

MONTEREY COLLEGE OF LAW

EVIDENCE

Final Examination

SPRING 2016

Professor J. Davenport

INSTRUCTIONS:

There are three (3) questions in this examination.

You will be given three (3) hours to complete the examination.

QUESTION 1

Adam is an attorney and his client is Darren. Adam's friend, Whitney, came by the office to bring Adam his lunch. Whitney knocked on the office door and entered the office. Darren was inside the office in an interview with Adam. Whitney gave Adam his lunch. While Whitney was exiting, Darren nodded to her and then said to Adam, "I just shot Van with a gun! I threw the gun into the river."

A police investigation resulted in Darren being arrested and charged with the murder of Van. The prosecution's theory is that Darren was angry at Van for stealing money from him. Darren's theory is self defense and that Van had threatened him with a gun.

Assume the following occurred in a California state court. Discuss all the evidentiary issues and arguments that would likely arise in each section below, including objections, if any, and the likely trial court ruling on the admissibility of the evidence.

Answer according to California Law.

1. During the prosecution's case-in-chief, Whitney testified that she heard Darren's statements to Adam.
2. Next, the prosecution called Darren's wife, Silvia, who testified that Darren showed her a gun in their bedroom nightstand a day before the shooting.
3. Then, the defense called Psychotherapist who testified that her client Van threatened to kill Darren.
4. Next, Darren testified that Van was the aggressor. On cross-examination, Darren denied having any felony convictions. The prosecution then introduced into evidence a certified copy of a felony assault with a deadly weapon conviction Darren had suffered in 2010.

QUESTION 2

Pat was struck by a car driven by David. Pat claims that he was walking in the cross walk when David, who was speeding and driving erratically, struck him. David claims that he was driving carefully down the street when Pat ran into the road from between two parked cars in front of David's vehicle. Pat has sued David in a negligence action to recover damages for his personal injuries.

Assume the following occurred in Federal Court. Discuss all the evidentiary issues and arguments that would likely arise in each section below, including objections if any and the likely trial court ruling on the admissibility of the evidence.

1. Pat seeks to offer into evidence a video re-enactment of David driving erratically moments before the accident happened. The reenactment is based on a video taken by a witness who observed the accident and filmed it on her cell phone. The witness provided the video to Pat at Pat's request. However, after providing the video, the witness inadvertently erased the cell phone video and no longer possesses it. The witness is unavailable at trial. It is undisputed by the parties that the Pat has in his possession a copy of the cell phone video that the witness had made from the original.
2. Pat seeks to admit the testimony of a police officer who responded to the accident. If permitted, the police officer will testify that he measured and analyzed the skid marks leading up to the collision site and, in his opinion, the skid marks indicate that David was at fault for the accident.
3. David calls Mark, David's employee, who was in David's vehicle at the time the accident occurred. Mark testifies that Pat "came out of nowhere and it was impossible for David not to hit him". Pat calls Mark's former employer. Upon the court's request for an offer of proof, Pat states that the former employer would testify to the following: Mark was fired from his previous job for stealing from the cash register. Mark told the former employer that he really needs the job his job with David and that he would do anything to keep it.
4. To show that Pat had darted out in front of the vehicle without looking to see if any vehicles were coming, David seeks to introduce testimony that Pat has been hit by cars while crossing streets on three prior occasions during the last fifteen years.

QUESTION 3

Police are dispatched to a fight at a house party. When the police arrive, they find Paul, who is bleeding and badly injured. Paul tells the police that he was hit with a beer bottle. As Paul is speaking to police, he points at Danny and exclaims, "that's the guy who hit me in the head with the beer bottle!" Danny is arrested.

Paul is taken to the local hospital where he is treated by Dr. Feelgood. At the hospital Paul tells Dr. Feelgood that Danny hit him in the head with the beer bottle after a fight over drug money. Dr. Feelgood diagnoses Paul with a subdural hematoma and gives Paul 30 stitches.

Danny is charged with assault with a deadly weapon (a beer bottle). At the preliminary hearing, the prosecution calls one witness, Ralph, who allegedly witnessed the incident. Ralph testifies that he saw the fight and Danny hit Paul with the beer bottle in an unprovoked attack. Paul does not testify at the preliminary hearing. Paul leaves the jurisdiction and cannot be located at the time of trial.

Assume the following occurred in Federal Court. Discuss all the evidentiary issues and arguments that would likely arise in each section below, objections if any, and the likely trial court ruling on the admissibility of the evidence.

1. The prosecution seeks to introduce the testimony of Police Officer that Paul said, "that's the guy who hit me with the beer bottle".
2. The prosecutor calls Ralph. On the witness stand, Ralph testifies that he never saw the fight and he doesn't know who is responsible for Paul's injuries. The prosecutor seeks to admit Ralph's preliminary hearing testimony.
3. At the time of trial, Dr. Feelgood is on vacation. In lieu of her testimony, the prosecutor seeks to introduce Paul's medical records to establish the nature of the injuries and that Danny is the one who hit Paul in the head with the beer bottle while fight over drug money.
4. Danny's defense is that it was Ralph who hit Paul with the beer bottle. Danny calls Wendy, who was also at the party the night Paul was hit by the beer bottle. Wendy will testify that a week later, she overheard Ralph telling boasting to another person, "I'm glad Danny got sent to the hospital. I hit him then and I will hit him again if he stiffs me for drugs".

1)

===== Start of Answer #1 (1538 words) =====

In this case we will consider four items of evidence and discuss their admissibility.

1) Testimony of Whitney, Attorney Adam's friend regarding statements she heard Darren make to Adam

Relevance

Evidence is relevant if it has any tendency to prove any material fact at issue in a case. All relevant evidence is admissible. The court has the discretion not to admit evidence that would otherwise be admissible if its probative value is substantially outweighed by a danger of prejudice.

Good During their case in chief, the prosecution offered Whitney's testimony that she heard Darren's statement to Adam "I just shot a Van with a gun! I threw the gun into the river." This testimony is probative because it includes a confession by the defendant that he shot the victim Van, as well as location of the weapon he used." This statement is relevant to the prosecution's case to prove that Adam committed the crime, and it explains why the gun may not be available as evidence in the trial. In this case the statement is highly prejudicial to Darren because it is a confession. However, its probative value is so high, that even though it is also highly prejudicial, the prejudice may not be outweighed by its relevant probative value.

Attorney-Client Privilege

The Attorney Client Privilege is a federally recognized privilege in all jurisdictions that protects confidential communications between a client and their lawyer. Even though

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Darren's statement was made to Adam, Adam cannot testify because he is Darren's attorney, and therefore any communications from Darren to Adam are protected by the Attorney-Client Privilege. However, because Darren made the statement to Adam while Whitney in the room, the communication between Darren and Adam may not be considered confidential. The facts show that Darren was aware of Whitney's presence in the room when she came in to give Adam his lunch, because Darren nodded to Whitney before he said to Adam "I just showt Van with a gun! I threw the gun into the River." Therefore Darren acknowledged her presence and knew that he was making his statment to Adam in the presense of another individual. Therefore, Darren may not have a reasonable expectation that his communication to Adam was private or confidential.

Because Darren's statement to Adam ocured while Darren was aware of Whitney's presence in the room, his communication to Adam was not considered confidential and therefore is not protected by the Attorney client privilege. Therefore, Whitney may testify as a lay witness to anything of which she has personal knowledge. She personally observed Darren's statement to Dan. Therefore, it is likely that the court would rule that Whitney's testimony that she heard Darren's statements to Adam is admissible.

- Missed Hearsay Issue

2) Testimony of Sylvia, Darren's wife

Relevance

Evidence is relevant if it has any tendency to prove any material fact at issue in a case. All relevant evidence is admissible. The court has the descretion not to admit evidence that would otherwise be admissible if its probative value is substantially outweighed by a danger of prejudice.

Sylvia's testiomony that Darren showed her a gun in the bedstand a day before the shooting is relevant because it tends to prove that Darren owned a gun, and it may lend weight to the theory that because he owned a gun and he showed the gun to Sylvia

Darren intended to use the gun. Sylvia's testimony is also prejudicial against Darren, but when considering whether the probative value is outweighed by the prejudice, the court may determine that the probative value outweighs the prejudice.

Marital Privilege / Spousal Immunity

Both Federal and California law recognizes certain privileges for married couples. One of those privileges is Spousal Immunity, which gives immunity to a husband or wife from testifying against his or her spouse. This privilege is held and exercised not by the accused spouse, but by the spouse who is asked to testify. In order to assert this privilege, the couple must be married at the time one attempts to assert the privilege. It appears in this case that Sylvia and Darren are currently married. Sylvia could have exercised her privilege for spousal immunity and refuse to testify against her husband. However, in this case it appears that she has chosen not to assert that privilege and has testified that Darren showed her a gun in their bedroom nightstand a day before the shooting. Therefore, her testimony is admissible because she has chosen to waive her privilege.

Good

Marital Privilege / Spousal Communications

Another privilege both Federal and California law recognizes for married couple is the privilege for marital communications. Any communication between a married couple during the course of their marriage is included in this privilege. This privilege is held by both partners in the marriage. Because Sylvia and Darren are currently married, Sylvia would not be able to testify to anything Darren communicated to her during their marriage. The question in this case is whether Darren showing her a gun in their bedroom nightstand a day before the shooting is considered a communication. The prosecution would argue that Darren showing his gun to Sylvia is simply an action and not a communications. The defense would argue that Darren showing Sylvia his gun is an act of communication to her the information that he has a gun and where the gun is located.

Good!

Because Sylvia has chosen to waive her privilege of spousal immunity from testifying,

and because Darren's act of showing Sylvia the gun was not an expressly verbal communication, it is likely that the court would find Sylvia's testimony to be admissible.

3) Testimony of Van's Psychotherapist

Relevance

Evidence is relevant if it has any tendency to prove any material fact at issue in a case. All relevant evidence is admissible. The court has the discretion not to admit evidence that would otherwise be admissible if its probative value is substantially outweighed by a danger of prejudice.

In this case Van's Psychotherapist's testimony that her client threatened to kill Darren would be highly relevant and probative to the case because it would tend to prove Darren's argument for self defense that Van threatened him with a gun. This evidence would have no prejudicial effect against the defendant because ^{can prejudice the prosecution} it would support his theory of the case. Therefore, it is likely that the value of Van's Psychotherapist's testimony would be found to be more probative than prejudicial and therefore admissible.

Psychotherapist - Client Privilege

Federal courts as well as California Courts recognize a privilege between Psychotherapists and their clients. This privilege protects any communication made between a client and his or her therapist. The reasoning is that a client should have a reasonable expectation of confidentiality in order to be able to fully disclose one's problems and embrace therapeutic help. Therefore, under normal conditions, anything that Van expressed to his Psychotherapist would be protected from disclosure by the Psychotherapist - Client privilege. However, an exception to this privilege is in the case of threat of death or severe bodily injury. If a client expresses to his or her Psychotherapist the express intent to kill or injure another person, the Psychotherapist may disclose that threat in order to potentially save a life. In this case, Van's statement to his Psychotherapist in which he expressed intent to kill Darren may remove his

Good

statement from the protection of the Psychotherapist-Client privilege, and therefore that statement may be admissible in court.

4) Testimony of Darren that Van was the aggressor, including his denial of a felony conviction and a certified copy of Darren's felony assault conviction

Relevance

Evidence is relevant if it has any tendency to prove any material fact at issue in a case. All relevant evidence is admissible. The court has the discretion not to admit evidence that would otherwise be admissible if its probative value is substantially outweighed by a danger of prejudice. Darren's prior felony conviction for assault with a deadly weapon is relevant, because the fact that he has committed a similarly violent act in the past would tend to prove that he is capable of murder. However, the evidence of past crimes is so prejudicial that it substantially outweighs any minor probative value there may be, therefore Dan's felony conviction would not be admissible as evidence against him.

Impeachment and Felony Convictions

A witness may be impeached with evidence of felony convictions under certain circumstances. In Federal Cases the felony conviction is one which involves truthfulness, then a court must admit the record of the felony conviction as admissible evidence if it is offered to impeach the credibility of a witness, unless the conviction is from longer than 10 years ago, in which case the court may use its discretion whether to admit the conviction. In this case Darren's felony conviction is not for a crime involving truthfulness or credibility, so it would not be admissible. However, California law has a broader standard, and the court may use its discretion to allow felony convictions for crimes that involve moral turpitude - or a tendency to do evil. The prosecution would argue that felony assault is a crime of moral turpitude, and therefore Darren's felony conviction should be admissible to impeach his credibility, since under cross-examination Darren denied having any felony convictions.

*Great job
- missed authentication issue*

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=====**End of Answer #1**=====

2)

===== Start of Answer #2 (1553 words) =====

This is a civil case under a Federal court; therefore, Federal rules of evidence apply. The cause of action is negligence. Pat (P) has sued David (D) in a negligence action to recover damages for his personal injuries.

1. Pat is seeking to offer into evidence a video-re-enactment of David driving erratically moments before the accident happened. The reenactment is based on a video taken by a witness who observed the film and filmed it on her cell phone.

Relevance

P is seeking to introduce the evidence to prove that D caused the accident and met all the elements of negligence: was not driving as a reasonable driver under the circumstances. Courts will deem it admissible if it is relevant and had not been excluded under the statute, Constitutions and other policy reasons. An evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence to determining the action.

Best Evidence Rule

P is trying to bring in the video and to prove that the contents of the video is what it purports to be. There are couple of criteria that it needs to meet before it comes in as admissible;

Best Evidence Rule

When a party is bringing in an evidence and uses the content of that evidence for its truth, the best evidence rule is implicated. The court will likely want the original. Here, there is no original as the facts show it was made unavailable. The court will likely rule that because the video was unavailable, and not because of P's actions, it will consider the video that was a remake. In civil cases, such as negligence case, Plaintiff has the burden of producing the evidence to prove that P has met all the elements of the cause of action. Here, P has to establish that the original was unavailable and the re-make video depicts what happened. Court will likely rule that it will come in, however, the

Best Evid
Rule only
applies if
1.) Legally
operative doc
2.
or
with knowledge
based on
viewing
recording

credibility of the video whether the jurors will believe it is not strong since the witness who can testify that the re-make video is the accurate depiction of what happened.

Authentication

Courts will like to rule that an item is authenticated, to prove that it is what it purports to be. Here, P will have a hard time trying to authenticate the video because the witness who supposed recorded the video is not available to testify that the video is a replica of what the original video she recorded. Although the facts show that the video was inadvertently erased, the witness can still testify to what she witnessed because she witnessed it, she had first hand knowledge. She perceived the situation with her own eyes, she heard it and if she can recollect and communicate what she saw and she can take the oath to testify that she understands that she needs to tell the truth, then she can. However, P will have a hard time bringing in the video as admissible evidence because it can not be authenticated.

Foundation

To bring in an evidence, P will need to show what the video is, why it is relevant, how it was made, what it was based on and the chain of custody to prove that it was made with accuracy and it clearly depicts what happened. He needs to build the foundation before he can bring the evidence.

2. Expert/lay testimony

P is seeking testimony of a police officer who responded to the accident. He will testify that he measured and analyzed the skid marks leading up to the collision and in his opinion, the skid marks indicate that David was at fault for the accident.

not sure whether p is seeking the police officer's testimony as a lay opinion. If the police officer is testifying as a lay witness, his opinion regarding what he measured will come in because this is based on his personal knowledge. However, him testifying as to whose fault it was will not come in because generally, a lay person opinion not based on his personal knowledge is generally not admissible.

good!

If P was bringing the officer's testimony as an expert testimony opinion, he will need to build the foundation and qualify the officer as an expert. An expert testimony's opinion is admissible if (1) his expertise, knowledge is appropriate for the subject matter at hand (2) his testimony was built from sufficient facts from what he gained during the court trial and prior to trial; (3) his testimony relied on a reliable method and (4) his application of the theory was reasonable reliable. here, the police officer is not an expert in trying to prove who is at fault. His expertise lies on writing down accurate reports based on what he witnessed, other people reported to him and other information that he gathered. Therefore, he does not qualify as an expert.

Good

As mentioned above, he can testify to what he gathered through his personal knowledge and what he perceived, but other than that, his other testimony as to the determination of whose at fault is not admissible.

3. Here, D is trying to bring in a testimony of his employee, Mark to relay what Mark witness. Mark testifies that Pat "came out of nowhere and it was impossible for David not to hit him."

Relevance

Relevance defined above (supra). D will argue that this is relevant to prove that P contributed to the accident and negates the element of negligent on D's part. It proves who caused the accident and whether D was negligent. Since Mark is testifying as what he saw at the time, court will argue that he is competent to testify. He can perceive, recollect, communicate and take the oath (understand the need to tell the truth). P will argue that it is not relevant because it proves bias. Mark is an employee of D. He stands to lose his job if he tries to say a different story since D is his boss. P can definitely use this to impeach Mark Showing bias is one of the type of impeachment, P can use in cross examinaiton and can use extrinsic evidence to prove that Mark is biased with his testimony. Although P can bring in extrinsic evidence, it has to be pertinent to the specific trait - that it Mark's honesty. If P is bringing in testimony that

Mark was fired from his previous job for stealing cash register, this is not proving that he is dishonest. It just proves that he steals, it doesn't impeach his character for truth-telling and does not attack his honesty. The other evidence where Mark told the employer that he really needs his job with the defendant and that he would do anything to keep is under the hearsay exclusion.

Analysis
off
Can use tones and acts in a conviction for impeachment.

Hearsay exclusion

Hearsay is an out of court statement made by the declarant to prove the truth of the matter asserted. here, Mark's statement to his former employer was made out of court and since P will try to bring it in for its truth, that Mark's motive to lie is to keep his job, court will argue that this testimony does not come since it is under the hearsay exclusion.

4. To prove that P contributed to the accident and that she darted out in front of the vehicle without looking to see if any vehicles were coming, David is seeking to introduce testimony that has been been hit by cars while crossing streets of three prior occasions during the last three years.

Here, D will argue that this evidence is relevant to show that P was negligent and not him. P will argue that this is not admissible because similar happenings to prove that the situations are similar and since P has been negligent before under the same circumstance, she must be negligent under this circumstances. Character evidence is not allowed for this reason. it allows the highly prejudicial effect for the jury to conclude the case based on the inference versus proving the case based on the facts presented. The only that this evidence comes in is for D to prove that this situation is so similar and the circumstances are so similar, that it shows that P had the habit of darting out in front of the vehicle without looking. Under the habit doctrine, a person's habit can come in as evidence to prove that he/she acted the same way as a regular specific response to a particular situation. That argurment will be a stretch here since there are no facts to support the claim that P, out of habit, crosses the street without looking all the time. D will have to prove this. The facts does not support this. In addition, the circumstances

Good

Great job!

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are different even if P has been hit by cars while crossing the street on three prior occasions during the last fifteen years, it does not prove that P is negligent. Under the character evidence rules, a party may not bring in character evidence to prove that a person acted in conformity with his/her character. This just proves that she gets run over often, but it does not prove that she is negligent. The circumstances could have been different.

===== End of Answer #2 =====

3)

=====**Start of Answer #3 (888 words)**=====

Relevance is the tendency to prove or disprove a material fact of consequence. Generally, all relevant evidence is admissible unless its probative value is significantly outweighed by its prejudicial effect. Here on after a relevant analysis will be provided for every issue.

1. PO's testimony

Danny (D) has been charged with assault with a deadly weapon and the prosecution seeks to introduce the testimony of PO who will testify that Paul who is now out of the jurisdiction that Paul said, "that's the guy who hit me with the beer bottle." This is relevant to show that D, used a deadly weapon, the charge against him.

Hearsay is an out of court statement by a declarant used to prove the truth of the matter asserted.

EW ✓
The statement by P was made outside of court and now it is being used against D. The prosecution will argue that the statement is admissible under excited utterance. P had just been hit with a beer bottle after a heated house party fight. P made the statement under the excitement of a stressful event. Thus, the statement will be admissible.

PSE ✓
This statement would not be admissible under present sense impression because time is of the essence under this exception and the statement to the police would've had to be made contemporaneously or within seconds of its occurrence.

its confrontation
D will argue that this would violate his 6th amendment right and that he should be able to face the witness against him.

2. The prosecution has called Ralph who at a preliminary hearing testified that he witnessed the incident, he testified that he saw the fight and D hit P with the beer bottle in an unprovoked attack. This is relevant to demonstrate that D was the aggressor and

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did in fact use a deadly weapon.

When the PSI was made under oath
It can be used as substantive evidence
(it is non-H under the federal rules)

At the time for trial, R testified that he never saw the fight and that he doesn't know who is responsible for P's injuries. The prosecution will seek to bring in R's prior inconsistent statement. D will likely object and say that the prior testimony would be considered hearsay because they were made outside of court at a prior proceeding. However, under prior statements the prosecution will bring in R's testimony that was given under oath at a prior proceeding. It will then be up to the jury to decide on the evidence.

3. The prosecution seeks to introduce Dr. Feelgood's medical records to establish the nature of the injuries and that Danny is the one who hit P in the head with the beer bottle. This is relevant to prove that D was at fault and that P was hit with a deadly weapon the charge against D.

Privilege

Privileged communications are those between two properly related parties in connection to the relation. A confidential communication entails two elements (1) physical privacy, and (2) the intent of the holder to maintain secrecy. The privilege must be invoked by the party who seeks to benefit from the privilege. An attorney-client relationship requires that the communication is made during a professional consultation. Generally, if a third party is present the privilege is waived.

D will assert that this is privileged information per the Dr. patient privilege. However, FRE does not recognize the Dr. patient privilege and even if it did, D would not be able to assert the privilege only P would.

Hearsay

D will assert that the records and the statement saying that he hit D are hearsay. The prosecution will state that under the physical condition exception the statement would be admissible. The statements made must be related to diagnosing someone and must be related to a medical condition. Thus, the only part of the statement that would be

admissible would be, "I was hit in the head with a beer bottle." The part of the statement where P says "D hit me" would be left out as well as the part where he says "after a fight over drug money."

Good job! noted double hearsay issue & exclusion of stmt. of fault

The medical records would be admissible under the business records exception. The prosecution would have to establish that records are part of the business routine, the were recorded during or right after an event, by someone with personal knowledge, they are trustworthy and they would have to be properly authenticated. Dr. F is on vacation so he would not be able to authenticate the records.

Nonetheless, the part where P got hit in the head with a bottle would be allowed under the physical condition exception.

4. The statement that W will testify about is relevant to prove that D, did in fact hit P with a beer bottle.

Hearsay

"I'm glad D got sent to the hospital. I hit him then and I will hit him again if he stiffs me for drugs" would be considered a hearsay statement, it was said outside of court and now it is being used against D.

The prosecution will argue that under the admissions against party opponents, personal admission, the statement would be admissible. This would be an exemption to the hearsay rule. It is a statement made by the person about his own conduct.

In conclusion, it is likely that although, all of the evidence points to D's guilt, it would violate his 6th amendment right not to be able to face P, who left the jurisdiction.

==== End of Answer #3 =====

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- Analysis off

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END OF EXAM