

San Luis Obispo College of Law

EVIDENCE

Final Examination

Spring 2020

Professor S. Lizardo

INSTRUCTIONS:

There are three (3) questions in this examination.

You will be given 4 hours to complete the examination.

SPRING 2020 EVIDENCE EXAM QUESTION AND ANSWER

Andrew is being charged with the first-degree premeditated murder of his mother in the case of People of the State of X vs. Andrew. Andrew is a 30-year-old husband and father of two young children. In the months leading up to this incident, Andrew was laid off from his long term, well-paying job. He began working two jobs to support his family. Andrew began using methamphetamine to allow him to stay up the long hours he needed to work.

The following are undisputed facts of the case: On the day of the murder, Andrew was using methamphetamine. Andrew went to his mother's home to visit her. Andrew's mother, Beatrice and brother, Cody were home. Cody was upstairs when he heard Beatrice and Andrew screaming in the kitchen. Cody ran to the kitchen and saw Beatrice lying on the ground with one stab wound to her chest and Andrew bleeding profusely from wounds to his arm. Cody called 911 and the police and ambulance arrived shortly thereafter. Beatrice was pronounced dead at the scene. Andrew was taken to the hospital where he was treated for his injuries and arrested for murder.

The prosecution's theory is that Andrew and Beatrice were arguing and Andrew stabbed Beatrice out of anger, killing her. The defense theory is that Andrew was in a methamphetamine induced psychosis and began cutting his own arm. Beatrice tried to stop Andrew by grabbing the bloody knife from his hands and the knife slipped accidentally killing Beatrice.

Assume the following occurred in the jury trial of Andrew. 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. **The State of X has adopted the Federal Rules of Evidence.**

1. In her case in chief, the prosecutor seeks to introduce Andrew's medical records which include a statement made by Cody to ambulance personnel immediately after the stabbing stating, "Andrew stabbed my mom because they were arguing."

Relevance: Evidence is relevant if has some tendency make the existence of a fact of consequence more or less likely than it would be without the evidence.

The statement of Cody contained in the medical records is relevant because it supports the prosecution's theory that Andrew killed Beatrice out of anger and refutes the defense of accident or mistake.

Hearsay: Hearsay is an out of court statement offered for the truth of the matter asserted.

The medical records would be hearsay if offered for their truth

Business records exception to the hearsay rule:

1. The declarant (the ultimate source of the report) had a business duty to report the information
2. The declarant had personal knowledge of the facts or events reported
3. The written report was prepared close in time to the events contained in the report while it was still fresh in the declarant's memory
4. It was a routine practice of the business to prepare such reports
5. The report was made in the regular course of business.
 - a. This requires that the entry be related to the nature of the business.
 - b. Reports specially prepared for litigation are not made in the regular course of business

Typically, medical records are authored by doctors or other health professionals who have a business duty to report the information and personal knowledge of the facts reported. Medical records are written close in time to the events contained therein while they are fresh in the medical professional's memory. It is routine practice of the business to prepare such records. The records are made in the regular course of business.

The business record exception would not cover the statement made by Cody to the paramedic because Cody does not have a business duty to report to the paramedic. Cody's statement would have to be redacted from the business record unless another exception to the hearsay rule applies.

Excited Utterance: It could be argued that Cody's statement was an excited utterance.

1. An event occurred.
2. The event was startling, or at least stressful
3. The declarant has personal knowledge of the event.
4. The declarant made a statement about the event.
5. The declarant made the statement while he or she was under a state of nervous excitement

Cody just witnessed his mother, who suffered a fatal stab wound, in the kitchen and heard what transpired between his mother and the defendant prior to the stabbing. The event is stressful. It was made to an EMT who arrived on the scene shortly after the incident occurred. His statement would likely be admissible under the excited utterance exception.

Authentication: Business records are self-authenticating if the custodian of records files a declaration indicating that the elements of the business records exception are satisfied. If this was done, a sponsoring witness is not required for the introduction of the evidence.

Best Evidence Rule: The best evidence rule applies where the document's contents are at issue – it is a legally dispositive document, or the contents of the documents are known to the witness only through reading the documents. The best evidence rule does not apply in this situation where the document is convenient proof of facts exist independent of the document. The medical records for Andrew do not implicate the best evidence rule.

2. Next, the prosecution calls Evan, Andrew's neighbor. Evan testifies that one month before the murder Andrew came to Evan's house and accused Evan of secretly videotaping him through his television. When Evan denied videotaping Andrew, Andrew pulled out a knife and threatened to stab Evan. Evan said Andrew appeared to be under the influence of drugs.

Relevance: Evan's testimony is relevant to rebut Andrew's claim of accident by showing that he has acted in a violent manner in the past while under the influence of methamphetamine.

Character Evidence:

The general rule is that information about a person's character may not be introduced to suggest that the person did something because he or she has a propensity to do such things. Both the Federal Rules and California prohibit the use of character to prove conduct in conformity with that character (propensity). See FRE 404(a)(1), CEC 1101(a)

Character evidence is not permissible in a criminal case unless the Defendant opens the door to his or her own good character. The prosecutor is seeking to introduce Evan's statement in their case in chief. The defendant has not opened the door to his good character. Even if the defendant opened the door to his good character, under the Federal Rules, the prosecutor would be limited to cross examining the defendant's character witness about if they had heard or knew of prior relevant acts of the defendant and would be prohibited from introducing extrinsic evidence if the witness was not familiar with that information. The prosecutor could also call their own character witnesses, but those witnesses would be limited to stating their opinion of the defendant's character or the defendant's reputation for the trait in the community.

Prior Bad Acts.

The basic rule is that when a person is charged with a crime, extrinsic evidence of her other crimes or misconduct is inadmissible if such evidence is offered by the prosecution solely to establish a criminal disposition. The prosecution may not show the accused's bad character to imply criminal disposition. The reason the rules preclude this use of character evidence is due to the danger that the jury may convict the defendant because of past crimes rather than because of her guilt of the offense charged.

Admissible if Independently Relevant.

Although evidence that could lead to a conclusion about someone's character is kept out if offered to show action in conformity with that character on a specific occasion, it can be admitted if it is introduced for other purposes. FRE 404(b) states that such prior acts or crimes may be admissible for other purposes (such as to show motive, opportunity, intent, preparation, knowledge, identity absence of mistake or lack of accident) whenever those issues are relevant in either a criminal or a civil case. Upon request by the accused, the prosecution in a criminal case must provide reasonable notice prior to trial (or during trial if pretrial notice is excused for good cause shown) of the general nature of any of this type of evidence the prosecution intends to introduce at trial. Thus, if the evidence is logically relevant to a fact in issue other than character, and the probative value of the evidence is not substantially outweighed by its prejudicial effect (FRE 402), the prosecution may introduce evidence of the uncharged act.

Absence of Mistake or Accident.

In cases in which the defense of accident or mistake are asserted prosecution evidence of similar misconduct by the defendant is admissible to negate the possibility of mistake or accident. In this case, the prosecution will assert that the evidence that Andrew threatened Evan with a knife is relevant to show the Beatrice's death was not a result of accident or mistake. When evidence is admissible for a non-character motive, the restrictions placed on the form character evidence can take is not present. Thus, the prosecutor can introduce this evidence in their case in chief and in the form of Edward's testimony about the specific instance.

403: Whether the probative value is substantially outweighed by the prejudicial effect.

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. The defendant will argue that the probative value of the evidence is substantially outweighed by the danger of undue prejudice, confusing the issues and misleading the jury. "Unfair (or undue) prejudice" means not merely damaging to one party's case; it refers to a tendency to evoke an emotional bias against one party without having a substantial effect on a disputed issue. Evidence is unduly prejudicial "when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction." The defense will argue that this evidence is prejudicial because of the danger that jurors will believe that Andrew is a dangerous person and convict him based on his past acts. The prosecutor will argue that this evidence goes directly to core issues presented at the trial – whether the incident was a premeditated murder or an accident. Weighing both considerations, the court will likely

permit the evidence because although the evidence is significantly prejudicial it also has a significant probative value on material issues presented in the case.

Lay Opinion Evidence:

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is rationally based on the witness's perception, helpful to clearly understanding the witness's testimony or to determining a fact in issue; and not based on scientific, technical, or other specialized knowledge. Typically, courts will allow lay witness opinion testimony on issues such as the general appearance or condition of a person, including intoxication or sobriety.

3. In the defense case in chief, the defense calls Andrew who testifies that he was delusional and trying to cut off his own arm when his mother grabbed the bloody knife and it slipped and accidentally stabbed her. On cross examination, the prosecutor asks Andrew if he has been convicted of a misdemeanor offense for threatening his neighbor Evan with a weapon.

Relevance/Impeachment:

Under the federal rules, a witness may be impeached by a prior conviction in one of two circumstances:

Crime Involving Dishonesty or False Statement. Under the Federal Rules, a witness' character for truthfulness may be attacked (or impeached) by any crime (felony or misdemeanor) if it can be readily determined that conviction of the crime required proof or admission of an act of dishonesty or false statement.

Felony Not Involving Dishonesty. A witness' character for truthfulness may also be attacked, under the Federal Rules, by any felony whether or not it involves dishonesty or a false statement. As the offense is a misdemeanor and not a felony, this would not be a proper avenue for impeachment.

Prior Bad Act Impeachment. This conduct would also not qualify for impeachment as a prior bad act, as the prior bad act must be an act of dishonesty or false statement. Threatening someone with a knife would not qualify.

Objection sustained; the prior conviction is not admissible.

4. Andrew has numerous potential character witnesses including former co-workers, family and friends who would testify that he has a peaceful, non-violent nature. What tactical issues should the defense attorney consider in deciding whether to introduce evidence of Andrew's good character?

Note: There could be a variety of answers to this question. The idea is to ensure that the student understands the character evidence rules and can articulate how that would impact a decision to use character witnesses.

Introducing evidence of character witnesses who indicate that Andrew has a peaceful, non-violent character would be beneficial for Andrew to support his theory of the case. It would also allow the jury to see that Andrew has many people in his life that support him and can attest to his good character.

The potential cons of introducing character evidence really depends on the court's decision as to whether the jury will hear Evan's evidence about Andrew threatening to stab him with a knife. If the court rules that evidence is inadmissible under a prior bad act theory, then Andrew would open the door to allow the prosecutor to question his character witnesses about threatening to stab Evan to show that Andrew's character witnesses do not know Andrew's character well enough to be credible on that issue. If the court rules that Evan's testimony is admissible, then the potential negative effect of introducing Andrew's character evidence is diminished.

Question 2

Hudson is being charged with armed bank robbery. During the crime, Hudson shot off a 9 MM firearm into the ceiling. He placed the firearm in his waistband which caused a burn mark on his hip that became infected. Hudson called Arlo, his attorney and asked for help on the bank robbery charges. Once Arlo met with Hudson, Arlo referred Hudson to Dr. Dyle for the medical injury.

Subsequently, Hudson met with his attorney, Arlo, Dr. Dyle and Lindsey, Arlo's law clerk. Suddenly, Hudson's wife, Wallis, barges into the meeting and says, "I am mad at you for cheating on me! I just told Detective Cosmo that you robbed the bank!" Wallis storms off and files for divorce. Hudson says to Arlo, in the presence of Dr. Dyle and Lindsey, "Wallis knows that I gave you my ski mask, firearm and cash to hide."

On the day of the robbery, Detective Cosmo investigated, seized one spent 9 MM bullet from the bank ceiling and a surveillance tape. The tape showed a masked robber shooting a firearm into the air and placing the firearm into his waistband. Detective Cosmo is a qualified firearms expert.

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. The prosecution calls, Lindsey, the law clerk, who testified that she was present at and heard all of Hudson's statements to Arlo about hiding the ski mask, 9 MM firearm and the cash.
2. Next, the prosecution presents, Wallis, Hudson's wife, who voluntarily testified that right after the robbery, Hudson told her in their bedroom "I robbed a bank." At the time of the trial, Hudson and Wallis had reconciled and are still married.
3. The prosecution presents Dr. Dyle who testified that he treated Hudson for an infected burn mark on the hip. Also, the doctor says that Arlo called him and asked him to look at Hudson's injury or "burn mark."

4. Finally, the prosecution presented Detective Cosmo. He testified that one spent 9 MM bullet was recovered from the bank ceiling. Also, he laid the foundation for playing the surveillance video to the jury.

Evidence-Q # 2: ANSWER OUTLINE-Prof. S Lizardo

*** PLEASE NOTE: Arguments may have a different point of view. Okay so long as logical, used the rules and critical thinking. **

1. LINDSEY 'S TESTIMONY, THE LAW CLERK

RELEVANCE- evidence must be both logically relevant and legally relevant to be admissible.

Logical Relevance

-Evidence is logically relevant if it tends 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 Lindsey's testimony to establish the identity of the robber as Hudson, and that he used a firearm, was masked and stole cash from the bank. -

Legal Relevance

-Trial judge has the discretion to exclude evidence if the probative value is substantially outweighed by the danger of unfair prejudice.

PROP 8

- In California, **Prop 8** applies to criminal cases, and provides that all relevant evidence is admissible even if it is objectionable.

-However, Prop 8 evidence is subject to the being excluded under CEC 352, if the unfair prejudice outweighs the probative value. Furthermore, Prop 8 has several exemptions.

- Evidence offered is exempt from Prop 8 because the evidence has probative value in determining the identity of the shooter and the location of the weapon.

- Risk of unfair prejudice this appears to be outweighed by the probative value in showing that the defendant is violent and shot Van.

HEARSAY

-Hearsay is an out- of- court statement offered to prove the truth of the matter asserted and is inadmissible unless an exception applies.

- What Lindsey heard Hudson say was an out- of- court statement offered to prove the identity of the robber as Hudson, that a firearm and ski mask and that Arlo was given these items along with cash from the robbery.

SPONTANEOUS STATEMENT EXCEPTION-Lindsey repeating what Hudson said

A statement that is otherwise hearsay be admissible as an exception if the statement made while the declarant (Darren) was under the stress of a startling or stressful event and the statement must concern the immediate facts of the stressful event.

- "Wallis knows that I gave you my ski mask, firearm and case to hide," may be a spontaneous statement exception since it may be argued that Hudson may still be under the stress of his wife barging into the meeting. However, this exception is not likely to prevail if the event, the robbery, has had a significant lapse of time.

Exception does not apply. -

(NOTE: The call of the question was for CEC, not FRE Excited Utterance.)

ADMISSION BY PARTY

-A statement is not inadmissible when offered against the declarant in a case where he is a party.

- Hudson is the defendant in a criminal case, he is a party.

-Party who is offering the robber's testimony – is the prosecution

-The parties are on separate sides.

-Since Hudson made the statements of asking Arlo to hide the firearm, the ski and cash, these are Admissions by a Party Opponent and will be admitted into evidence.

STATE OF MIND

-Statement of declarant's then existing physical or mental condition or state of mind.

-Discussion of statements by Hudson to Arlo.

CONTEMPORANEOUS STATEMENTS

-A statement that is otherwise hearsay will be admissible as an exception if the statement made by the declarant is explaining his conduct while the declarant is engaged in that conduct.

- Lindsey that is repeating Hudson's statements concerning the robbery, the ski mask, the firearm and cash. She is not explaining her own conduct.

- Exception does **not** apply.

PRIVILEGE

Specific relationships that are built on trust and confidentiality protect disclosure of certain information.

ATTORNEY – CLIENT PRIVILEGE – Lindsey’s Presence at Meeting

-The attorney-client privilege allows the client the right to refuse to disclose confidential legal information between the client and the attorney. The attorney has separate ethical obligations aside from the privilege.

- Arlo is H’s attorney and is having a confidential client communication with Hudson. The law clerk, Lindsey is present. (Dr. is there, too- under separate discussion below)

-“Reasonably Necessary”- Third Party’s Presence / Eavesdropper or not

Hudson’s admission about being the robber to his wife, Wallis, may qualify for the crime or fraud exception. However, the exception is generally limited to future crimes. Hudson did ask his attorney to hide the gun, ski mask and cash.

Then, Hudson advised Arlo that his wife knew of his conduct in requesting help in hiding the items. Furthermore, the statements by Hudson to Arlo may be considered “consciousness of guilt.”

The third- party presence of Lindsey, the law clerk. would defeat the privilege and her hearing Hudson’s statements to Arlo the request to hide the ski mask, firearm and cash would be deemed admissible unless she is termed an **eavesdropper or reasonably necessary to Arlo’s meeting with Hudson.**

(Note: OK if students argue otherwise, so long as logical.)

2. WALLIS’S TESTIMONY- TELLING HUSBAND’S ADMISSION OF BEING ROBBER AND KNOWLEDGE ARLO IS HIDING ROBBERY ITEMS

SPOUSAL TESTIMONIAL PRIVILEGE

-One spouse cannot be compelled to testify against another spouse in a criminal proceeding. It can only be invoked by the spouse-witness and can only be claimed during marriage.

- Here, Wallis is volunteering to testify against her spouse. The testifying spouse may testify against a spouse in **any proceeding**. Wallis is the holder of the privilege.

-Waiver of the privilege

MARITAL COMMUNICATIONS PRIVILEGE

-The privilege protects confidential spousal communications and survives if the marriage ends by death or divorce.

-Apparently, Hudson tells Wallis about the robbery. No third parties were present and this shared confidential communication was in their bedroom.

- Hudson and Wallis are legally married at the time of her testimony. Although Wallis did file for divorce, the parties had reconciled by the robbery trial.

- Presumption of confidential communication in certain relationships. Had Wallis just seen the ski mask, the firearm and cash, the viewing would not be protected.

(Note: OK if students argue other way so long as a logical argument.)

3. DR. DYLES'S TESTIMONY

RELEVANCY- see rules above.

Dr. Dyle's testimony is logically relevant because the doctor treated Hudson for an infected burn and the robber was seen on the video to place a firearm in his waistband. There can be a reasonable inference that the identity of the robber is Hudson.

The defense will argue that the doctor's testimony is too prejudicial and not probative. The jury may weigh the doctor's testimony more because he is a doctor and not a layman. Also, the testimony is speculative. However, after balancing the interests, the trial court will admit the testimony.

PHYSICIAN – PATIENT PRIVILEGE: ATTORNEY REFERRED

-A physician-patient relationship is protected from disclosure if the patient's confidential communication was for the purpose of diagnosis or treatment. The holder of the privilege is the patient, here is Hudson who was treated for an infected burn.

The key issue is since Arlo, H's attorney did the referring, is the doctor now covered under the umbrella of the attorney-client privilege? If the physician was contacted for the purpose of a pending litigation, there may be an extension of the attorney-client privilege.

Defense may argue that since Arlo referred Hudson and this was treatment for an infected burn, the testimony should be excluded. This testimony is covered by both privileges- the attorney-client and the physician-patient privilege. Also, since Dr. Dyle was present at the meeting with Arlo and Hudson, is likely the attorney was consulting Dyle for the robbery trial.

(Note: an argument may be made that Dr. Dyle is not protected by attorney-client privilege and was really a third party in the meeting, hence the privilege was waived.)

EXCEPTION: CRIME OR FRAUD

-Recognized exception to disclosure if crime or fraud.

-Since the physician was made aware of the robbery and the hidden items during the meeting with Arlo and Hudson. He also heard Wallis say Hudson was the robber. This serves to be an exception to privilege.

4. DETECTIVE COSMO'S TESTIMONY- THE SPENT 9MM BULLET & SURVEILLANCE TAPE

RELEVANCE- see rules above.

Detective Cosmo's testimony about seizing a 9MM bullet from the bank ceiling has a tendency to show the robber fired a firearm into the air. Since he is a qualified firearms expert, he will be allowed to testify to the caliber of the bullet he recovered.

The logical relevancy of the surveillance video has a tendency to show the robber as wearing a ski mask and shooting off a firearm into the air. This conduct shows intimidation and fear which is a requirement of robbery.

Defense will object to the testimony and presentation of the surveillance tape as too prejudicial and not probative. Since the video shows the violent act of shooting off a firearm some jurors may convict Hudson on that fact alone.

AUTHENTICATION OF SURVEILLANCE VIDEO

Chain of custody is established because Detective Cosmo was the investigating detective for the bank robbery and seized the bank surveillance video. He can identify the date, time and location of his seizure.

SECONDARY EVIDENCE RULE

-The contents of writings may be proved by secondary evidence unless a genuine dispute. This includes copies, duplicates or reproduction of original. The Best Evidence Rule has been abolished in California.

- Applies only when evidence is offered to prove material items of writings.

- The surveillance video will be considered a writing since sound recordings are covered under writings.

Evidence
Final Examination
Spring 2020

Question 3

John "Bizarre" Shibble owns and runs a roadside zoo in the Midwest specializing in big cats. His specialty is Snow Leopards. Known for being flamboyantly gay and for being an avid gun enthusiast, Shibble's eccentricity led him to star on a reality show entitled "John Bizarre: The Leopard Prince." Shibble has had an ongoing feud with Karen Best, an animal rights activist. The feud got worse and worse over the years.

One day, police found Karen Best's body on the side of the road down the street from Shibble's zoo. She had been shot three times in the chest, but no bullets or casings were located at the scene. Shibble was a primary suspect in the homicide case, but prosecutors did not charge him because there were no eyewitnesses to the killing and a lack of physical evidence for proof beyond a reasonable doubt.

Karen Best's estate, through her husband, Hank, sues John Shibble in a Federal Court for intentional tort alleging wrongful death. Shibble denies all allegations and claims he was not even aware Karen Best was dead until he saw it on the news. The following evidence is proffered at the trial:

- 1) Hank calls Tom Otto, the cameraman, who filmed the reality show, to testify to the statement made by Shibble. While being filmed shooting explosive soda cans filled with Tannerite, Shibble said, "Yee Haw! Karen Best, you bitch, if I ever see you on my property, I'll put a bullet in your head for real!"
- 2) Hank also calls an engineer, William Pluma, who is a former Marine sniper. Pluma testifies that he developed his own test to determine the caliber bullet used in a shooting. The test uses ballistics gel and digital imaging. Pluma will testify that You Tubers with gun and science-related shows have given his test positive reviews. The results of his test in this case suggest that Best's bullet wounds were caused by a specialty cartridge: .347 Leopard Magnum.
- 3) Hank calls Rex Vander, a Federal Agent familiar with the feuding Shibble and Karen Best. Vander will testify Shibble has a criminal record that includes felony assault from two years earlier and felony perjury from five years earlier. He will also testify that his opinion was that Karen Best was a "sweet woman who did not seem the violent type."

- 4) Shibble calls Jim White. White testifies that White told Shibble the well-circulated rumor in California that Karen Best had secretly gunned down her millionaire husband and fed him to the big cats she had rescued in order to inherit his fortune.

Discuss all the evidentiary issues and arguments that would likely arise in each section above, including objections, if any, and the likely trial court ruling on the admissibility of the evidence. Answer according to **Federal Law only**.

ANSWER-Evidence Final Examination-Spring 2020- Question 3

1) Section 1

- a. Logical Relevance:
 - i. Is logically relevant: shows intent to kill
- b. Legal Relevance:
 - i. Highly prejudicial, but not unduly so (not an impermissible inference).
 - ii. 403 objection likely to be overruled
- c. Hearsay:
 - i. General Rule: Yes, likely to be considered hearsay.
- d. Hearsay Exceptions:
 - i. Non-hearsay: Admission by party 801(d)(2)
 - ii. 803(3) – State of Mind/Hillmon Doctrine
 - 1. Other exceptions not likely to apply:
 - a. Business records: The show is the record
 - b. Recorded recollection: The show is the record
 - 2. 804 Exceptions don't apply (not unavailable):
 - a. Statement against interest
- e. Best Evidence Rule:
 - i. The cameraman is a witness himself, and does not require testimony about what was in the recording
 - ii. The recording itself would be required if the BER applied due to no apparent exception

2) Section 2

- a. Logical Relevance: shows that the caliber used in the killing is available to defendant, so it is relevant. Low bar for relevance here is key.
- b. Legal Relevance: Depending on ruling on expert witness, may be prejudicial in that it exaggerates the reliability of the evidence and the probative value relies entirely on the name of the cartridge being tied to the nickname of Shibble.
 - i. Result could go either way on this on this, but the main factor will likely be time wasting for something so minute.
- c. Expert Testimony:
 - i. Qualification as an expert: Will probably qualify
 - ii. *Daubert* applicable because FRE:
 - 1. Generally accepted: No
 - 2. Peer review/Publication: Yes, but not ideal
 - 3. Testability: It can and apparently has been tested

4. Rate of error: unknown
5. Independent research: Apparently yes, but not ideal
 - a. Court's discretion as gatekeeper will be key here, and it could go either way (although I would lean toward exclusion)

3) Section 3:

- a. Relevance: Felony assault – as propensity, tends to show he is violent. As non propensity, does not tend to prove anything (little factual support for anything else)
- b. Bad Character evidence:
 - i. Felony assault
 1. It is character evidence – specific instances
 2. Propensity – Violence – not allowed
 3. MIAMI COP Exceptions: None apparent
 4. Impeachment: No indication that Shibble has testified and so can't be impeached
 - a. If he does testify, the applicable rule is that it must be admitted subject to 403
 - b. No age out
 - ii. Felony Perjury
 1. Propensity – Crime – not allowed
 2. MIAMI COP Exceptions: None apparent
 3. Impeachment: No indication that Shibble has testified so he can't be impeached
 - a. If he does testify, it qualifies as an act of dishonesty or false statement
 - b. No age out
 - iii. 403:
 1. Prejudice: Propensity is the likeliest impermissible inference; time wasting as witness appears to have no other purpose.
 2. Probative Value: Little to nothing given lack of MIAMI COP or impeachment value
- c. Good character evidence:
 - i. Relevance: It does not seem to prove anything since her actions are unknown and don't appear to be central to the case

1. No claims of self-defense
 2. No claim of violence
 - ii. Nonviolent opinion
 1. It is character evidence: opinion
 2. Propensity – nonviolence – not allowed
 3. Mercy Rule: Does not apply to victim in civil case
 4. “Opens the Door” to impeachment
 - iii. 403:
 1. Prejudice: Makes the victim more likeable, meaning that anyone who feuded with her is less likeable, and the jury may turn it into a “popularity contest”
 2. Probative value: decreases likelihood that jury will invent self-defense argument on its own
 3. Given that it is already probably not admissible, 403 will likely keep it out.
 - d. Tactical: Should not object because it may allow for rebuttal testimony
- 4) Section 4:
- a. Logical Relevance:
 - i. Rebuts evidence that Karen Best was nonviolent, even if independently inadmissible
 - ii. May help establish a claim of self-defense, though that is not the theory upon which Shibble is relying
 - b. Legal Relevance:
 - i. Will tend to enflame the passions against the victim, potentially leading them to find Shibble not liable despite facts; may distract jurors from central issues
 - c. Hearsay:
 - i. General rule: It can be used as hearsay, and there is a substantial likelihood the jurors will take it as true
 - ii. Not-Hearsay: May use it to demonstrate that Shibble believed that Karen Best was dangerous, and therefore he had a valid claim of self-defense
 1. Note: Self-defense is not his defense, so this use would make the not-hearsay logically irrelevant
 - iii. Excepted Hearsay: No apparent exceptions apply

1)

Choice of Law

This is a civil action in Federal Court the Federal Rules of Evidence will apply

Relevance

In the Federal Rules of Evidence (FRE) all relevant evidence is admissible. Relevant evidence is evidence that tends to make a material fact more or less likely. The test that is applied is the logic test.

Here Tom's testimony is relevant because it tends to show that John had a beef with Karen. The acrimony in their relationship is relevant to proving a motive for killing her.

Toms testimony is relevant and therefore admissible

Balancing Test

The balancing test is also called the Legal test. Here the judge must determine if the evidence is more probative than prejudicial. If evidence is too prejudicial the judge has the discretion to bar it from coming in.

Here, Tom's testimony about the statement that John made is highly prejudicial but it will likely be allowed because of the probative value in establishing motive.

Tom's testimony is coming in.

Witness Competency

In order for a lay witness to be competent, they must have personal knowledge, memory of the event and be able to communicate effectively. If they are testifying in court they must do so under oath.

Here Tom has personal knowledge of the statement that John made because he was filming him. If he cannot remember, the video may be used to refresh him memory as a

prior recollection refreshed or it may be played for the jury but not admitted into evidence as a prior recollection recorded if the first attempt to refresh his memory fails.

Hearsay

Hearsay is an out of court statement offered to prove the truth of the matter asserted. Hearsay is inadmissible unless it falls under an exclusion or exception.

Here Tom is testifying to a statement that he heard John say while they were filming. It was out of court and it is being offered to prove the truth of the matter asserted which is that John killed Karen. John's statement "yee haw! Karen Best you bitch if I ever see you on my property Ill put a bullet in your head" is hearsay

The statement is hearsay and would be inadmissible unless an exception or exclusion applies.

Admission Exclusion

The FRE recognizes several assertions that are excluded from the Hearsay Rule. Any statement made by an opposing party and offered against the party is an Admission. Personal knowledge is not required and it is excluded for the purposes of hearsay.

Here John made the statement

"yee haw! Karen Best you bitch if I ever see you on my property Ill put a bullet in your head" . John will argue that he was not serious and that he was showing off for the camera because they are rivals.

The statement will be admissible as non-hearsay.

Exceptions

Present state of mind

The present state of mind exception is used to demonstrate an internal state of mind.

The statement may also come in as a present state of mind. John is asserting that if Karen ever comes on his property he will shoot her, He is speaking out loud how he feels internally.

The statement may come in under present state of mind.

John's hearsay statement will likely be admitted with either an exception or an exclusion.

Williams Testimony

Relevance as defined above

Ballistics information will be relevant because it will assist in determining the type of weapon in the shooting

Hanks testimony is relevant and therefore admissible

Balancing Test as defined above

The information offered by the expert is highly probative and is fact based with a low prejudicial component.

The evidence is more probative than prejudicial and is coming in.

Competency of the Witness as defined above

Expert Witness

The basic competency is defined above. In addition to the basic competency an expert witness may state an opinion so long as he has scientific knowledge, is qualified as a witness, the testimony/opinion is based on sufficient fact and the expert has relied on accepted principles and methods. The opinion may be based on information he got from personal knowledge, facts known to the expert learned at trial and facts known by the expert.

Here Hank, an engineer is being called to testify about a test that he developed to determine the type of caliber of the bullet. His test uses ballistic gel and digital imaging. He is testifying that you tubers and science related shows gave him a thumbs up.

Daubert

When an expert witness is testifying about novel scientific or technological methods the court must examine whether the new technology is supported by reliable methods and procedures.

Here Hank is admitting test reports based on his own novel theory. In order for them to pass the Daubert test, they would have to be based on reliable scientific method, be accepted and subjected

to peer review. The known potential error rate would have to be disclosed as would the existence of standards and controls.

Here Hank refers to his peer review as you tubers and scientific tv shows. Those are not the types of peer review that Daubert requires.

The novel method by Hank would not pass Daubert and would not be admissible.

Rex Vander

Relevance as defined above

Balancing Test as defined above

the evidence is both relevant and probative and will be admissible

Competency of the Witness as defined above

The agent is speaking about investigative work that he has personal knowledge of. He will testify under oath and there is nothing in the fact pattern that would imply lack of memory.

The witness is competent.

Character Evidence:

Character Evidence may not be admitted to prove conduct in conformity. Character evidence is comprised of Opinion, Reputation and Specific Instance.

Here the agent will testify that John has a criminal record that includes a felony assault from two years ago. Felony perjury from 5 years earlier. This is a civil case and Character evidence is inadmissible. The only exception of defamation and child molestation does not apply,

Opinion Testimony about Karen

Opinion testimony is generally inadmissible unless it helps the trier of fact.

Here again character evidence is inadmissible in a civil case. The only exception would be for impeachment purposes and if John had placed his character at issue. Given that this is Hank's case and chief, neither Karens reputation or John's is at issue. And Hank is not permitted to bolster Karen's reputation unless it is at issue.

Jim White

Relevance as defined above

Balancing as defined above

Whites testimony is likely to be neither relevant or probative and will be highly prejudicial,

Competency of the witness as defined above

So long as white satisfies the requirement he is competent. Here that is in question because he is testifying about a rumor. Which is not personal knowledge.

Character Evidence as defined above.

His statements will be inadmissible because they will not assist the trier of fact and may be confusing. Further reputation character evidence is inadmissible in a civil case unless it is for impeachment purposes.

Shibble is placing Karen's reputation at issue and she has not opened herself up to impeachment (she's dead but her reputation is not up for impeachment)

Shibble will be barred from admitting Character evidence.

Hearsay-as defined above

It is not certain that White has an out of court assertion to testify about. The fact pattern says it is a widely circulated rumor and that is not really an out of court assertion.

If it was found to be an assertion it would be barred by hearsay because there is not applicable exclusion or exception.

Whites Testimony will not be admitted.

END OF EXAM

2)

Prop 8

Under Prop 8, criminal cases in California allow for the admissibility of all relevant evidence, subject to a few exceptions. This is a criminal case in California so Prop 8 will apply.

Law Clerk (L) testimony

Logical relevancy - tendency test

In order for evidence to be admissible it must be logically relevant. Logical relevancy is the tendency to prove or disprove a material fact. Logical relevancy is in general a low bar

The Prosecution (P) will claim that L testimony is logically relevant because she has first hand knowledge of what Hudson (H) told to Arlo (A) the attorney.

The court will find L's testimony legally relevant

Legal relevancy - balancing test

To be admissible evidence must also be legally relevant. For evidence to be legally relevant its probative value must not be substantially outweighed by unfair prejudice, waste of time, misleading the jury or confusion.

P will argue that L's testimony is also legally relevant as it is also highly probative and speaks to the material issues in the case. The defense however will likely object to L testifying as this information is highly prejudicial for H. However, in order for evidence to be excluded due to prejudice, it must rise to the level of unfair prejudice. Most evidence is likely to be prejudicial to the defense, but this statement is likely not unfairly prejudicial.

The court is likely to find that L's testimony is legally relevant

Witness competency

Witnesses are generally presumed to be competent until the contrary is demonstrated. There are 4 basic testimonial attributes that every witness must have to some degree. Capacity to observe, to recollect, to communicate, and to appreciate the obligation to tell the truth.

There are no facts to suggest the L is incompetent so his competency is presumed.

Objection - Privilege - Attorney Client

To assert the attorney client privilege, there must be a confidential communication between a lawyer and a client made for the purposes of requesting or receiving legal advice. the privilege extends to agents, including law clerks, of the attorney if their presence is reasonably necessary to complete their work. The privilege is personal and must be asserted to.

Here the defense will object to L testifying as her knowledge is protected by attorney client privilege. P may argue that L is a law clerk and not an attorney but H will assert the personal privilege that he holds because L the law clerk is reasonably necessary for A to complete his work so the privilege extends from A to L.

The court is likely to find that L's testimony is inadmissible IF H asserts his privilege.

Wallis' (W) testimony

Logical relevancy - tendency test - see supra

P will argue that W, as H's wife she has vital information that speaks to H's guilt. The fact that he told her "I robbed a bank" after the robbery has a significant tendency to prove his is guilty

The court will likely find that W's testimony is logically relevant

Legal relevancy - balancing test - see supra

The P will also argue that W's testimony is highly probative as H made as admission to W that he did in fact rob the bank. The defense will argue that this information is inadmissible hearsay and will

rise to the level of unfair prejudice. It is possible the court can admit the evidence as conditionally relevant, based on the condition the W's testimony has an independent basis to admit the hearsay.

W's testimony is likely not going to rise to the level of unfair prejudice so will be admitted as legally relevant.

Witness competency - see supra

There are no facts to suggest the W is incompetent so his competency is presumed.

Objection - Hearsay

Is the statement hearsay?

Hearsay is an out of court statement made by a declarant that is offered for its truth. Hearsay is not admissible to prove the truth of the matter asserted. Hearsay encompasses all assertive conduct, which is conduct that is intended to communicate something.

The statement that W is testifying to was said by H, the declarant, out of court and it is being offered for its truth. Unless an applicable hearsay exception applies this statement will not be admissible as it is hearsay.

W's testimony is hearsay

Can the statement still be admissible?

Party Admission

A statement made by a party opponent and against that party are admissible as hearsay exception

Here the P is offering the statement made by the defendant H, against H. Because H has personal knowledge of the fact that he robbed the bank and then admitted that to W. H as the party who made the statement cannot complain about not being able to cross examine himself, so this admission will qualify as a hearsay exception.

It is likely that W's statement will be admissible as a party admission, a hearsay exception.

Husband and Wife Privileges

Spousal Immunity

In a criminal case a spouse cannot be compelled to testify against the defendant spouse. The witness spouse holds the privilege, and cannot be compelled to testify, but can if she wants to.

The facts state that W and H are husband and wife, so W cannot be compelled to testify. However, W is the holder of the privilege and it says that she testified voluntarily. H may object spousal immunity but that objection will be overruled because W voluntarily testified and as the holder of the privilege, which she waived when she chose to testify

The spousal immunity privilege will not apply because W waives her privilege

Confidential Marital Communication

A spouse is not allowed without consent to disclose a confidential communication made by one to the other during marriage. Both spouses hold the privilege.

H will object to W's testimony under the privilege of confidential marital communication (CMC). P will argue that W filed for divorce, but until the divorce is final the CMC will still apply. In addition, the CMC will not expire retroactively upon divorce. As long as the statement was made during the course of the marriage the CMC privilege will apply to BOTH spouses.

H will object to W's testimony under the CMC privilege and that objection will be sustained as H will likely not consent to her testimony.

Dr. Dyle's (Dr) testimony

Logical relevancy - tendency test - see supra

The P will argue that Dr's testimony is logically relevant as the surveillance footage showed the robber firing a gun and then placing it into his waist band. Here the Dr will testify that H has a burn

which can be considered circumstantial evidence that he is the one who robbed the bank and burned himself when he placed the gun in his waist band.

The court will find Dr's testimony logically relevant

Legal relevancy - balancing test - see supra

The P will argue that this testimony is highly probative as the Dr will be qualified as a medical expert and able to speak to the likely cause of the burn. If this Dr can show that the burn is due to a recently fired gun that evidence speaks to H being the bank robber.

The court will find that Dr's testimony is legally relevant

Witness competency - see supra

There are no facts to suggest the Dr is incompetent so his competency is presumed.

Objection - Privilege - Dr/Patient

To assert the doctor-patient privilege, there must be a confidential communication between a doctor and a patient made for the purposes of medical treatment or diagnosis. The privilege extends to agents, including nurses, of the doctor if their presence is reasonably necessary to complete their work. The privilege is personal and must be asserted to by the patient.

Here H will object to the Dr testifying as he will claim that his conversations with the doctor were intended to be confidential and thus covered under privilege. However, because A called Dr and asked him to look at H's burn these conversations between Dr and H are not covered under the doctor-patient privilege. This is because the exam was not for the purposes of medical treatment or diagnosis, but instead in preparation of litigation.

The court will find that the doctor-patient privilege does not apply.

Objection - Privilege - Attorney Client- see supra

The Dr was an agent of A when the attorney asked the Dr to look at H's burns. This exam as stated was not for medical diagnosis but instead for A to better serve H as his client therefore Dr is reasonably necessary for A to complete his work and these conversations are covered by attorney-client privilege.

The court is likely to find that Dr's testimony is inadmissible IF H asserts his attorney-client privilege.

Detective C's (C) testimony

Logical relevancy - tendency test - see supra

The P will argue that C's testimony is logically relevant as he will be able to speak to his first hand knowledge from the crime scene. He is testifying to what he perceived with his own senses and that information is helpful in proving the facts of the case.

C's testimony is logically relevant

Legal relevancy - balancing test - see supra

The prosecution will also argue that the evidence is legally relevant as C investigated on the day of the robbery. His knowledge of the crime scene is highly probative and given that he is only testifying to what he says it is not prejudicial to H.

C's testimony is also legally relevant

Witness competency - see supra

There are no facts to suggest the C is incompetent so his competency is presumed.

Expert opinion

A witness who is qualified as an expert may testify in the form of an opinion if the expert specialized knowledge will help the trier of fact to understand the evidence. The opinion must be relevant and the methodology underlying the opinion must be reliable.

If P can lay the proper foundation it will be found that C is an expert. He likely has come into contact with a large number of firearms and is very familiar with 9 mm bullets. C's testimony is a relevant and reliable opinion that a 9mm bullet was recovered from the bank ceiling.

Objection - Secondary Evidence Rule (SER)

Any writing, tangible collection of data, or recording must satisfy the SER when offered to prove its contents. Contents of a writing may be proved by a copy unless there is a genuine dispute over the material terms or admission of the secondary evidence would be unfair.

The defense will object to C's testimony that if he is going to testify to contents in the surveillance video, he be required to produce the video. The facts state that the surveillance video was played for the jury. Similarly, C was testifying to what he personally saw, not what he witnessed in the surveillance video so the objection as to the secondary evidence rule could be overruled.

Authentication

Before a writing may be received into evidence, the writing must be authenticated by proof of showing that the writing is what the proponent claims it is.

The facts state that C laid the proper foundation to play the video so it will be presumed authenticated.

END OF EXAM

3)

Question 1

This state has adopted the Federal Rules of Evidence and it is a criminal trial.

1.

Relevance

To be admissible, evidence must be both logically and legally relevant.

Logical Relevance

To be logically relevant, it must have a tendency to prove or disprove any disputed fact of consequence (FRE 401). Andrew's medical records, and the included statement by Cody, his brother, that "Andrew stabbed my mom because they were arguing" is logically relevant because it tends to prove that Andrew did actually know what he was doing and purposefully murdered their mother.

Legal Relevance

Legal relevance is based on the balancing test and looks to if the probative value outweighs the danger of unfair prejudice, confusions of the issues, misleading the jury, undue delay, and waste of time (FRE 403). While the idea of someone stabbing another would affect the jury, that is what the case is about so it is not unfairly prejudicial. A jury may see a medical record as being more conclusive than just a normal document, so that may be a prejudice concern, but it will likely be determined to be legally relevant.

Witness Competency

All people are qualified to be witnesses, unless there is a reason for them to be disqualified. Witness competency is based on personal knowledge and their ability to perceive, be truthful, remember, and communicate. It is an undisputed fact that Cody was upstairs at the the time of the murder. He only has personal knowledge of the fact that he heard them screaming and saw the aftermath of Beatrice on the ground with a stab wound and Andrew bleeding from his arm. His comment that Andrew stabbed Beatrice and that is was because they were arguing is not within his personal knowledge. A court would not likely consider this competent.

Lay Opinion

Lay opinion must be rationally based on the perception of the witness (first-hand knowledge) and helpful to a clear understanding of the testimony. It must not be based on scientific, technical, or other specialized knowledge. As discussed supra, Cody's comment was not based on his own first hand knowledge, but rather is an inference he made. This may not be considered proper lay opinion.

Hearsay

Hearsay is an out of court statement offered to prove the truth of the matter asserted. The medical record, including the statement, was made outside of court and is being offered to prove that Andrew actually did stab his mother and the reason why. There are two levels of hearsay here: Cody's statement, and the writing down of his statement by the ambulance personnel.

Business Record

The writing down of the statement by ambulance personnel would likely fall under the hearsay exception of business records. This includes records of any type of business, made in the regular course of the business, made at or about the time of the event being recorded, by someone with personal knowledge and a business duty to report. A custodian of record or functional equivalent must support the document in court. The statement was made in the regular course of the ambulance technician's job in response to the stabbing. It was made immediately after the stabbing. The ambulance technician likely had a business duty to report so that the E.R. doctor has a better sense of what treatment to administer. There is no indication that whether or not there is a custodian of record.

Excited Utterance

An excited utterance is a statement made while under the stress of excitement of a startling event. The death of Cody's mother, which had just occurred moments earlier, is a stressful event. This exception would likely apply.

Present Sense Impression

Present sense impression is a description of an event made during or immediately thereafter. This is a description of the event (whether true or not, it is Cody's belief of what occurred) made to ambulance tech right after the event. This exception would likely apply.

The hearsay statement would likely be admissible.

Confrontation Clause

Even if a hearsay exception is satisfied, the 6th amendment right of confrontation prohibits the use of testimonial hearsay statements against a criminal defendant if the declarant is unavailable and the defendant has not had a prior opportunity to cross-examine the declarant. A criminal defendant has a right to confront the witnesses against them. Per Crawford, this only applies to testimonial statements. Look to the primary purpose: is it for an ongoing emergency (not testimonial) or is it to prove past events in anticipation of a hearing (testimonial). This does not apply because there is not indication that Cody is unavailable and the statement was made during an ongoing emergency (right after the murder occurred), making it not testimonial.

Writings

Authentication

There needs to be sufficient evidence that writing, recording, and other tangible evidence is what the offeror claims it is. Since the medical record is being introduced, not the ambulance personnel as a witness, it must be determined if it is authentic. FRE states that business records, along with official documents, are presumed authenticated unless there is evidence to show a lack of authenticity. Since there is no lack of authenticity, this would likely be determined authentic.

Best Evidence Rule

The best evidence rule states that to prove the content, if material and in dispute, of a writing, the original must be used. The original writing here is the medical record, so this is met.

Privileges

Doctor-patient privilege

The doctor-patient privilege protects confidential communications between a doctor and a patient for the purpose of medical diagnosis or treatment. Andrew may argue that the doctor-patient privilege applies because the prosecution is trying to admit his full medical records. The statement by Cody is not a confidential communication between a doctor and patient; it is between a doctor (ambulance tech) and the patient's brother. So that does not apply. As for the rest of the record, Andrew has put his medical condition at issue by arguing that he was in a meth-induced psychosis. Anything however in his medical records that is not related to that specific medical issue and that is not waived by a third party presence, should not be included.

2.

Relevance

To be admissible, evidence must be both logically and legally relevant.

Logical Relevance

To be logically relevant, it must have a tendency to prove or disprove any disputed fact of consequence (FRE 401). Andrew's past stabbing attempt on his neighbor Andrew and the fact that he knew what he was under the influence of drugs tends to show that Andrew may have known what he was doing when he allegedly stabbed his mother. This would be logically relevant.

Legal Relevance

Legal relevance is based on the balancing test and looks to if the probative value outweighs the danger of unfair prejudice, confusions of the issues, misleading the jury, undue delay, and waste of time (FRE 403). The jury may confuse the issues of the separate stabbing and the stabbing at issue, but likely not. Also, the description of the event is not unfairly prejudicial. This is likely legally relevant.

Lay Opinion

Lay opinion must be rationally based on the perception of the witness (first-hand knowledge) and helpful to a clear understanding of the testimony. It must not be based on scientific, technical, or other specialized knowledge. There is no indication as to why Evan thought that Andrew was under the influence of drugs. If it is based on proper methods (his own lay opinion, and not specialized reasons) it would be helpful to the jury's understanding of the event.

Impeachment

Impeachment is discrediting, disparaging, or contradicting witness testimony to cast doubt on its substance and veracity. One method of impeachment is character witness impeachment. It is possible that the prosecution is trying to bring in Evan's statement solely to impeach the idea that Andrew could have been in such a meth induced psychosis that he could have not had the appropriate level of intent. However, since this is the prosecution's case in chief, the defense has not yet had a chance to present that argument in order to be impeached.

Character Evidence

The general rule is that character evidence is inadmissible to show conduct in conformity. There are three types of character evidence: opinion, reputation, and specific instance. This would be an example of specific instance. There are some exceptions. One would be impeachment (discarded above). Another would be if the defendant had opened to the door to their own good conduct or the bad conduct of the plaintiff. The defendant has not yet presented an argument related to character, so the prosecution cannot offer character evidence.

However, the prosecution in a criminal case can use this for other purposes other than character propensity. These other purposes include motive, intent, absence of a mistake, identity, or common scheme or plan (modus operandi). Here the prosecution would likely state that the purpose was to show that Andrew was able to previously form the intent to stab a person while under the influence of meth. If it was to be used solely for this purpose, then it would be admissible. They could also argue that it was modus operandi. Both times were under the influence of drugs and a knife was involved. But that would be more of a stretch because it was only twice and was not very unique.

END OF EXAM