

Monterey College of Law

EVIDENCE

Final Examination

SPRING 2019

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INSTRUCTIONS:

There are three (3) questions in this examination.

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

QUESTION 1

While at home, Dalton planned an armed robbery with his wife, Wanda. She is opposed, but she goes along for marital harmony.

The week before the robbery, Dalton tells his psychotherapist that he is planning an armed bank robbery as a cover-up to kill his wife, Wanda. Further, Dalton is in an emotional state, but the psychotherapist calms him down. Dalton leaves the session and returns home.

The next week, Dalton enters the bank while Wanda is a look-out. Dalton pulls a firearm and orders a bank teller to: "Hand over all the cash!" The bank teller complies. On the way out of the bank, Dalton is tackled by a security guard and hits his head on the floor. Dalton gets free and runs to the car. The bank teller dies before trial.

Once Wanda sees Dalton bleeding from the head, she drives him to an emergency room. When the doctor asks what happened, Dalton responds: "I was at a bank and was tackled." The doctor examines Dalton and diagnoses a concussion.

Fearful he may be apprehended, Dalton hires Adam as his attorney. During the interview, Dalton says, "I really messed up. I never should have never robbed the bank. Here is the firearm." Adam asked, his law clerk, Paige, who was present in the interview, to take possession of the firearm. Paige placed the firearm in the office safe.

Dalton and Wanda are both charged with an armed robbery and a conspiracy to commit armed robbery. The prosecution has granted Wanda immunity for her testimony. Prior to the trial, Wanda filed for divorce.

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.

1. The prosecution calls Paige to testify to Dalton's statements and that the firearm was given to Adam by Dalton for safekeeping.
2. Next, the prosecution's presents, Wanda, to testify that Dalton had a firearm during the robbery and to Dalton's statement in the bank. Further, she testified that she drove Dalton to the emergency room because of his injuries.
3. The prosecution then calls the psychotherapist to testify to Dalton's statements.
4. Finally, the prosecution presents the doctor to testify to Dalton's statements and the diagnosis.

Question 2

Dr. Scholl is a Podiatrist (foot doctor). On June 1st Dr. Scholl enters Pizza Town pizza parlor and orders a large pizza from Darlene, an employee of Pizza Town. As he waits for his pizza he sees an advertisement in the restaurant listing a large pizza special for \$10 - three dollars less than Dr. Scholl paid. Dr. Scholl is a prickly character and becomes irritated when he sees he was overcharged. He yells at Darlene for overcharging him. Darlene pushes Dr. Scholl to the ground causing him to land on his buttocks.

Police Officer Johnson arrives on the scene. Officer Johnson speaks to Dr. Scholl who requests to file charges against Darlene. Officer Johnson receives a dispatch call for a homicide that just occurred and has to leave before interviewing any other witnesses. As he is leaving Darlene hands him a note that says, "I pushed that jerk because he was yelling at me. I didn't mean to make him fall." Officer Johnson doesn't write his report until the following day because he was needed at the homicide scene all night. When he looks for the handwritten note from Darlene to attach to his report, he realizes that he lost it.

A month later, Dr. Scholl provides the District Attorney with medical records showing that he underwent laser eye surgery for retinal detachment. Based on the medical records, the District Attorney files a felony charge of assault with great bodily injury against Darlene. The prosecution's theory is that Darlene pushed Dr. Scholl to the ground causing his retinal detachment. The defense theory of the case is that Dr. Scholl pushed Darlene first and she acted in lawful self-defense.

Assume the following occurred in the jury trial of the State of X v. Darlene. 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.

Question 2 continued....

The State of X has adopted the Federal Rules of Evidence.

1. In her case in chief, the prosecutor calls Dr. Scholl to testify to his version of events. Dr. Scholl further seeks to testify to his diagnosis and his conclusion that, “due to the sheering nature of the impact of his buttocks on the ground, his retinas detached from his eyeballs.”
2. Next, the Prosecutor calls Police Officer Johnson to the stand to testify to the contents of the note Darlene gave to him.
3. In her case in chief, Darlene seeks to introduce the following evidence:
 - a. The testimony of the commissioner of the medical board who will testify that Dr. Scholl cheated on his medical board exam and his medical license has been revoked;
 - b. Documentary evidence that Dr. Scholl has filed a law suit against Darlene and Pizza Town seeking \$5 million dollars in damages for his injuries and lost wages as a result of this incident.
4. Next, Darlene calls 4 year old Willy to the stand. The prosecutor objects. Willy’s proposed testimony is that he was at Pizza Town when he saw the angry man push the lady first. Willy can’t describe what the man or lady was wearing. He thinks it happened on his birthday (which other evidence will show is in March) because he had a party at Pizza Town on his birthday.

Question 3

Don, a former soldier in the Army, was laid off from his job at a packing plant. Feeling betrayed, Don went to a local bar and began drinking. He met another patron, Aaron, who mentioned that he had a heist planned that required at least one explosives expert. Don enthusiastically volunteered. Aaron promised Don that the heist would earn him several million dollars and might get him on to other lucrative jobs in the future. Aaron asked for Don to tell him his background to see if Don was a good fit for the job.

Don explained that had been an explosives expert in the Army, but before that, he and his childhood best friend, Tom, used to pull the slugs out of ammunition cartridges and dump the gunpowder into various receptacles, creating homemade explosives. Though he had never gotten caught, Don also explained that he made a Molotov cocktail and threw it at his ex-girlfriend's apartment, burning it to the ground and killing three people. Don explained it was then he decided to join the Army to get away from his hometown. In the Army, Don quickly became efficient with explosives. His former commanding officer, Col. Collins, awarded him a commendation when he was able to talk a colleague through the process of disarming mortar-based IED (Improvised explosive device) over the phone. Aaron said, "I'm impressed, soldier. Sounds like you'll be a perfect fit."

On the day of the heist, the thieves, including Don and Aaron, approached the subject bank in a van only to be immediately arrested by FBI, who had gotten a tip from someone who overheard the two talking in the bar. All co-defendants entered pleas of guilty in exchange for a plea bargain except Don, who demanded a trial on charges of conspiracy to commit bank robbery.

Question 3 continued....

You represent Don.

The following evidence was proffered at trial:

- 1) Don's childhood friend, Tom, was called as a witness. Tom was asked about Don's enthusiasm with regard to explosives, and one incident in particular when Don threatened another child, "If you don't give me your lunch money, I'll build a bomb and blow you up and steal it."
- 2) A state police detective was called to testify that an apartment complex where Don's ex-girlfriend was indeed burned by a Molotov cocktail, killing several people, and the timing coincided with Don's recruitment into the Army.
- 3) Col. Collins was called to testify that Don had a reputation as having an intimate knowledge of explosives, to describe the exact specifications of the IED that Don helped defuse, and to describe the events in which Don helped diffused the IED.
- 4) An FBI agent testified that a search of the van in which the thieves arrived contained a mortar-based IED identical to the design of the one that Don had assisted defusing years earlier.

Don wants you to object to "improper character evidence" and California Evidence Code section 352 to each proffer. Please analyze his objections under California Evidence rules as to each proffer, including tactical reasoning, to advise Don.

Question 1

Blue Book

NAME

SUBJECT Evidence Spring 19

INSTRUCTOR Jennifer Daveyport

EXAM SEAT NO

SECTION

DATE 4/22

GRADE

10^{7/8} x 8^{1/4}

25 - 24 PAGE

Question # 1

Re: CA / Criminal / armed robbery + conspiracy to commit armed robbery.

#. The prosecution calls Paige to testify to Dalton's statement and that the firearm was given to Adam by Dalton for safekeeping.

Relevance - evidence is relevant if it tends to prove or disprove a material fact at issue. In this case, Paige's testimony (hereafter P) would be relevant to establish Dalton's guilt.

Hearsay - hearsay is defined as an out of court statement that is offered as proof for the truth of the matter asserted. Here, Dalton's statement (hereafter D) "I really messed up. I never should have ever robbed a bank. Here is the firearm" that P heard would be considered hearsay and not admissible unless there is an exemption or exclusion that would allow it to come in.

Statement by party opponent - D's statement could be considered an admission as a statement by a party opponent when he stated "I really messed up. I should have never robbed the bank," the statement

Good!

was said in front of P. a third party.
and this would be considered an exemption
as non-hearsay because it would be in
the scope of Personal Admissions. Ⓢ

Statement against interest - D's statement can
also be introduced as an exception to hearsay
as a statement against interest when a
party makes a statement against penal,
monetary or property interest, which in
this case be a penal interest since if
D is found guilty he could go to jail.
This exception would only be available if
P were unavailable to testify, but that is
not the case here so there would not be
a hearsay exception on this ~~new~~ regard.

Implied Admission - When D says "Here is
the firearm" in front of P he also implies
his guilt by providing the weapon that was
used in the robbery and which could incriminate
him. This statement could be admissible under
this exception.

Even though there are viable exemption and exceptions the defense will raise a defense to prevent P from testifying:

Attorney-client Privilege: ~~the~~ ~~attor~~ this privilege is created when a person seeks and retains legal representation from an attorney (or even a person who represents itself at such) and that their communication are meant to be confidential and for the purpose of legal representation. P is Adam's law clerk which would put her under the scope of attorney-client privilege because this privilege extends to all the people the attorney employs that are necessary for legal representation. ~~This would also extend to her placing the firearm~~ ^{not}

However, the fact that Adam gave P the fire arm to place in the safe would be admissible because this does not include communication between Adam and D. Also, it is not part of the work-product doctrine which says that notes and other things the attorney uses for legal representation or in preparation for litigation are privileged.

The firearm is not part of work product.
~~And would be admissible~~ P. could testify
to what she did with it. The defense can
ask that the statement be limited to show
D. gave a firearm to Adam for safekeeping
but not to bring in for culpability.

Other considerations:

Vicarious Admission: Dalton was in a
conspiracy with his wife Wanda so his
admission ~~also~~ also makes her culpable.
If P. statements are allowed after meeting
the hearsay burden then this could be
used against Wanda. But as stated above
P's testimony would be limited because
of attorney-client privilege and ~~only~~
D. D's firearm that P got would be allowed
which may be used to inculcate Wanda
because they were co-conspirators, and the
firearm was used in furtherance of the
conspiracy.

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#2 The prosecution presents Wanda to testify that Dalton had a firearm during the robbery and to Dalton's statement in the bank. Further she testified that she drove Dalton to the ER because of his injuries.

Relevance - previously defined. Here, D's statement in the bank "Hand over all cash!" would be relevant to prove D's guilt and part in the robbery.

Hearsay - defined previously. Here, D's statement is hearsay because it was made out of court and is offered for the truth of the matter asserted. And it would only be admissible if there is an exception that would allow it. The prosecution could introduce it with the following:

a Spontaneous statement - an statement that is made while the person has personal knowledge of an event that is startling and that is stressful. D's statement It also needs to be done during or soon after the event occurs. Wanda (hereafter W) can testify that she heard that and the prosecution will argue that D was startled and under stress because

he was conducting an armed robbery which is in itself a very stressful event because it could be fraught with danger especially because D had a firearm.

Contemporaneous Statement - These statements are admissible when they are made at the time of the event or immediately after, in CA the statement has to narrate the conduct of the ~~witness~~ person, in this case the "Stu" statement "Hand over the cash!" does not narrate conduct is merely an order. So this would not apply as an exception.

The statement would be admissible as an spontaneous statement, but the defense will assert that is not admissible due to the following:

Marital Privilege - spouses have privileges that protect their communications during and in some instances prior or after marriage depending on which privilege they claim. There is a policy consideration that these privileges exist to preserve the

harmony in the marriage

~~§~~ Spousal Immunity Privilege - This privilege can only be asserted by the testifying spouse in a criminal case. It exists to protect communication prior or during the marriage, but no longer can be asserted if the marriage ends. Wanda (W), ~~can assert this pri~~ is no longer married to D and cannot assert this privilege. ~~And she can testify in to~~

Spousal Confidential Communication Privilege - applies to confidential conversations between spouses during the marriage and even extends after divorce or death and any spouse can claim it. But in this case W is not testifying about a communication but rather observations and actions. There is no SCCP to be asserted.

~~W~~ Wanda will testify as a witness for the prosecution as a lay witness of the events.

Lay witness - these are witnesses who can testify if they can be helpful to the trier of fact, can testify about personal knowledge that only they can have and are not giving opinions (this is generally not allowed / admissible) in order to testify a witness has to be competent (has personal knowledge of the event, understands the duty to be truthful and can communicate properly) Wanda is able to testify because she can assert that D had the fire arm and she can state to what she heard, also to having driven D to the ER to seek medical care.

However the defense will try to impeach W's testimony (or undermine its credibility) because the defense can do so on cross-examination, once a witness is on the stand they open themselves up for impeachment.

Bias / Motive: The defense will raise the impeachment issue on bias or motive

Because W struck a deal with the prosecution in exchange for immunity.

#4 The prosecution calls the psychotherapist to testify to Dalton's statements.

Relevance - defined previously. Here, D has told ~~the~~ the Psychotherapist (hereafter MD) that he is planning an armed robbery as a cover up to kill his wife, Wanda. Which would help establish his role and guilt in the ~~Heaven~~ bank robbery.

Hearsay - defined previously. Here, the statements made by D to his MD are out of court and could only be admitted if there is an exception.

State of mind - this exception allows a statement to be admitted if it goes towards the defendant's state of mind. D's statement that he was planning the robbery to kill his wife was made during an emotional state that shows he was distressed.

Conspiracy - D's statements to his MD can be used to show that D was planning the bank robbery ~~and~~ the prosecution could try to bring it in as a ~~state~~ statement by party opponent.

However, the defense will try to ~~now~~ assert the psychotherapist-client privilege to block the statements from coming in.

This privilege exists between a therapist and a client for the confidential treatment or diagnosis of a mental health condition.

However, the prosecution can try to get the statement in because the privilege can be waived if there is ~~an~~ a threat of harm or great bodily injury, but the MD did not act on this because they can state that D calmed down prior to going home and was no longer a threat.

The MD's statement would not be admissible because it falls under the psychotherapist-patient privilege.

the prosecution presents the doctor to testify to Dalton's statement and the diagnosis

Relevance - Rejected previously - The statement "I was at the bank and was tackled" ~~was~~ that D said to the Dr. would be relevant because it would go towards his culpability.

Hearsay - Rejected previously - The statement from D to the Dr. is hearsay because it would go towards the truth of the matter asserted and it can only be admissible if there is an exception.

Medical Diagnosis or Treatment - there is an exception to allow for the admission of evidence that pertains to medical treatment or diagnosis. The prosecution can offer the statement to prove that D sought medical care but not to prove he was the bank robber.

~~Business records~~ the doctor's

Although there is not a formal Dr-patient privilege it is assumed and

ca observes it. The doctor may not disclose the diagnosis because that ~~is~~ is considered privilege information but he can disclose that D was at the bank because that is not for treatment, only the part that he was tackled or relevant to medical treatment and not admissible.

So the prosecution could request limiting instructions to allow the Dr's testimony that D told him he was at the bank.

ca observes it. The doctor may not disclose the diagnosis because that ~~case~~ is considered privileged information but he can disclose that D was at the bank because that is not for treatment, only the part that he was tackled or relevant to medical treatment and not admissible.

So the prosecution could request limiting instructions to allow the Dr.'s testimony that D told him he was at the bank.

2)

ROG 1

Relevance

Logical Relevance

Evidence is logically relevant if it has some tendency to make a fact in dispute more or less probable. Here, the evidence being offered by Dr. Scholl's narrative testimony is that the actions of D were the direct cause of his injuries and the crime as charged.

Legal Relevance

Evidence must have probative value that is not substantially outweighed by its prejudicial effect to be admissible. Here, the evidence being offered is probative of the causation between the actions of D and the injury of Dr. Scholl and not necessarily prejudicial on its own.

Expert Testimony

Experts are often called to relate their scientific or specialized knowledge and give opinion as to the ultimate issue of facts present so that it may aid the trier of fact in understanding complex issues beyond average human knowledge. Although there is no set criteria for qualifying an expert, the expert should be able to reasonably relate his opinion to a set of facts and analysis based on scientific principles that are easily testable with methods reasonably relied upon by others in his/her field. Here, if the prosecutor is

presenting Dr. Scholl as a lay witness--who would generally not be permitted to give opinion as to such issues--then this type of testimony should be stricken. However, the prosecutor may be trying to present Dr. Scholl--a foot doctor--as an expert in both physics and ophthalmology. If this is the case, he should not be permitted to testify as an expert witness because the knowledge and expertise required are outside the realm of normal foot doctor medicine and as a lay witness he is trying to relate scientific information. The court should strike this testimony.

Great Answer!

Objection Speculation

There should also be an objection made by the defense because the testimony calls for speculation.

ROG 2

Relevance

Logical Relevance

The note given by Darlene tends to show that she did in fact push Dr. Sccholl. For that reason it is logically relevant to the trier of fact to aid in sorting through facts in dispute.

Legal Relevance

The note is also probative of the events that led up to the assault without being substantially outweighed by its prejudicial effect.

Non-Hearsay

What was written on the note is a statement by a party opponent and non-hearsay.

Best Evidence Rule

The Best Evidence Rule requires an original writing to be produced in place of oral witness testimony when, (1) legally operative documents such as deeds, contracts, and divorce decrees, or (2) the sole source of the witnesses knowledge of the contents of that writing come from the writing itself. This rule is in place because there is a higher probability of error in relating facts of such complex documents without the original. However, there are some exceptions such as collateral issues, voluminous materials, admissions adverse to the producing party, and public records. Here, the note given by D to the officer is the type of document that would be required to be produced because the officers sole knowledge of the facts therein come from the writing itself.

Authentication

Such a document would require proper foundation and then authentication by the officer to say that it is a true and correct original being offered into evidence.

Secondary Evidence

Where there has been a good faith effort to locate the original document or duplicate without success due to destruction or loss and good cause exists, the secondary evidence rule allows oral testimony to come in for the writing. Here, because the officer simply lost the writing through no fault of his own, his testimony may be sufficient and the court would allow him to continue.

Great

ROG 3

Relevance

Logical Relevance

The evidence of Dr Scholl cheating and having \$5MM on the line are both logically relevant to developing motive and intent to lie.

Legal Relevance

This evidence is probative of Dr. Scholl's potential motives in pursuing this case and the prejudicial effect does not substantially outweigh the probative value.

Impeachment

Impeachment is casting adverse light on the veracity of a witness after they have given testimony with or without extrinsic evidence. Here, evidence is being offered to prove that Dr. Scholl cheated and is therefore untruthful. As a prior bad act for truthfulness, this is the proper impeachment technique. However, you cannot introduce the subsequent measure taken against the misconduct because it tends to show that a third party concluded as to the issue of law and that he did in fact "cheat."

Character Evidence

Generally, character evidence is inadmissible to prove that some one acted in conformity with their bad character through introduction of prior bad acts. In civil cases, where character is at issue, opinion, reputation and prior bad acts may come in as substantive evidence. In criminal trials, a Defendant must open the door to character evidence in on direct-examination of a witness and then the prosecutor has an opportunity on cross to ask "have you heard," or "did you know," questions relating to opinion and reputation for the character trait in question. However, there are non-character reasons for introducing this type of evidence such as to develop motive, intent, mistake of absence or identity, interest or common plan or scheme.

Here, D is trying to introduce evidence that Dr. Scholl stands to gain tremendous sums of money and therefore Prior misconduct not resulting in conviction for the character trait in question--here truthfulness--can come in, however not in this form.

ROG 4

Relevance

Logical Relevance

This evidence is relevant to show that Dr. Scholl initiated the attack.

Legal Relevance

This type of evidence is probative and not necessarily prejudicial.

Lay Witness

A lay witness may give their impression and relate what they have seen through personal knowledge. That the child is 4 years old is an argument of competency, if the witness understands the gravity of the situation and knows the importance of truthfulness under the circumstances then he should be allowed to testify as to what he witnessed. That he does not remember what the man or lady were wearing are collateral issues that are not necessarily relevant, so long as he can identify the man in court and the lady and give his first hand account of what he saw.

END OF EXAM

3)

Question 3:

1. Tom's Testimony

Relevance: Evidence is logically relevant if it has a tendency to prove or disprove a material issue. Logically relevant evidence may be excluded under CEC 352 if its probative value is substantially outweighed by its prejudicial effect.

Don's statement, " If you don't give me your lunch money, I'll build a bomb and blow you up and steal it, " is relevant because it shows that Don has always had an enthusiasm with explosives. I believe this is a bit of a stretch, and the court might find Don's statement to be irrelevant.

Character Evidence: In civil cases character evidence can only be introduced if character is at issue. However, in criminal cases the defendant must be the one opening the door. Character evidence is limited to reputation or opinion no specific acts unless the defendant seeks to introduce the victim's character for violence. Also the prosecution is limited on his cross exam and can only ask about things he reasonably believed happened, no extrinsic evidence is allowed and the everything must be relevant. In California the character evidence can be for a specific or general law abiding trait.

Great!

Here, Tom's statement would be inadmissible because a heist would be considered a criminal case thus it would have to be the defendant who opens the door. In this case Tom is clearly testifying against Don, further he is using a specific incident which is not allowed. For all these reasons, Tom's character testimony would not be admissible in court. The prosecution could try to introduce the testimony as a prior bad act/ crime to demonstrate either intent or motive. However, once again I believe that would be too

much of a stretch it's prejudicial effect is too substantial we need to keep in mind that if this event indeed happened, it happened many years ago. Tom is basically indicating that Don has the propensity to build bombs etc. to get what he wants because that is what he did once in the past. Propensity is never allowed in character evidence unless the defendant opens the door.

2.State police detective testimony

Relevance: supra

The testimony by a state police detective that an apartment complex where Don's ex-girlfriend was burned by a Molotov cocktail, killing several people, and that timing coincided with Don's recruitment into the army is relevant to show that Don might have left to the army because he indeed was the one who burned his girlfriend and killed those people .

Character evidence: supra

Once again the prosecution is not allowed to open the door to the Defendant's character. Here, the state police detective is testifying against Don. The defendant is the only one in California who is able to open the door to his character. Further, the testimony is extremely prejudicial. Thus, the court would not allow the police detective's testimony to come in.

3. Col Collins Testimony

Relevance: Supra

Col. Collins testimony is relevant because it shows that Don had intimate knowledge of explosives and that Don know how to diffuse the IED.

Character evidence: supra

Here, Col Collins will testify that Don had a reputation as having an intimate knowledge of explosives. Reputation is always allowed in character evidence but what is not allowed is for the prosecution to open the door. Because the prosecution is not allowed to introduce such statement as character evidence the prosecution will seek to introduce the testimony as a prior bad act to show defendant's knowledge. The prosecution would likely prevail because the testimony would prove that Don is a very knowledgeable man when it comes to explosives. Thus, Don most likely used such knowledge in the present crime. Prior bad acts can be used to show intent, plan, identity, motive, preparation, opportunity, absence of mistake, absence of accident, consent or knowledge. The court making use of CEC 352 would likely find that the probative value was not substantially outweighed by the prejudicial effect.

4. FBI agent testimony

Relevance: supra

The testimony is relevant because it shows that the IED was designed by Don.

Character Evidence: Supra

As mentioned before the prosecution cannot open the door to defendant's character evidence thus the FBI agent's testimony would be admissible. However, the prosecution can introduce the testimony to under prior bad acts. Basically, the prosecution can introduce the testimony to show identity. When prosecution tries to introduce evidence to establish identity

END OF EXAM