

MONTEREY COLLEGE OF LAW

EVIDENCE

Final Examination

SPRING 2018

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

Doug is being prosecuted for his alleged assault and battery on Phil on June 1 in the bleachers at City Field. The complaint alleges that *Doug* struck *Phil* over the head with a Budweiser bottle while *Phil* was giving the Phillie's pitcher a standing ovation for striking out the Met's best batter. Phil received serious injuries as a result of the incident. Doug was not immediately prosecuted for the crime because the incident caused a riot and it was unclear initially who was responsible for Phil's injuries. The Prosecution filed charges against Doug six months later based on witness statements obtained by police after the incident occurred.

Assume the following occurred in the jury trial of *People vs. Doug*. Apply the federal rules of evidence. 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. As their first witness, the Prosecution calls police officer, Bob. Bob did not observe the incident. Bob interviewed Sue an hour after the incident occurred and included her statement in the report. At the time of trial, Sue could not be located. Bob will testify that Sue said she was sitting three rows above Phil and Doug and clearly saw Doug hit Phil with a beer bottle. Sue said it was the most brutal attack she has ever seen and was visibly shaking when she gave her statement to Bob.
2. Next, the Prosecutor calls Allen. Allen will testify that he was at the game with Phil and that he saw Doug strike Phil over the head with a Budweiser bottle without any provocation. On cross-examination of Allen, defense counsel asks Allen the following:
 - a. Whether he has ever been convicted of felony possession of marijuana?
 - b. If Allen was convicted of perjury twelve years before?
3. After the Prosecution rests, the defense calls City Field's head security officer, Walt. Walt is required to investigate incidents and write reports regarding those incidents by City Field. Walt testifies that he interviewed Allen the night of the incident and Allen stated that he was heavily intoxicated and did not see who hit Phil.
4. The defense calls Joe, a janitor who works at City Field. Joe testifies that after the game, he snuck into the security room where the surveillance monitors were located and re-wound the security footage because he wanted to see what happened during the fight. He saw Matt, not Doug, hit Phil with the beer bottle. He never reported what he saw to Bob or police because he accidentally erased the security footage and was afraid he would get fired.

QUESTION 2

Dan is criminally prosecuted for forgery in California state court. Forgery is committed when a person knowingly alters and presents as genuine a false document.

The following evidence is presented in the Prosecutor's case in chief: Dan walked into Bank of America with a government check made out to him for \$100,000. Dan attempted to deposit the check into his checking account and withdraw \$5,000. The bank teller, Sally, believed that the check appeared suspicious in nature and called police. When police arrived, they learned that the check had been stolen from a local government agency. The check was altered to include Dan's name and the amount. Dan's defense at trial is that Dan did not knowingly alter the check and present it as genuine because of Dan's underlying mental illness.

Assume the following occurred in the jury trial of People vs. Dan. Apply the California rules of evidence. 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. In the Defense case in chief, the first witness called is Dan's mother. Dan's mother testifies to the following:
 - a. She believes that Dan was not sane on the date of the offense. In the month before this incident occurred, Dan told her on multiple occasions that he was a special agent tasked by the government with protecting society from an alien attack and that the government was secretly paying him for his services. She has observed him talking to himself as if he is responding to voices in his head. She observed this behavior an hour before Dan was arrested.
 - b. She believes Dan tried to obtain the money from the bank because he is schizophrenic and truly believes the government is paying him to protect our nation from an alien attack.
 - c. She further testifies that due to his erratic behavior, she took him to a psychiatrist two days before he was arrested and she was present when the doctor diagnosed him with schizophrenia.

QUESTION 2 continued....

2. Dan's mother further testifies that in her opinion, her son is a peace-loving person, a truthful person, and that everyone in the community feels that way. Dan's mother testified one time Dan found a wallet on the ground with five hundred dollars in it. Dan tracked down the owner and returned the wallet and the money to its rightful owner.

3. Next, Dan's attorney calls Dr. X, a licensed psychologist who has practiced in the field for 20 years. Dr. X testifies that Dan was suffering from schizophrenia at the time of the incident. She further testifies that schizophrenia can result in delusional thinking and that Dan experienced delusions about being a secret government agent at the time of the offense. On cross examination by the Prosecution, Dr. X testifies that she has never personally treated Dan. She states that her opinion is based on her review of Dan's medical records, an interview with Dan's mother, and an astrological reading she conducted.

4. The defense rests. In rebuttal, the Prosecutor re-calls the bank teller, Sally. Sally testifies that one week prior to the incident for which Dan is on trial, he entered the bank and attempted to pass a government check that had been stolen from the same agency as the one presented in this case. Sally verified that the check was stolen through the bank's check verification system. Sally told Dan that the check was stolen and that she would not honor the check.

QUESTION #3

Dixon is being charged with the murder of Vincent. The prosecution's theory is that Dixon shot Vincent with a Glock 9 mm firearm because Vincent was seeing Dixon's wife, Wallis. The defense theory is that Dixon acted in self-defense because Vincent pulled a knife on him first.

Dixon went to see Abbott, his attorney. During the meeting, Peggy, a paralegal and Ian, an investigator, both sat in on the meeting. Peggy took notes of the meeting. During the meeting, Dixon said, "I shot Vincent because I hate him. He was seeing my wife. Here is the firearm." Abbott asked Ian to take possession of the firearm and call the police to advise them to come take custody of the weapon. Instead, Ian placed the firearm in the office safe.

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.

Answer according to California Law. Assume the firearm is legal.

1. During the prosecution's case-in chief, Peggy testified that Dixon said: "I shot Vincent." Then, Dixon gave Ian a firearm. She could not recall the exact make of the firearm, but after looking at her notes, she testified it was a Glock 9 mm. On cross-examination, Peggy could not recall that Dixon said Vincent was seeing his wife.
2. Then, the prosecution called Wallis, Dixon's wife, who testified that right after the murder, Dixon told her in their bedroom, "I have always hated Vincent, so I shot him." Also, she testified that she did not have an affair with Vincent. At the time of the trial, Wallis had divorced Dixon.
3. Next, the prosecution called Detective Ed, a firearms expert, who testified that the spent casings at the crime scene were from a Glock 9mm firearm.
4. Finally, the prosecution presented Nate, a neighbor of Dixon's. Nate stated that he and Dixon would often go to the gun range and practice shoot Dixon's Glock 9mm.

QUESTION 1

Criminal prosecution of Doug for his alleged assault and battery on Phil on June 1 in the bleachers at City Field. The complaint alleges that Doug struck Phil over the head with a Budweiser bottle while Phil was giving the Phillie's pitcher a standing ovation for striking out the Met's best batter. Phil received serious injuries as a result of the incident. Doug was not immediately prosecuted for the crime because the incident caused a riot and it was unclear initially who was responsible for Phil's injuries. The Prosecution filed charges against Doug six months later based on witness statements obtained by police after the incident occurred.

Assume the following occurred in the jury trial of *People vs. Doug*. Apply the federal rules of evidence. 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. As their first witness, the Prosecution calls police officer, Bob. Bob did not observe the incident. Bob interviewed Sue an hour after the incident occurred and included her statement in the report. At the time of trial, Sue could not be located. Bob will testify that Sue said she was sitting three rows above Phil and Doug and clearly saw Doug hit Phil with a beer bottle. Sue said it was the most brutal attack she has ever seen and was visibly shaking when she gave her statement to Bob.

Relevance: Evidence is relevant if it has some tendency to prove or disprove a material issue. Sue's statement is relevant because it establishes that Doug was the one who hit Phil with a beer bottle.

Hearsay: Out of court statement offered for the truth of the matter asserted. Bob is relating a statement made to him by Sue, outside of the current proceeding in court. The statement is being offered for its truth – that Doug hit Phil. Thus, the statement is hearsay. For the statement to be admissible a hearsay exception must apply.

Excited Utterance: A declaration made by a declarant during or soon after a startling event that is made while the declarant is under the stress of excitement produced by the startling event will qualify as an excited utterance and is admissible as an exception to the hearsay prohibition.

The startling event must have been some occurrence startling enough to produce nervous excitement and thus render the declaration an unreflected and sincere expression of the declarant's impression. The declaration must relate to the startling event. The declaration must be made while the declarant was under the stress of excitement (before the declarant had time to reflect upon it).

The Prosecution will argue that that Sue was clearly under the stress of the event as she was still shaking and had indicated that it was the most brutal attack she had ever seen. The defense will argue that the hour that passed between the incident and the event indicates that the statement was not made under while still the stress of the event and before the time for reflection.

Present Sense Impression. A present sense impression is admissible as an exception to the hearsay rule. It requires that a person perceive some event that is not particularly shocking or exciting and it does not in fact produce excitement in the observer, that person may nevertheless be moved to comment on what she perceived at the time of the receipt of the present sense impression or immediately thereafter. The theory behind allowing this as an exception to the hearsay rule is that there is usually little or no time for a calculated misstatement. An hour is too long under this exception and Sue did not make the statement as she was perceiving it.

Confrontation Clause: *The accused in a criminal case has the right to confront and cross examine the witnesses against him. Here, Sue is unavailable. There is no indication that Doug had an opportunity to cross examine Sue prior to trial.*

Primary Purpose Analysis: *Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency; and statements are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past facts potentially relevant to later criminal prosecution.*

Factors students should consider some of the following in the analysis: whether the perpetrator remains at the scene and is not in law enforcement custody • The dispute is a public, not a private one • The perpetrator is at large • The perpetrator's location is unknown • The perpetrator's motive is unknown • The perpetrator presents a continuing threat • A gun or other weapon with a "long reach" is involved. • The perpetrator is armed with such a weapon • Physical violence is occurring • The location is disorderly • The location is unsecure • The victim is seriously injured • Medical attention is needed or the need for it is not yet determined • The victim or others are in danger • The questioning occurs close in time to the event • The victim or others call for assistance • The victim or others are agitated • No officers are at the scene.

2. Next, the Prosecutor calls Allen. Allen will testify that he was at the game with Phil and that he saw Doug strike Phil over the head with a Budweiser bottle without any provocation. On cross-examination of Allen, defense counsel asks Allen the following:
 - a. Whether he has ever been convicted of felony possession of marijuana?

Relevance – *The defense attorney's questions are relevant to case an adverse reflection on the credibility of Allen as a witness.*

Impeachment – *Impeachment is the casting of an adverse reflection on the veracity of a witness.*

Impeachment with Conviction of a Crime. *Under certain circumstances a witness may be impeached by proof of conviction of a crime. Under the Federal Rules, the crime must be a crime involving dishonesty or false statement (misdemeanor or felony) or a felony conviction. If the crime is one of dishonesty or false statement, the court has no discretion to exclude it, even under FRE 403. If the crime is a felony not involving dishonesty, then the court may exercise its discretion to exclude it. Where the witness is someone other than the accused in a criminal case, the court will determine if the probative value is substantially outweighed by its prejudicial effect.*

- b. If Allen was convicted of perjury twelve years before?

Possibly admissible. The conviction is for a crime that goes to truthfulness 609(a)(2), but the conviction is more than 10 years old. There is a presumption against admitting convictions past the 10 year limit; however, under Rule 609(b) the judge may do so if D gave P advance notice that he intended to use A's conviction and if the judge decides that the probative value of the conviction substantially outweighs its prejudicial effect.

3. *After the Prosecution rests, the defense calls City Field's head security officer, Walt. Walt is required to investigate incidents and write reports regarding those incidents by City field. Walt testifies that he interviewed Allen the night of the incident and Allen stated that he was heavily intoxicated and did not see who hit Phil.*

Relevance – *The prior inconsistent statement indicates that Allen's testimony on the witness stand is mistaken or untruthful.*

Prior Inconsistent Statement – *For the purpose of impeaching the credibility of a witness, a party may show that the witness has, on another occasion made statements that are inconsistent with some material part of his present testimony. Under the Federal Rules, an inconsistent statement may be proved either by cross examination or extrinsic evidence. To prove the statement by extrinsic evidence, certain requirements must be met: A proper foundation must be laid and the statement must be relevant to some issue in the case.*

To lay a foundation for extrinsic evidence of the witness' prior inconsistent statement you must give the witness at some point an opportunity to explain or deny the allegedly inconsistent statement.

The evidentiary effect would be that the prior inconsistent statement would only be admissible to impeach the witness (not for substantive evidence) because the statement was not made under oath at a prior hearing or other proceeding.

4. *The defense calls Joe, a janitor who works at City Field. Joe testifies that after the game, he snuck into the security room where the surveillance monitors were located and re-wound the security footage because he wanted to see what happened during the fight. He saw a Matt, not Doug, hit Phil with the beer bottle. He never reported what he saw to Bob or police because he accidentally erased the security footage and was afraid he would get fired.*

Best evidence rule - *The best evidence rule expresses a preference for originals because of the possibility of inaccuracy in approximating the contents of a writing and the belief that oral testimony based on memory presents a greater risk of error than oral testimony in other situations*

The best evidence rule applies where the writing is a legally operative or dispositive instrument or where the knowledge of a witness concerning a fact results from having read or seen it in the document. When the best evidence rule applies, the rule expresses a preference for an original or a duplicate (an exact copy of the original) unless there is a genuine question raised about the original's authenticity. If the proponent cannot produce the original, he may offer secondary evidence of its contents if there is a satisfactory excuse provided justifying the admissibility of secondary evidence. such as loss or destruction.

Admissibility of Secondary Evidence. *Here, Joe's knowledge of the incident comes from watching it on the surveillance video, so the best evidence rule would apply. if the proponent of the writing cannot produce the original in court, secondary evidence of its contents will be admitted if a satisfactory explanation is given for the non-production. This includes loss or destruction of the original if it was lost or destroyed in good faith. Thus, secondary evidence in the form of the Joe's testimony would not violate the best evidence rule as long as the court found that the evidence was destroyed accidentally and not in bad faith.*

Evidence-Spring 2018- Answer Outline - QUESTION 2

Dan is criminally prosecuted for forgery in California State court. Forgery is committed when a person knowingly alters and presents as genuine a false document.

The following evidence is presented in the Prosecutor's case in chief: Dan walked into Bank of America with a government check made out to him for \$100,000. Dan attempted to deposit the check into his checking account and withdraw \$5,000. The bank teller, Sally, believed that the check appeared suspicious in nature and called police. When police arrived, they learned that the check had been stolen from a local government agency. The check was altered to include Dan's name and the amount. Dan's defense at trial is that Dan did not knowingly alter the check and present it as genuine because of Dan's underlying mental illness.

Assume the following occurred in the jury trial of People vs. Dan. Apply the California rules of evidence. 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. In the Defense case in Chief, the first witness called is Dan's mother. Dan's mother testifies to the following:
 - a. She believes that Dan was not sane on the date of the offense. In the month before this incident occurred, Dan told her on multiple occasions that he was a special agent tasked by the government with protecting society from an alien attack and that the government was secretly paying him for his services. She has observed him talking to himself as if he is responding to voices that are not present and observed this behavior an hour before Dan was arrested.
 - b. She believes Dan tried to obtain the money from the bank because he is schizophrenic and truly believes the government is paying him to protect our nation from an alien attack.
 - c. Dan's mother testifies that due to his erratic behavior, she took him to a psychiatrist two days before he was arrested and she was present when the doctor diagnosed him with schizophrenia.

- a. Mom's testimony that Dan was not sane on the day of the offense.

Lay witness opinion testimony - Opinions by lay witnesses are generally inadmissible. However, there are many cases where, from the nature of the subject matter, no better evidence can be obtained. Lay witness opinion testimony is permissible when:

1. It is rationally based on the perception of the witness
2. Helpful to a clear understanding of her testimony or to the determination of a fact in issue; and
3. Not based on scientific, technical or other specialized knowledge.

Here, mom's opinion that Dan was not sane at the time of the commission of this offense is based on her personal observation. She states that she observed him speaking to himself as if he was responding to voices that were not present. He told her he was a special agent fighting aliens. It is helpful to a clear understanding of her testimony and a fact in issue. Dan's mother is in a unique position to assess his mental state based on her knowledge of Dan.

Dan's Statement to mom that he is fighting aliens: Not admitted for a hearsay purpose – the truth of the matter asserted, but rather to show lack of sanity.

b. Mom's testimony that Dan tried to obtain the money because of his belief.

Speculation - Prosecutor should object based on Speculation. Should be stricken.

c. Mom took Dan to a psychiatrist due to his erratic behavior and she diagnosed him with schizophrenia.

Hearsay - The doctor's diagnosis would be hearsay – OOC statement offered for the truth of the matter asserted. This portion of the testimony should be objected to by the Prosecution and stricken from the record.

2. Dan's mother further testifies that in her opinion, her son is a peace-loving person, a truthful person, and that everyone in the community feels that way. Dan's mother testified one time Dan found a wallet on the ground with five hundred dollars in it. Dan tracked down the owner and returned the wallet and the money to its rightful owner.

Relevance: This proposed evidence is relevant to show that Dan is not the type of person who would commit the crime of which he is accused.

Character Evidence: CEC 1102 permits the defendant in a criminal case to offer character evidence that will assist in his or her defense. However, when the defendant chooses to offer such evidence about his good character for a particular relevant character trait, he also opens the door to the prosecution's use of character evidence on that particular character trait at trial.

CEC 1102 only allows use of opinion or reputation testimony to prove the defendant's good character for the pertinent trait. The defendant must offer such evidence before the prosecutor is allowed to introduce character evidence on the same pertinent trait. The prosecutor is allowed to introduce opinion or reputation evidence of the defendant's bad character for the pertinent trait. The prosecutor is also allowed to cross examine the defendant's character witness about their knowledge of specific instances of the defendant's bad character for that trait. The prosecutor can inquire – not prove. What that means is that the prosecutor can inquire whether the character witness actually knows enough about what goes on in the community to testify competently about the defendant's reputation within that community. The prosecutor can ask, "have you heard" or "did you know" about a specific instance of the defendant's bad character for that trial. If the witness does not know about them, the prosecutor cannot bring in independent evidence of the conduct. The prosecutor also must have a good faith basis for asking about the specific instances. This is allowed because the prosecutor is not offering the evidence to prove the defendant's character, but rather to undermine the credibility of the character witness.

In her opinion, her son is a peace-loving person. While opinion testimony is allowed in California, it must be offered about the defendant's general law abiding behavior or a relevant trait of the defendant based on the charges he is charged with. The fact that defendant is peace loving is not relevant to the charges he is facing.

In her opinion, he is an honest person. That everyone in the community feels that way. A witness can provide their personal opinion based on their knowledge of the defendant. A witness is also allowed to testify to that individual's reputation in the community. This would be a permissible use of character evidence.

He tracked down the owner and returned the wallet and the money to its rightful owner. He once found a wallet on the ground at the supermarket with five hundred dollars in it.

Specific instances of conduct are not allowed in this situation. California only allows specific instances of conduct in criminal cases when the evidence involves the character of the victim or the defendant's character for violence after he has offered evidence of the victim's character for violence. If the character trait raised is not for violence, only the use of reputation and opinion character evidence is permissible (1102)

3. Next, Dan's attorney calls Dr. X, a licensed psychologist who has practiced in the field for 20 years. Dr. X testifies that Dan was suffering from schizophrenia at the time of the incident. She further testifies that schizophrenia can result in delusional thinking and that Dan experienced delusions about being a secret government agent at the time of the offense. On cross examination by the Prosecution, Dr. X testifies that she has never personally treated Dan. She states that her opinion is based on her review of Dan's medical records, an interview with Dan's mother, and an astrological reading she conducted.

Expert Testimony – Expert testimony is admissible if the subject matter is scientific, technical or other specialized knowledge would help the trier of fact understand the evidence or determine a fact in issue. The evidence must be relevant and the methodology must be reliable.

The opinion must be supported by a proper factual basis. The factual basis must consist of facts that are of a kind that are reasonably relied upon by experts in the field.

The astrological reading is not of a type that would be reasonably relied upon by psychologists and should be excluded as a basis of Dr. X's opinion. If Dr. X could not come to the same conclusion without the astrological reading as a basis for her opinion, her opinion should be stricken.

The interview with Dan's mother and medical records are the types of information that are relied upon by other psychologists. Under the California case, *People v. Sanchez*, if an expert testifies to case-specific out of court statements to explain the basis of his or her opinion, those statements are considered by the jury for their truth, thus rendering them hearsay. Thus, the expert's reliance on those statements must be admitted through an applicable hearsay exception or witness. Dan's mother testified, so any case-specific facts Dr. X testified to based on the interview with Dan's mother would be permissible if those statements were testified to by Dan's mother.

The medical records would need to fall within a hearsay exception or the author of those records would need to be called as a witness for Dr. X to relate case-specific facts contained within the records. If Dr. X states that she generally relied upon the records, but did not relate case-specific information, such reliance would be reasonable.

4. The defense rests. In rebuttal, the Prosecutor re-calls the bank teller, Sally. Sally testifies that one week prior to the incident for which Dan is on trial, he entered the bank and attempted to pass a government check that had been stolen from the same agency as the one presented in this case. Sally verified that the check was stolen through the bank's check verification system. Sally told Dan that the check was stolen and that she would not honor the check.

Relevance: *To show Dan had knowledge that the check that he tried to pass in this case was stolen because one week before, he tried to pass another stolen check from the same agency.*

Specific Acts of Misconduct. *The basic rule is that when a person is charged with one crime, extrinsic evidence of her other crimes or misconduct is inadmissible if such evidence is offered solely to establish a criminal disposition.*

However, evidence of other crimes or misconduct is admissible if these acts are relevant to some issue other than the defendant's character or disposition to commit the crime charged. Here, the defendant is arguing that he did not possess the knowledge that the check was stolen because of his mental health issue. Sally's testimony that Dan entered the bank one week before and was told that the check was stolen tends to show that Dan possessed that knowledge that the checks were stolen.

Impermissible Impeachment – *This prior bad act is inadmissible for impeachment as Dan did not testify.*

Impermissible As Rebuttal Character Evidence - *The prosecution was entitled to ask Dan's mother if she knew about Dan entered the same bank a week prior to his arrest and attempted to pass a stolen check because Dan's mother testified to Dan's character for truthfulness, a relevant trait as to whether Dan would knowingly pass a forged check. By opening the door to Dan's character for truthfulness, the prosecution is permitted to respond by probing the defendant's character witness as to whether she knows of the defendant's prior acts of untruthfulness as long as the prosecutor has a good faith basis to ask such questions. However, the prosecution is not permitted to introduce extrinsic evidence, such as the testimony of Sally. Thus, the evidence would be inadmissible for this purpose.*

QUESTION #3 ANSWER OUTLINE - (DIXON- PEGGY- WALLIS-DET.ED- NATE)

1. PEGGY'S TESTIMONY

Logical Relevance- Tendency Test

Evidence is logically relevant if it has a tendency to make the existence of a disputed fact of consequence to the determination of the action more or less probable than it would be without the evidence.

Prosecution is offering Peggy's testimony to establish the existence of a disputed fact, that Dixon shot Vincent. This is relevant since it identifies the murderer. Also, Peggy's testimony establishes that a Glock 9mm firearm was used and that Dixon possessed such a firearm, or the instrumentality of the death.

Legal Relevance- Balancing Test

Trial court has discretion to exclude evidence if the probative value is substantially outweighed by the danger of unfair prejudice. This is known as the Balancing Test. It does not appear that Peggy's testimony would unfairly prejudice the jury and be admitted.

Prop 8-

In California, Prop 8 applies to criminal cases, and provides that all relevant evidence is admissible even if objectionable. However, Prop 8 is subject to be excluded under CEC 352. If the unfair prejudice outweighs probative value. Prop 8 has many exemptions: Privileges and Hearsay are exempt.

Hearsay

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted and is inadmissible unless an exception applies. The declarant is Dixon, but Peggy is repeating the out-of-court statement that Dixon shot Vincent.

Further, Peggy is testifying that Ian was given a firearm by Dixon. As such, this seems to be conduct, not assertive conduct. However, once Peggy looks at her notes, she is "jogging her memory" on the make of the firearm. This memory jog of her notes may be refreshing her memory or a Past Recollection Recorded.

Hearsay Exceptions- Past Recollection Recorded v. Refreshed Memory (The Firearm)

Past Recollection Recorded is a Hearsay exception requiring a writing made or adopted by a witness who now cannot now remember the facts, made while fresh in his/her mind. As compared to a memory jog or "Refreshed Memory," anything may be used to refresh a witness's memory. There is no hearsay issue on "Refreshed Memory/Present Memory Refreshed" because the writing is not being offered into evidence. However, Past Recollection Recorded is a different and is a hearsay exception since the writing (her notes) may be admitted as evidence.

Here, Peggy's notes seem to remind her that the weapon Dixon gave to Ian was a specific make, a Glock 9mm. Thus, her memory was refreshed by her notes during the attorney meeting. As such, her notes would not be read or admitted into evidence and the memory jog was her notes.

Party Admission by Dixon "I shot Vincent"

An admission requires the declarant be a party and offered by the opponent.

Here, the prosecution is offering Dixon's statement and he is the defendant in the case. Therefore, it is likely admissible. However, a privilege may be asserted.

Declaration/Statement Against Interest "I shot Vincent"

This requires a statement against the declarant's pecuniary, proprietary, penal interest, or social disgrace when made. The declarant must be unavailable. Should Dixon assert his Fifth Amendment privilege against self-incrimination, he will be deemed unavailable by the trial court.

Here, Vincent is making a statement that he shot Vincent which subjects him to prosecution for the murder. This statement is against his penal interests and may be admitted for identifying him as the shooter. However, a privilege may be asserted.

Attorney – Client Privilege- "Reasonably Necessary"/ Work Product

The attorney-client privilege allows a client the right to refuse to disclose confidential legal communications between a client and the attorney. The attorney has separate ethical violations aside from the privileges. The holder of the privilege is the client. Both Peggy and Ian were third parties and present during the attorney-client interview with Dixon.

Here, the issue is whether Peggy, as Abbott's paralegal is covered under this privilege. If an attorney has staff members that are "reasonably necessary" to the attorney's function, then that party is covered under the privilege. Also, would her notes be considered to be covered under "Work Product?"

The **work product doctrine** protects an attorney's mental impressions and trial strategies from discovery. The opponent may discover work product items through a showing of "substantial need."

Here, the prosecution wants testimony from Peggy of what may be deemed "confidential attorney-client" discussions between Dixon and Abbott. The fact that Peggy, a paralegal, was present does not defeat the privilege since Peggy will be considered "reasonably necessary" to Abbott's meeting with Dixon. The court may view her notes "in camera" and likely determine that they are covered under the work product doctrine if the notes are deemed mental impressions of Abbott, since Peggy is taking notes. Therefore, the notes are not discoverable.

Dixon tendering the firearm to Abbott (via Ian) is not likely hearsay. It may be construed as conduct, not meant to be assertive. The Dixon gave the firearm to Ian may be covered under the attorney-client privilege. There is not accessory argument to break the privilege since Abbott specifically directed Ian to call the police and notify them to seize the Glock. It is likely that Abbott will not be responsible for Ian acting on his own by placing the weapon in the safe.

2. WALLIS'S TESTIMONY (DIXON'S WIFE)

Logical Relevance- supra

Wallis's testimony has a tendency to establish that Dixon shot Vincent and he hated him. This demonstrates a motive for the killing as hatred. It is likely the testimony will be allowed because the statement prove a reason for the murder.

Legal Relevance-supra

On balance, the probative value of the Wallis's testimony is greater than the unfair prejudice. It will be allowed in.

Hearsay- defined supra

Hearsay Exceptions- supra

Party Admissions- I have always hated Vincent, so I shot him.

Spontaneous Statement Hearsay Exception-

requires that the declarant be under the stress of an event. The statement was made right after

Present Sense Impression- I have always hated Vincent, so I shot him

requires that the declarant be describing an event or condition after perceiving it.

State of Mind- I have always hated Vincent, so I shot him

requires a statement of the declarant's the existing state of mind or mental condition.

It is highly likely that a court will admit the statement under one or more above exceptions.

Marital Communications Privilege- Private Setting

This survives if the marriage ends in death or by divorce. Dixon and Wallis were alone.

The privilege protects confidential spousal communications and survives if the marriage ends in divorce or by death. Dixon and Wallis are legally married at the time of the confidential communication in their bedroom. The shared bedroom is a private and confidential setting.

Spousal Testimonial Privilege- Effect of Divorce

A spouse cannot be compelled to testify against his/her spouse in a criminal proceeding. It can

Only be invoked by the witness-spouse and can be claimed during marriage.

Here, Wallis is divorced from Dixon when she testifies. This can be invoked during marriage only.

It is likely that due to the marital communications stated above, Wallis cannot testify.

Denial of Affair with Vincent- admissible since no privilege and based on her knowledge.

3. DETECTIVE ED- Expert

Logical Relevance- supra

The detective's testimony regarding spent 9 mm casing shells is logically relevant because it has a tendency to show that Dixon possessed a Glock 9 mm firearm and Vincent was murdered by such a weapon. The testimony is logically relevant as establishing Dixon as the likely shooter with a specific make of gun.

Legal Relevance- defined supra

The trial court is likely to rule the expert's testimony as not unduly prejudicial and a helpful aid to the jury. Since the firearm used is a Glock 9mm and the spent casings are from such a weapon, the probative value is more substantial than unfairly prejudicial. The testimony is legally relevant.

Expert- Firearms/Casings

An expert may testify if he has specialized knowledge, training or experience, is qualified and the testimony is relevant and helpful to the jury. In short, it must be beyond the scope of common knowledge. Ed must qualify as an expert by the preponderance of evidence standard. Assuming Ed qualifies as an expert and he reasonably relies on methods accepted by other experts in the field, he will be allowed to testify.

As a firearms expert, Ed would know ballistics and what spent casing are from a Glock firearm. He must be fact specific and be careful not to offer any opinion on guilt or discuss ultimate legal issues.

4. NEIGHBOR NATE- Lay Witness

Logical Relevance – defined supra

Nate's testimony has a tendency to establish that Dixon possessed a Glock 9mm and knew how to use it since he and Nate would practice shoot at a gun range. The theory of the prosecution is that instrumentality of death was a Glock 9mm. Since Dixon owns such a weapon, the testimony will be logically relevant as it establishes Dixon's familiarity with the firearm.

Legal Relevance- defined supra

Nate's testimony is based on his perceptions of Dixon at the gun range. On balance, his testimony is more probative than unfairly prejudicial. Therefore, his testimony is legally relevant.

Lay Witness observation- *in general, a lay witness may testify about facts directly know to the witness. The opinion must be rationally based on the witness's perception and helpful to the jury.*

Here, Nate is a neighbor of Dixon and they go to the gun range and fire a Glock 9mm that is Dixon's.

1)

This is a jury trial in Federal court between People v Doug, therefore, the FRE will apply.

Relevance: To be admissible, evidence must be relevant. To be relevant, evidence must have any tendency to make a material fact more or less probable than it would be without the evidence.

Even if the evidence is relevant, a judge has discretion under 403 to exclude it if the probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, wasting time, or misleading the jury.

1.

RELEVANCE (defined supra): Sue's statements to Bob are relevant for the prosecution to show that Doug was the aggressor and hit Phil in the head, and that it was done with the beer bottle, which speaks to the assault and battery charge for which Doug was convicted.

Defense will object on Confrontation Clause and hearsay grounds.

HEARSAY: Hearsay is an out of court statement offered for the truth of the matter. Hearsay is inadmissible unless an exclusion applies.

EXCITED UTTERANCE: A statement that is made under stress in response to a startling event.

When Bob interviewed Sue, he asserts that she was visibly shaking and that it was the most brutal attack she had ever seen. Even though Bob interviewed her after an hour

after the incident occurred, under this exception, the time lapse is irrelevant as long as the declarant is still under stress from the event, which Sue seemed to be. However, since Sue is now unavailable, the judge may exclude the evidence.

CONFRONTATION CLAUSE: This is the right of a defendant (D) to face his accusers at a criminal trial. For a statement to be inadmissible, it must be an out of court statement, made by a declarant who is unavailable, the statement was testimonial and D did not have an opportunity to cross examine the statement before/at trial.

Good!

here, Sue's statement was made out of court to Bob and made for the purpose of being used in a later prosecution (not to address a present emergency). Doug did not have an opportunity to cross examine her statement prior to trial and she is now unavailable, her statements will likely be inadmissible.

2.

RELEVANCE: Allen's testimony is relevant for the prosecution to show that Doug as the aggressor when he struck Phil, which speaks to the charges against Doug. The prosecution will argue, however, that the questions that defense is asking about Allen's prior convictions are collateral to the case at issue.

IMPEACHMENT: Impeachment is the casting of an adverse reflection on the veracity of a witness. Statements may be proved by cross examination (cross) and extrinsic evidence (EE).

FELONY CONVICTIONS: A witness may be impeached by proof of prior convictions involving dishonesty and any felony convictions not involving dishonesty. May be proved on cross and EE.

Great!

Any crimes involving dishonesty: Crimes involving dishonesty are automatically permissible unless the crimes are more than 10 years old. (subject to 403)

The defense is seeking to impeach Allen's testimony based on his conviction of perjury 12 years prior. Prosecution will argue that perjury is an act of lying and therefore is a crime of dishonesty. However, because the crime happened 12 years ago, the court will likely exclude the evidence based on the rationale that older priors are less probative.

Any felony convictions: Allen's felony possession of marijuana may be admissible but is subject to 403 balancing, which usually favors admission, however, since this is a crime involving drugs, it is not probative as to credibility for truthfulness, so it will likely be excluded.

3.

RELEVANCE: Walt's testimony is relevant for the defense to show that Allen's intoxication at the time he was interviewed by Walt would make Allen's statements incompetent.

WITNESS COMPETENCY: A witness is competent to testify if she has personal knowledge as to the subject matter of her testimony and must be able to narrate, recollect, communicate and understand the duty to tell the truth under oath.

Walt is competent to testify about his interview with Allen because he personally spoke to Allen, which gives him personal knowledge and is the subject matter of his testimony.

HEARSAY: Walt is testifying that Allen told him (OOC) that he did not see who hit Phil. This statement contradicts what Phil previously testified to earlier in trial that he did see

Doug strike Phil. Prosecution or the defense could move to impeach Allen as to these contradicting statements, if Allen was still available to testify as a witness. There may also be an issue as to whether Allen would be competent to testify as to those statements because he was heavily intoxicated when he made them. The threshold for competency is low, so it is likely his statements could be used for possible impeachment purposes.

4.

RELEVANCE: The video footage would be relevant for the defense to show that Doug's innocence by showing that Matt was the person who hit Phil. Prosecution will argue on best evidence rule, hearsay and authentication grounds

BEST EVIDENCE RULE (BER): BER expresses a preference for originals in two situations: when the writing is legally operative or when the witness (W) knowledge comes from reading, or in his case, viewing the writing.

Good BER discussion

Here, the defense calls witness Joe will testifies that watched security footage showing that Matt hit Phil, therefore, the BER applies. Secondary evidence such oral testimony, may be admissible when the W has an adequate excuse for his non-production such as loss or destruction in good faith. Here, Joe claims that he erased the footage out of fear of being fired from his job, which the court is likely to conclude was done out of good faith, therefore his testimony will likely be admissible as long it has been authenticated.

AUTHENTICATION: To be admissible, evidence must be authenticated. To prove that evidence is genuine, the proponent must state that the evidence is what she/he claims it is. Here, Joe personally watched the security footage, which was located in the security room where the surveillance monitors are located. Because the footage was located in place where this kind of footage would normally be kept, this footage is likely deemed to be genuince and admissible.

ID:

Exam Name: EvidenceBMCI-Spg18

END OF EXAM

2)

1.a. RoG

Logically relevant

Good

If Dan's mother believes he cannot separate fantasy from what's real, this is relevant to a forgery prosecution because he must intentionally deceive.

Non-Hearsay Exclusion - Indirect State of Mind

Here she uses statements Dan made to her. This is an out of court statement, but is not hearsay, because testimony is not offered for the purpose of establishing the truth of the matter. Here this is an (indirect) state of mind exclusion from hearsay, intended not to establish the truth of what Dan told her; but, rather to establish that Dan said crazy words regarding "protecting society from an alien attack." Thus, her testimony would be admissible as it is not hearsay.

Great

b. Lay opinion -

Dan's mom is a lay person attempting to advance her belief her son has schizophrenia. This constitutes a medical diagnosis and would be inadmissible, because lay people can only testify to their perceptions which are non-scientifically based, requiring no specialized training or knowledge. Her statement that he is schizophrenic would be inadmissible, because such designation remains an authentic medical condition would require an expert with training, knowledge, and experience sufficient to diagnose, treat, and testify as an expert regarding whether Dan had schizophrenia. Her opinion regarding her belief that Dan obtained the money from the bank because he is protecting from alien attack, would be inadmissible except as noted for the indirect state of mind exclusion supra.

c. Psychiatrist/Patient privilege

Logical relevant

A medical diagnosis of schizophrenia is relevant because it may inhibit the ability of the prosecution to prove intent, an element of the crime of forgery.

Hearsay - of a Privilege matter (FRE; yes/ CEC: NO, in criminal)

Mom's testimony would be hearsay because she is recounting an out of court statement/diagnosis that the doctor made to establish the truth that Dan has schizophrenia. in her presence. It would be admissible because there is no doctor/patient privilege in California for criminal matters.

Medical Treatment

The statement would qualify because in Mom's presence, Dan sought medical consultation with a psychiatrist for the purpose of diagnosis and/or treatment. She can testify toward what she observed, and her testimony would be admissible under the hearsay exception for diagnosis and treatment.

2. Character Evidence of Dan's mother for Dan's Truthfulness/Veracity

Under CEC, character evidence may be admissible to demonstrate that her son's reputation is that of a truthfulness in the community, but testimony that he is peace-loving (non-violent) would be inadmissible because neither violence or peacefulness is a salient character trait for the criminal charge of forgery. Dishonesty is salient, not character evidence for violence. She, as a witness, may testify toward Dan's reputation in the community for truthfulness, because truthfulness is salient to the forgery charge. Here, witnesses may testify to opinion and/or reputation as admissible. In California,

Good!

Mom's testimony regarding the act Dan found a wallet on the ground with five hundred dollars and returned it would not be admissible. Only Acts, Reputation, or Opinion may be advanced. If Dan were accused of a violent act in California, an act would be admissible as character evidence. *Great*

Mom impeached for Bias because she is Dan's Mom.

She would be impeached by opposing counsel because she is Dan's mother. Mothers can be expected to have a bias favoring her son.

Habit

There is not evidence to pursue testimony based on Dan's "habit" of truthfulness.

3. Non-treating licensed psychologist as expert opinion

Logical Relevance

If Dan cannot discern fantasy from fiction, he may lack the requisite intent to commit the crime of forgery. Whether Dan suffers delusional thinking via schizophrenia would be relevant to meeting the requisite element of intent, *Good*

Psychologist Expert Witness

Defense calls the psychologist as an expert witness. Courts use *voir dire* to qualify expert witnesses based on their knowledge, training, education, or experience. An expert witness does not require knowledge. Their opinion may be based on typically utilized criteria, and tenets attendant to, and used by others in their field. Said experts may only testify toward their area of expertise vis-a-vis material issues before the court. The CEC would apply the

Fry Test of scientific reliability of generally acceptable (in the discipline - here, psychology) to form an opinion regarding Dan. While the expert may testify to an ultimate issue, the expert may not testify to inherent state of mind to-commit-the-crime issues. Thus, Dr. X may not testify that he suffered delusions at the time of the offense. This would be inadmissible. Here, it is acceptable that Dr. X never personally treated Dan, because an experts opinion may be based on industry standards (in psychology) for forming an expert opinion based on knowledge, training, experience.

Fry Test

Remember the Sanchez Case.

The doctor's review of medical records is appropriate to render an expert opinion. An interview with mom, may be salient and acceptable in forming his expert opinion. Even hearsay evidence otherwise inadmissible is acceptable so long as such evidence is salient toward forming his opinion. Here, the astrological reading she conducted would be inviolate of acceptable psychological practices utilized by other credentialed psychologists. Thus, astrological readings alone would lack scientific basis and fail the Fry test.

4. Sally the teller

Logically relevant

That Dan previously attempted to pass a bad check lacks relevance that he is guilty in the instance case; except, it may be nominally relevant to establish knowledge, or common scheme. See infra.

Documentary Hearsay

Sally's testimony regarding Dan having previously attempted to pass a bad check and the circumstances surrounding the past activity constitutes hearsay. Her testimony recounts an out of court statement intended to prove that since he tried the same thing before, he

likely is guilty of forgery in the instant case. This constitutes propensity evidence, and would be prohibited if her testimony's purpose includes the inference he tried to do the same thing last week, and thus Dan is guilty of the instant charge.

Purpose other than the truth of the matter; i.e., knowledge, scheme, motive, preparation, intent, mistake (or accident),

Here, the Prosecutor would argue that purpose of Sally's testimony is to establish a common scheme, or knowledge of check forgery; not for the truth of the matter. Here, Sally verified that the check was stolen through from the same agency as the one presented in the instant case. This represents a common scheme and likely would be admissible.

356 (or 352!) Analysis for California (403's counterpart)

Defense would object that such testimony's probative value is substantially outweighed by the undue prejudicial effect of a near-identical attempt, inclusive of a different check stolen from the same agency. If he did it last week, he did it with the instant case. This evidence likely could be inadmissible on this grounds as well.

Documents

Should Sally's testimony be admitted, the check constitutes a writing, and would require authentication, and either the original or duplicate production, unless its production is excused in which secondary evidence would be permitted. CEC however, renders inadmissible testimony as secondary evidence. California, operates under the Secondary Evidence rule, which places less emphasis on originals/copies as seen with FRE's Best Evidence Rule.

END OF EXAM

3)

This is the People v Dixon in California state court, therefore the CEC applies.

Relevance: To be admissible, evidence must be relevant. To be relevant, evidence must have any tendency to make a material fact more or less probable than it would be without the evidence.

Even if the evidence is relevant, a judge has discretion under 352 to exclude it if the probative value is outweighed by the danger of unfair prejudice, confusing the issues, wasting time, or misleading the jury.

1.

a) RELEVANCE (defined above): Peggy's testimony that Dixon (D) shot Vincent (V) and then handed the firearm to Ian, is relevant for the prosecution to show that D confessed to the crime and identified the weapon, the Glock 9 mm.

D will object on privilege and hearsay grounds.

ATTORNEY-CLIENT PRIVILEGE: this is a federal statutory privilege that protects confidential communications between an attorney (and necessary third parties) and client during professional consultation for legal advice. The holder of the privilege can refuse to disclose, prevent others from disclosing or commenting on the privilege.

Here, D was seeking legal advice from Peggy regarding the charges of murder so his statements to Peggy that he shot V would be protected. Confidential communication is defined as physical privacy and intent to maintain secrecy. During the meeting, a paralegal and Ian, an investigator, were present. They are considered necessary third parties for the purposes of gathering information, so D's statements are protected in their presence as

Good

well. Because his meeting with Peggy, Ian and paralegal are protected, Peggy would be barred from testifying if he did not assert the privilege. It's not clear from the facts whether he asserted or not.

Peggy's notes as to the make of the firearm would also be protected from disclosure because they would qualify as work-product, which is any material that contains an attorney's mental impressions about a case that will be used for litigation. *Great!*

HEARSAY - STATEMENT OF A PARTY OPPONENT: Includes any out of court statement made by a party that is now used against them. This would be a personal admission on D's behalf that he shot V, and would be admissible if the statement isn't covered under privilege.

2. REL - This testimony would be relevant to show that Dixon may have had a motive to shoot V because he hated him for having an affair with Wallis.

MARITAL COMMUNICATIONS/SPOUSAL IMMUNITY PRIVILEGE: This is privilege protects confidential communications between spouses and protects a witness spouse from being compelled to testify against the other spouse in a criminal proceeding.

To assert spousal immunity, the spouses must be married at the time of the trial. At the time of trial, D and W were divorced, so she is allowed to voluntarily testify against D. To assert the marital communications privilege, both spouses hold it, and each may refuse to disclose and prevent the other from disclosing confidential communications. This privilege survives divorce. D can assert this privilege in order to prevent W from divulging the statement he told her in their bedroom about hating Vincent and shooting him.

3. REL - Detective Ed's statements are relevant to connect the casings found at the crime scene to the weapon that D used to kill V.

Lay witness vs Expert witness (defined previously): Ed's testimony would be proper as a lay witness because it is rationally based on his perception of the casings and his experience in the field as a firearms expert. It is doubtful he would qualify as an expert unless he could show that his conclusions about the casings were of the type that would be reasonably relied upon and/or generally accepted in the relevant scientific field. It will be for the judge to decide this matter.

4. REL - relevant to show that D owned a Glock 9mm, and had experience in shooting it, which would negate his theory of self-defense. Defense would argue that Nate's testimony highly prejudicial because it could prejudice the jury into believing that if D went to the shooting range to practice shooting D's Glock that he liked guns, knew how to shoot them, and would have likely shot V. This would show propensity, which is not generally inadmissible.

(ran out of time...)

END OF EXAM