading question

Leading questions are questions that contains the answer. It is improper to ask a leading question in direct examination.

Here, this question is a leading question. D's attorney states that no one saw the accident, and merely asks for concurrence. M is an employee of D and is being called as D's witness. Because this is D's witness, and this is direct examination, this question is an improper leading question. P's attorney should have objected to this question as leading, and the court should sustain that objection.

Personal knowledge

See rule above. M's answer talks about a thorough investigation but does not state who engaged in the investigation. It is unclear whether M has any personal knowledge about this testimony. Therefore, P's attorney should object to the response, and the court should either (1) sustain the response, or (2) order some clarification to identify M's basis for the statement.

A.3. Mark's firing

Logical relevance

See rule above. The question is relevant because it tends to show a potential basis for M's bias. This evidence throws into question M's previous testimony. Therefore, it is logically relevant.

Legal relevance

See rule above. The question is relevant as described above. It is prejudicial in that it

does not precisely go to a disputed fact, but merely throws into question M's truthfulness. Still, the court will likely find it more relevant than prejudicial.

Form of the question - leading question

See rule above. While leading questions are not allowed in direct examination, they are allowed in cross examination. Here, P's attorney is cross examining M. Therefore, this question form is appropriate.

Form of the question - compound

When questioning a witness, a lawyer may only ask one question at a time. Compound questions are disallowed.

Here, this question is composed of two questions: (1) did P fire M, and (2) was the firing for stealing money. Because it is a compound question, D's lawyer should object, and the court should sustain the objection.

Form of the response - nonresponsive

A witness must respond to the question asked. A response that does not answer the question can be stricken, and the witness will be instructed to answer the question.

Here, M's response does not respond to the question. P's attorney asked M if P fired M for stealing money. M does not answer the question, but instead states that M claimed these things. Therefore, P should object to the answer, and the court should sustain the objection and order M to answer the question.

Character evidence

See rule above. This evidence is a past act being introduced to show that M's testimony

is false because he was previously fired by P, and therefore has an axe to grind. As this is character evidence it is inadmissible as substantive evidence.

Impeachment

See rule above. This evidence is proper impeachment evidence because it shows M's bias. Therefore, it will be admitted for impeachment purposes.

A.4. Repair of the stairs

Logical relevance

See rule above. The fact that the stairs were repaired after the accident tends to show that there was something wrong with the stairs previously - during the time of the accident. Therefore, it tends to show that the stairs were negligently maintained by D, and that P's claim has merit. Therefore, this evidence is logically relevant.

Legal relevance.

See rule above. As stated above, this evidence is relevant. However, it is prejudicial because it uses a subsequent repair against D. The prejudice of this use is the reason for the rule against its use, as described below. Therefore, it is prejudicial. The court may exclude it on these grounds, but there is a specific rule on point.

Subsequent remedial measure

Where a defendant makes a subsequent repair, such repair may not be used to show the fault of the defendant. This is because it would make it less likely that defendants would make subsequent needed repairs. Subsequent repairs may be used to show ownership or control over the property.

Here, the ownership or control of the stairs does not appear to be at issue. Instead, this is being introduced to show that the stairs were in bad repair at the time of the accident. Therefore, it is inadmissible because it is a subsequent remedial measure. D's attorney should object to this line of questioning, and the court should sustain it.

A.5. Store customer's statement

Logical relevance

See rule above. Here, this statement tends to show (1) that P in fact fell on the stairs and (2) that the step was broken. Therefore, it shows both that P fell, and that D was potentially at fault. As such it is logically relevant.

Legal relevance

See rule above. Here, the evidence is relevant as described above. There is little risk of prejudice because M can say whether this did or did not occur.

Form of the answer - nonresponsive

See rule above. M does not respond to the question either affirmatively or negatively, and instead questions the relevance of the question. As M did not respond to the question, P's attorney should object to the response. The court should sustain the objection and order M to respond.

Hearsay

Hearsay is an out of court statement being introduced for the truth of the matter asserted. Hearsay is generally inadmissible.

Here, Carol's statement, made out of court, is being introduced for the truth of the

matter asserted. It is being introduced to show that P fell on D's broken step. Therefore, it is hearsay, and D's attorney can object to it on those grounds. It will be inadmissible unless an exception applies.

Contemporaneous statement

A contemporaneous statement is a statement that a witness makes while an event is occurring. A contemporaneous statement is admissible as an exception to hearsay.

Here, Carol's statement was made immediately after the event. It was not made while the event was occurring, but a contemporaneous statement may be admissible if the statement was made immediately after the event. Here, it is likely that the court would find that this is admissible as a contemporaneous statement.

Excited utterance

An excited utterance is a statement made while a person is under the stress of an exciting event. Such a statement is admissible as an exception to hearsay.

Here, Carol's statement was made while witnessing a person fall down the stairs. This is an exciting event and would startle a reasonable person. Therefore, this statement was made due to a startling event. In addition, it was made immediately after the event, and likely while Carol was still under the stress of the event. Therefore, it will be admissible as an excited utterance.

B. Insurance company's report

Logical relevance

See rule above. The insurance report describes an investigation of the accident. It likely

provides background and a determination of fault. Therefore, it will be logically relevant.

Legal relevance

See rule above. The insurance report is relevant as described above. It will likely not be deemed to be prejudicial. There are no facts that indicate that the report is prejudicial to D.

Authenticity

To be admissible, the proponent of tangible evidence must establish that the thing is what it purports it to be. This may be done through the testimony of an individual with knowledge of the evidence.

Here, M was able to identify that the report that P proffered was what it purports to be - an insurance report that D's insurance company prepared. Therefore, it has been properly identified.

Hearsay

See rule above. The insurance report, a report that was prepared and contains statements made out of court, is being introduced for the facts set forth in the report. Therefore, it is hearsay, and will be admissible unless it is non-hearsay or an exception applies.

Vicarious statement

A statement that a party's agent makes out of court may be imputed to the party. A party's out of court statement is always admissible as non-hearsay. Similarly, a

vicarious statement made by a party's agent may similarly be admissible. Admissibility will depend on whether the agent is an employee or an independent contractor, and whether the statement is made in the course of employment.

Here, the insurance company is not an employee of D, but is instead an independent contractor. The insurance company provides insurance to D, and D does not control the insurance company's actions. Therefore, statements that the insurance company makes cannot be imputed to D. Therefore, the insurance report will not qualify as a vicarious statement.

Business record

A record made in a business's regular course of business is admissible as an exception to hearsay. The record must be part of a regularly conducted activity, must be regularly recorded, and must be made at or near the time by a person with knowledge of the items being recorded.

Here, the insurance company's report may be a business record. However, P's attorney has failed to establish a foundation for its status as a business record. P's attorney has failed to show that it was the insurance company's regular practice to prepare these reports, and that it was made at or near the time of the events by a person with knowledge of the items being recorded. Instead, P's attorney is seeking to introduce the record through M, who did not prepare the report. While M stated that the insurance company always prepares the report, he does not know how or by whom it was prepared.

In addition, if a record is created in anticipation of litigation alone, it is not a business

record. Here, the record is only created when the insurance company believes that D will be sued. Therefore, it does not constitute a business record.

The State Bar of California

OFFICE OF ADMISSIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2022

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the February 2022 California Bar Examination and two selected answers for each question.

The selected answers are not to be considered "model" or perfect answers. The answers were assigned high grades and were written by applicants who passed the examination after the First Read. They are reproduced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. These answers were written by actual applicants under time constraints without access to outside resources. As such, they do not always correctly identify or respond to all issues raised by the question, and they may contain some extraneous or incorrect information. The answers are published here with the consent of the authors.

Question Number	Subject
1.	Criminal Law and Procedure
2.	Community Property
3.	Torts / Remedies
4.	Evidence / Professional Responsibility
5.	Business Associations / Remedies

QUESTION 4

Dan is facing trial in the Superior Court of California for the murder of Victor. Dan entered into a valid retainer agreement with Attorney Anita for her to represent him. Anita met with Dan to discuss Dan's defense. In their interview, Dan claimed he had spent the entire evening when the murder occurred with his father, Frank. The next day, Anita sent an email to Dan expressing her concern that his alibi was weak. Dan replied to the email and admitted that he had lied about his alibi, but denied that he killed Victor.

Anita visited Dan's apartment and spoke with Dan's roommate, Ben, who said that Dan confided in him that he had killed Victor. Ben gave Anita a pair of Dan's pants that were covered in blood. The next day, Anita gave the prosecutor the bloody pants and the email exchange about Dan's alibi.

Anita then decided she did not want to represent Dan any longer because she was tired of his lies. Anita petitioned the court to withdraw as Dan's attorney. The court granted permission for Anita to withdraw. Frank then immediately hired another lawyer to represent Dan.

At Dan's trial, the prosecutor called Ben as a witness to testify to Dan's statement that he killed Victor. The prosecutor then called Anita to testify: (1) about Dan's statement that he had been with Frank on the night of the murder; (2) that Anita had received the bloody pants from Ben and turned them over to the prosecutor; and (3) that Ben had told Anita that Dan said he killed Victor.

1. Assume all proper objections have been made. Should the following items be admitted into evidence:

   a) Ben's testimony? Discuss.

   b) Anita's testimony regarding Dan's statement that he was with Frank the night of the murder? Discuss.

   c) Anita's testimony that she had received the bloody pants from Ben and turned them over to the prosecutor? Discuss.

   d) Anita's testimony that Ben told her that Dan said he had killed Victor? Discuss.

   Answer each according to California law.

QUESTION CONTINUES ON THE NEXT PAGE

2. What ethical violations, if any, did Attorney Anita commit by:

   a) Turning over the bloody pants to the prosecutor? Discuss.

   b) Turning over the email exchange regarding Dan's alibi to the prosecutor? Discuss.

   c) Withdrawing from representing Dan? Discuss.

   Answer each according to California and ABA authorities.

QUESTION 4: SELECTED ANSWER A

Under Proposition 8 of the California constitution, all relevant evidence is admissible during a criminal trial, unless it is subject to an exclusion such as hearsay or privilege.

Logical relevance

For any evidence to be admissible, it must be logically relevant. Evidence is logically relevant when it makes the existence of any fact of consequence more or less likely to be true. In California, the fact of consequence must also be in dispute.

Legal relevance

Evidence is legally relevant when the probative value of the evidence exceeds the risk of undue prejudice, confusing the jury, or unnecessary delay.

1. (a) Ben's testimony

Logical Relevance

See rule above.

Ben's (B's) testimony is logically relevant. B is able to testify that D admitted to killing Viktor (V). That is a fact at issue and of consequence, and highly relevant to this case.

Legal Relevance

See rule above.

B's testimony is also legally relevant. D's statement has substantial probative value. It wouldn't confuse the jury or cause undue delay. And while it would be prejudicial to D's case, it would not be unduly prejudicial, as the requirement of legal relevance does not prohibit any evidence that may show guilt.

Witness Competency

In order for witnesses to testify as to a certain topic, they must have personal

knowledge of the facts they are speaking to, and a present recollection of the events. They must also take an oath to tell the truth and be able to present their testimony in a way that is helpful to the trier of fact.

Here, B is competent to give this testimony. It is based on his personal knowledge of his conversation with D, and he is able to presently recall it.

Accordingly, because his testimony is relevant and he is a competent witness, he was property allowed to testify.

Hearsay

However, the issue is whether D's statement that Ben is testifying to is hearsay. Hearsay is an out of court statement offered for the truth of the matter asserted. Hearsay is not admissible, because the party is offered against is not able to impeach the witness or make issue of the declarant's credibility.

Here, D's statement is hearsay. It was told to B out of court, and it is being offered by the prosecutor as evidence that D killed V. Accordingly, it is inadmissible as hearsay. However, there are exceptions and exclusions to the hearsay rule. If one exists, the statement can still be offered into evidence.

Party admission

A party admission is an exclusion from hearsay. It exists when the opposing party has offered the statement out of court, and it is an admission of a relevant fact.

Here, the statement is being offered into evidence by the prosecution, so D is the opposing party. Additionally, this constitutes an admission of the most important fact of all - that D killed V. Accordingly, D's statement could be offered into evidence as a party admission.

Statement against interest

D's statement could also possibly be offered as a statement against interest. In order for this exception to apply, the defendant must make a statement that is against their proprietary, pecuniary, penal, or social interest, and they are aware it is against their interest when it is offered.

Here, this statement is clearly against D's penal interest. By admitting to a murder, he could be charged and sent to prison. This is also a fact that any reasonable person would be aware of.

However, in order for this exception to apply, the declarant must be unavailable. A declarant is unavailable when they are dead or sick, when they refused to testify, or when they assert a privilege, among other reasons. Here, it is possible that D, as the defendant in this case, will assert his right not to testify. If he were to do so, this exception would also be available.

In conclusion, this testimony was properly admitted as a party admission, and may also be proper as a statement against interest if D choose not to testify.

(b) Anita's testimony regarding Dan's statement.

Logical Relevance

See rule above.

Anita's (A) testimony is logically relevant because it speaks to D's possible alibi. Whether or not D was with Frank is a fact of consequence, and one that it is in dispute.

Legal Relevance

See rule above.

Her testimony is also legally relevant. Information concerning D's alibi has substantial

probative value and outweighs any of the other factors discussed above.

Witness Competency

A is competent to testify to testify on this topic because it is based on her conversation with D.

Attorney/Client Privilege

The issue is whether D's statement is covered by attorney/client privilege.

Attorney client privilege prevents the disclosure of any confidential information obtained from the attorney from their client for the purpose of furthering the representation. The privilege is held by the client, and only the client can choose to waive it, not the attorney. In California, the privilege lasts until the client's will has been probated after their death.

Here, D's statement to A was made during the representation. D and A entered into a valid retainer, and then the two of them met to discuss the case and provide A with the facts. The statement was provided as D's alibi, and while he later admitted that the statement was false it was still made as part of the representation and in furtherance thereof.

Hearsay

Additionally, the statement may be objected to as hearsay. However, it would not be provided into evidence for the truth of the matter asserted because (1) the prosecutor would not want to help D establish an alibi, and (2) D later admitted it was false.

In conclusion, the statement is protected by the attorney/client privilege and should not be admitted into evidence.

(c) The bloody pants.

Logical Relevance

See rule above.

This testimony is logically evidence is relevant because it speaks to the source of important evidence.

Legal Relevance

See rule above.

This testimony is also legally relevant because it is highly probative, and outweighs the other factors discussed above.

Witness Competency

A is competent to make this testimony because it is based on her personal interaction with B, and she has a present recollection of the events.

Attorney/Client Privilege

See rule above.

D may also assert that this evidence is subject to attorney/client privilege. However, information regarding where the bloody pants came from was not communicated to A by D. The attorney client privilege only covers statements made in confidence from the client to the attorney, not statements made by third parties, and not information obtained independently from the attorney. Because A received the bloody pair of D's pants from B, no information surrounding them is subject to attorney/client privilege.

In conclusion, the testimony regarding the bloody pants should be admitted into evidence.

(d) Ben's statement that Dan had killed Victor.

Logical Relevance

See rule above.

This testimony is logically evidence is relevant because it is an important admission by D as to his guilt.

Legal Relevance

See rule above.

This testimony is also legally relevant because it is highly probative, and outweighs the other factors discussed above.

Attorney/Client Privilege

D may once again attempt to assert attorney/client privilege. However, for the reasons discussed above, statements by third parties are not covered by the privilege, only statements between attorney and client. Accordingly, this information is not subject to attorney/client privilege.

Hearsay

See rule above.

However, this statement is also hearsay, as it is being offered for the truth of the matter asserted. When there are two layers of hearsay, both of them must be admissible for the statement to be admitted into evidence. Here, D's statement to B that he killed V is hearsay, and B's statement to A that D admitted to killing V is also hearsay.

D's statement to B would be admissible for the reasons discussed above. It is a party admission, and potentially a statement against interest.

However, Ben's statement does not fit into any hearsay exception. Because the hearsay rules require that all levels of hearsay have an exception, this statement should not be admitted.

In conclusion, B's statement to A regarding Dan's admission should not be admitted.

2. Anita's ethical violations.

(a) Turning over the bloody pants.

Duty of confidentiality

A may have violated her duty of confidentiality to D under the ABA and California rules of professional conduct. An attorney owes their client a duty of confidentiality. All confidential info obtained by an attorney in the course of representation must not be disclosed to third parties, and only used for their client's benefit. This duty is broader than the attorney/client privilege, as it prevents all disclosures not just testimony.

Here, that duty covers all confidential information A obtained about D during their representation. However, the duty of confidentiality does not extend to the fruits of a crime.

Fruits of a crime

If an attorney comes into possession of the fruits of a crime, that information cannot be protected by the duty of confidentiality. It must be turned over to the authorities. If a client informs their attorney where evidence of their crimes is located, the attorney is under no obligation to retrieve it. If they do, they must turn it in. However, an attorney is allowed to hold an item of evidence for a reasonable period of time in order to inspect it as part of building their client's case. Additionally, the attorney cannot disclose the source of the evidence when turning it over.

Here, A was under an obligation to turn in the bloody pants and did not violate her duty of confidentiality by doing so. However, if she was to disclose any information regarding where the evidence came from, that would have been a violation. Though that does not

appear to have occurred based on the facts presented.

Accordingly, A did not violate an ethical obligation by turning in the bloody pants.

(b) Turning over the email

Duty of confidentiality

See rule above.

However, A did commit a breach of her duty of confidentiality by turning over the emails from D. That information was protected by the duty of confidentiality, and A was under no requirement to turn that information over.

By disclosing this email, she breached her duty to D.

Duty of competence

A also may have breached her duty of competence. An attorney owes a duty to their clients to use their skill, knowledge, thoroughness, and preparation solely for their client's benefit. They must act prudently and diligently in their client's best interest.

By turning over an email admitting he lied about his alibi, A has violated that duty. A reasonably prudent attorney would not turn over confidential information regarding their client’s case and alibi.

If D has insisted on testifying at trial that he had this alibi when A knew it was not true, she would have ethical obligations to dissuade him from testifying, to seek to withdraw if D insisted on offering false testimony, and to only allow him to testify in a narrative fashion if she could not withdraw. However, this was far before that point

Accordingly, A also breached her duty of competence owed to D.

In conclusion, by turning over the email, A breached her duty of confidentiality and duty of competence.

(c) Withdrawing from representation.

Mandatory withdrawal

An attorney is required to withdraw when (1) they are terminated, (2) when their representation of the client violates the law or ethics rules (such as in the case of a conflict), (3) when a mental or physical condition prevents the attorney from undertaking effective representation, and (4) where the client's course of conduct requires the attorney to participate in or assist with a crime or fraud.

Here, A has not been terminated, there is no violation of law or ethics rules, she has no mental or physical condition preventing her from representing D, and D has not asked her to participate in a crime or fraud. Accordingly, there are no rules mandating that she withdraw.

However, there are also grounds that exists for permissive withdrawal.

Permissive withdrawal

Under the ABA, an attorney is permitted to withdraw if they can do so without prejudicing their client's case. This rule does not exist under the California ethics rules. Under both sets of rules, an attorney can also withdraw if the client insists on a course of action the lawyer disagrees with or considers repugnant, if the client has misused the client's services in the past, or if the client has not performed their duties (such as the payment of fees).

The most likely reason for withdrawal that A could argue is that D is insisting on a course of conduct that she disagrees with or considers repugnant. If she believes based on the evidence that D is guilty, and is lying about his innocence, that may be sufficient grounds. As the court has allowed her to withdraw from this case, it appears that they

agree with her.

However, A is required to give D notice prior to withdrawal. It does not appear that she has done so. By not providing him notice, there is a risk that her withdrawal has prejudiced his case.

Additionally, A is required to return any portion of an unused fee that D has paid and return his files promptly. The facts don't appear to indicate that she has done this either.

In conclusion, A has violated a duty to D by improperly withdrawing.

QUESTION 4: SELECTED ANSWER B

Ben's Testimony

Relevance

In order to be admissible, evidence must be both legally and logically relevant. Under the CEC, evidence is logically relevant if it tends to prove or disprove any fact in dispute related to the matter. However, judges have broad discretion to exclude logically relevant evidence if it is not legally relevant. Evidence is legally relevant if its probative value is not substantially outweighed by other factors such as unfair prejudice, waste of time, delay, unnecessarily cumulative evidence, or confusing the jury. Under Proposition 8, all relevant evidence is admissible in a criminal trial, subject to some exceptions such as hearsay and privilege rules.

Ben's testimony is logically relevant, since it tends to prove a fact in dispute (that Dan killed Victor). It is also legally relevant since its probative value is not substantially outweighed by unfair prejudice or other issues. Prop 8 will not apply because the statement is hearsay.

Hearsay

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Hearsay is inadmissible unless an exception applies. Here, Dan's statement that he killed Victor is an out-of-court statement that is being offered to prove that Dan killed Victor (the truth of the matter asserted). Thus, the statement is hearsay and will be inadmissible unless an exception applies.

Statement by Party Opponent

A statement made by a party to a proceeding will be admitted even though it is hearsay

if it is offered by the party's opponent. Here, the hearsay declarant is Dan, who is a party to the proceeding. The statement is being offered by his opponent, the prosecution. Thus, the statement qualifies as a statement by a party opponent and will be admissible.

Statement Against Interest

A statement against interest is a statement that was against the penal, financial, or social interest of the declarant when it was made. In order to be admissible as an exception to hearsay, the declarant must be unavailable to testify. A declarant is unavailable to testify if they have a total loss of memory, are dead, or are unreachable by subpoena. Here, Dan's statement that he killed Victor was against his penal interest, since confessing to murder can get you arrested and sent to prison. However, if Dan is testifying in his own defense, then he is available, and the exception will not be available. If Dan is not testifying in his own defense (as is his right as a criminal defendant), then he will be considered unavailable, and the statement may come in under this exception. Regardless, the statement will be admitted under the "statement by party opponent" exception.

Conclusion:

Ben's testimony is admissible.

Anita's Testimony: Dan's Statement

Relevance

Anita's testimony about Dan's statement that he was with Frank the night of the murder is logically relevant, as it tends to make it less likely that Dan killed Victor. Additionally, depending on how the prosecutor tries to use it, it may be relevant as impeachment

evidence. However, it may not be legally relevant. Since Anita used to be Dan's attorney, having her testify against him may hold undue influence with the jury, and create unfair prejudice that substantially outweighs the probative value of her evidence. Thus, the evidence may not be legally relevant.

Privilege

Even if the evidence is logically and legally relevant, it is protected by the attorney-client privilege. Attorney-client privilege is an evidentiary privilege held by the client, whereby an attorney may not disclose anything a client told her in confidence in the course of seeking legal services. Here, Dan clearly told her that he was with Frank in confidence, as they met (apparently alone) in order to discuss his case. Additionally, Dan told Anita this while seeking legal services, since they were discussing Dan's defense. Thus, Anita violated the attorney-client privilege by testifying against Dan without his waiver of the privilege. Under the CEC, the attorney may only violate the privilege in limited circumstances. For instance, the attorney may violate the privilege to prevent a crime that would result in substantial bodily harm or death to another. Here, the crime has already occurred, so Anita's testimony does not fall within the exception.

Prop 8 does not overcome attorney-client privilege.

Hearsay

Dan's statement to Anita does not qualify as hearsay, because it is not being offered to prove the truth of the matter asserted (that Dan was with Frank). Rather, it is either being offered for impeachment purposes (to show that Dan was lying), or for some other purpose. However, the testimony was still improperly admitted as it violated the attorney-client privilege.

Impeachment

If this statement is being offered for impeachment purposes, it is also improperly admitted, as it is not permissible to impeach a witness by prior inconsistent statement (in this case, Dan) who has yet to testify (and thus, there is nothing that his prior statement could be inconsistent with). It is also improper to impeach a witness by prior inconsistent statement if that witness is not given a chance to explain the inconsistency (which Dan will not get if he is asserting his Fifth Amendment right not to testify).

Character Evidence

If this statement is being offered to show Dan's character for dishonesty, it was also improperly admitted. In a criminal trial, character evidence is only admissible about traits pertinent to the crime charged and is only admissible once the defendant has opened the door. Here, Dan has not opened the door, and honesty is not a pertinent trait in a murder trial. Thus, this would be improperly admitted character evidence.

Anita's Testimony: Bloody Pants

Relevance

Anita's testimony about the bloody pants is logically relevant, since the fact that Dan had bloody pants tends to make it more likely that he killed Victor. Additionally, Anita's testimony can be used to authenticate the pants. There is the same legal relevance issue as before, where the fact that Anita was formerly Dan's attorney might create unfair prejudice sufficient to outweigh the probative value of the testimony. Thus, this testimony likely should not be admitted unless Prop 8 overcomes this issue.

Privilege

Receiving Dan's pants from Ben would not qualify as privileged information, since it was

not a statement made by Dan for the purpose of obtaining legal services. Thus, the attorney-client privilege does not apply.

Personal Knowledge

A witness must have personal knowledge about the matter of which they are testifying. Anita knows that she received the bloody pants from Ben and turned them over to the prosecutor. Thus, she had personal knowledge sufficient for this requirement.

Conclusion

The testimony about receiving Ben's pants was improperly admitted unless Prop 8 allows the evidence in despite the legal relevance issue.

Anita's Testimony: Ben's Statement

Relevance

Anita's testimony about Ben's statement is logically relevant because Dan's statement that he killed Victor tends to make that fact more likely. Anita's testimony still has the same legal relevance issue related to her being Dan's prior attorney. However, other than that the probative value is not outweighed by unfair prejudice, and so the evidence is legally relevant.

Personal Knowledge

There is no personal knowledge problem, because Anita is testifying about what Ben told her Dan said, rather than testifying that she heard Dan said something to someone.

Hearsay within Hearsay

Anita's testimony contains two levels of hearsay: the outer hearsay is Ben's statement, and the inner hearsay is Dan's statement. Where there are multiple levels of hearsay,

each level must be admissible under an exception in order for the entire statement to be admissible.

Dan's Statement (Inner Hearsay)

Dan's statement is hearsay because it is being offered to prove the truth of the matter asserted (that Dan killed Victor). As discussed above, this is likely admissible as the admission of a party opponent.

Ben's Statement (Outer Hearsay)

Ben's statement is hearsay because it is being offered to prove that Dan said he killed Victor. This is hearsay not admissible under any exception. It is not the statement of a party opponent since Ben is not a party. It also was likely not an excited utterance to Anita, as there is no indication that Ben was under the stress of a stressful event when he made it. Thus, because the outer hearsay is inadmissible, the entire statement was improperly admitted. Prop 8 cannot overcome hearsay issues.

Privilege

Attorney-client privilege does not apply to this statement, since Ben was not Anita's client and Dan's statement was not made directly to Anita (because it was made to a third party, it was not confidential).

Ethical Violations: Turning over Pants

Duty of Candor/Duty of Fairness to Opposing Counsel

Attorneys have an obligation of candor to the tribunal and a duty of fairness to opposing counsel. This duty prohibits them from concealing evidence. While Anita likely should have refused to take the bloody pants in the first place, it was likely not an ethical violation for her to turn them over to the prosecutor once she had them.

Ethical Violations: Turning over Email Exchange

Duty of Loyalty

Lawyers have a duty of loyalty to their clients. Anita violated this duty when she turned over the email exchange about Dan's alibi to the prosecutor, since a defendant in a criminal case could reasonably expect his attorney not to help the prosecution in ways not required by law or the ethical rules. Thus, this constituted a violation of the duty of loyalty.

Duty of Confidentiality

Under both the ABA and California rules, lawyers have a strict duty of confidentiality to their clients. This prohibits lawyers from revealing any information they learn related to their client's case that is not known to the general public. This rule is broader than the attorney-client privilege; the California rule is much stricter than the corresponding ABA rule.

Under the ABA rule, a lawyer may break the duty of confidentiality if it is necessary to prevent a crime, substantial bodily harm or death, or mitigate financial loss if the lawyer's services were used in connection with that financial loss. Additionally, if the lawyer's services were used or are currently being used to perpetrate a crime or fraud, the lawyer may break confidentiality to mitigate the harm. Under the California rules, confidentiality may only be broken in order to prevent a crime that is likely to result in substantial bodily harm or death.

Here, the breach of confidentiality was not permissible under either the ABA or California rules. Turning over the email exchange did not prevent or mitigate the harm from any crime or activity in which the lawyer's services were used. Anita might try to

argue that Dan was attempting to use her services to lie to the court by lying about his alibi. However, there is no indication that Dan was going to lie on the stand at trial, as he admitted his alibi was false. Additionally, even if he was planning on lying on the stand, Anita had a duty to try to mitigate by attempting to persuade him not to lie. If he insisted on lying on the stand, Anita would have been allowed to withdraw (under the ABA rules), or simply allow him to testify without engaging (the narrative approach, under the California rules). However, Anita did not attempt to dissuade Dan from lying, if that was even his intention in the first place. Thus, Anita violated her duty.

Duty to Communicate

Lawyers have a duty to communicate with their clients. By not telling Dan that she was turning the email exchange over to the prosecutor, Anita likely violated her duty to communicate with Dan and keep him appraised of her actions related to the case.

Ethical Violations: Withdrawal

Duty to the Profession

Lawyers have a duty to the profession that discourages them from withdrawing from the representation of clients simply because they are guilty, especially criminal defendants. Anita likely violated this duty by her withdrawal.

Permissive Withdrawal

Under the California rules, a lawyer is allowed to withdraw from representation if the client is making the representation unreasonably difficult. Here, the fact that Dan lied once about his alibi is probably not enough to meet the standard of "unreasonably difficult". It sounds like she has only had one conversation and one email exchange with him and did not even try to see if he had a different alibi. Additionally, just the fact that a

client is guilty is not "unreasonably difficult". Thus, Anita likely violated her duty under the California rules by withdrawing when it was not permitted.

Under the ABA rules, an attorney may withdraw if it will not result in unfair prejudice to the client. Here, the trial had not started, and Frank was immediately able to hire another lawyer for Dan. Thus, it is unlikely that there was unfair prejudice, and Anita did not breach her duty under the ABA rules. The ABA rules also permit withdrawal if a client's view is repugnant to the lawyer, which Anita can argue that Dan's views are.

Mandatory Withdrawal

Mandatory withdrawal under the ABA and California rules arises when a client is insisting on a course of conduct that would violate the law or ethical rules, or if the client insists on a course of conduct solely to harass another person (California only), or if the lawyer's mental or physical condition make it impossible to continue. None of these exceptions apply, so Anita is not covered by mandatory withdrawal.