EVIDENCE

Final Examination

Spring 2025

Prof. S. Lizardo

General Instructions:

Answer All Three Essay Questions.

Total Time Allotted: Three (3) Hours

Recommended Allocation of Time: Equal Time per Question

Evidence II
Final Examination
Spring 2025

Question 1

Defendant Emily is on trial for embezzlement after allegedly transferring large sums of money from her employer's account into her personal account using complex financial transactions. Emily's defense is that the accounting errors were unintentional. Assume the following occurred in the jury trial of Emily. 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. Apply the **Federal Rules of Evidence.**

1. The prosecution calls John, Emily's co-worker. John will testify that he received an email from Emily's email account, emily@companyemail.com, a couple of months before the accounting discrepancies were discovered that stated, "I am going to have to move funds around to cover the shortfall." John deleted the email shortly after he received it and it is not produced in court.

2. The prosecution calls Taylor, a financial analyst who will explain the methods used to detect the fraudulent transactions. Taylor discusses her educational background, professional certifications as a CPA, and work experience in forensic accounting. Taylor says she is basing her opinion on her analysis of the company's financial records, Emily's bank records, and Emily's Instagram account, which shows her taking lavish vacations and wearing designer clothing that is not commensurate with her pay scale. Taylor states that in her opinion Emily improperly diverted company funds to Emily's account and is therefore guilty.

3. The defense seeks to introduce a thesis Emily wrote on the ethical implications of employee accountability in financial management to show that Emily understands ethical standards in financial management and did not intend to commit embezzlement.

4. The defense calls Lisa, who will testify about Emily's honest business practices over the past decade.

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Evidence II

Final Examination
Spring 2025

Question 2

Darren is on trial for aggravated assault after allegedly attacking a rival during a bar fight. Assume the following occurred in the jury trial of Darren. 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. Use the **Federal Rules of Evidence.**

1. In a motion in limine, the prosecution seeks to introduce evidence of Darren's prior misdemeanor conviction for fraud, which occurred 10 years ago, and his prior felony conviction for assault, which occurred 2 years ago, to impeach his credibility if he testifies. Additionally, the prosecution argues that evidence of the prior conviction for assault establishes Darren's character for violence, which is relevant to the current charge.

2. The prosecution calls Morgan, a bartender at the bar where this incident occurred. She testifies that she saw Darren at the bar. She states, "He looked suspicious and angry before the fight broke out." Morgan also testifies that she heard David, another bar patron, say, "I saw Darren throw the first punch" immediately after the fight.

3. The defense calls Tom, who will testify that David was fired from his job for stealing and that David hates Darren and would do anything to get back at him.

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Evidence II
Final Examination
Spring 2025

Question 3

Blaze is the owner of a restaurant that is in financial trouble. He starts a kitchen fire and the accelerant blowbacks on his hands causing severe burns. Blaze runs out of the closed restaurant with a gas can in his hand.

A Passerby just got off work and is driving by the restaurant. He notices a male all dressed in black running in the alleyway carrying a gas can and shaking his hands. Within moments, Passerby sees smoke and immediately calls the fire department. Passerby waits for the fire department to arrive and gives a statement to Fire Marshall Bill.

At the emergency room, when Dr. Hertz asks how the burns happened, Blaze says, "I did this by lighting the barbecue. "Blaze is diagnosed and treated him for second-degree burns. The doctor's notes included the diagnosis, and that Blaze had a strong odor of gasoline emitting from his hands.

Fire Marshall Bill is an experienced arson expert. Inside the restaurant, he locates a V-shaped burn pattern indicating the presence of an accelerator poured along the kitchen floor. Also, the expert used a "sniffer" that is a specialized device designed to detect and analyze the presence of accelerants. In Bill's expert opinion, along with Passerby's statement, he concludes that the fire was intentionally set using gasoline.

A week later, Blaze goes to a consultation with Atticus, his attorney. During the meeting, Atticus tells his law clerk to join them. When Atticus asks Blaze what happened to the gas can, Blaze stated that he threw it into the river. Then Atticus tells Blaze to get rid of any clothing he wore at the scene. Blaze tells Atticus that the black clothing he wore is in his washer. Atticus tells him to destroy the clothing. Blaze complies.

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 Evidence Code.

1. During the prosecution's case, Passerby testified to his observations and what he told Fire Marshall Bill.

2. Next, the prosecution calls Dr. Hertz to testify to his diagnosis, treatment and the strong odor of gasoline emitting from Blaze's hands.

3. Next, the prosecution then calls Fire Marhsall Bill to testify as an expert and that in his opinion that this was arson.

4. Finally, the prosecution calls the law clerk to testify about the whereabouts of the missing gas can and to the statements by Atticus to Blaze about the black clothing.

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ANSWER OUTLINE

EVIDENCE-SPRING 2025

MCL – SLO – HYB

PROF. O'KEEFE & PROF. LIZARDO

Question 1- Judge O'Keefe

Defendant Emily is on trial for embezzlement after allegedly transferring large sums of money from her employer's account into her personal account using complex financial transactions. Emily's defense is that the accounting errors were unintentional. Assume the following occurred in the jury trial of Emily. 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. Apply the **Federal Rules of Evidence.**

1. The prosecution calls John, Emily's co-worker. John will testify that he received an email from Emily's email account, emily@companyemail.com, a couple of months before the accounting discrepancies were discovered that stated, "I am going to have to move funds around to cover the shortfall." John deleted the email shortly after he received it and it is not produced in court.

   Relevance: Evidence is relevant if it has some tendency to prove or disprove a material fact. The email sent by Emily about her plans to transfer money is relevant to show that her acts were intentional rather than accidental.

   Authentication: Authentication is the requirement that the proponent of evidence provide a basis for the fact finder to believe that the evidence is what the proponent claims it is. The rule applies to documents, records or other physical things described in testimony if offered into evidence. It also applies to references to human beings as having been seen by a witness or having spoken to a witness.

   Here, John could authenticate the email, testifying he read the email, hewas familiar with Emily's email account and that the email came from Emily's account.

   Best Evidence Rule: The best evidence rule applies only where the contents of a writing are at issue, such as when the contents of a writing directly affects legal rights that are at issue in the case (such as a contract, a will, defamatory writings and recordings, etc.) or where the knowledge of a witness concerning a fact results from having read it in the document.

The rule does not apply if the fact to be proved exists independently of any writing, the writing is collateral to a litigated issue or in the case of summaries of voluminous records or public records.

If the best evidence rule applies, then the proponent of the evidence has to either introduce the original (in this case the note) or a duplicate (an exact copy of the note) or provide a legally justifiable excuse why they cannot produce the original or a duplicate. A duplicate is admissible to the same extent as the original unless there is a genuine issue as to the document's genuineness or It would be unfair to admit the duplicate.

If you don't have the original or a duplicate, you must convince the court that you have a satisfactory explanation for why you do not have it:

a. The original was lost or destroyed in good faith
b. The original is outside the jurisdiction and unobtainable
c. The original is in the possession of the adversary, who after notice, fails to produce it

If the court is satisfied, then you can introduce any type of "secondary evidence" to prove the terms of the writing. This could include oral testimony, handwritten notes, photos, etc.

In the present case, the best evidence rule would apply. John's knowledge of the contents of the writing (the email) comes solely from reading the email. John deleted the email and, therefore cannot produce the original or a duplicate (although there may be some question as to whether it could be retrieved). The prosecutor would have to ask the court to introduce secondary evidence of the contents of the document – the oral testimony of John, in lieu of the original. If the court finds the explanation satisfactory, then the court will allow oral testimony about the contents of the writing.

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

Statement of a Party Opponent: The emails would be admissible as a statement of a party opponent. This allows for the admission of a party's own statements against them.

2. The prosecution calls Taylor, a financial analyst who will explain the methods used to detect the fraudulent transactions. Taylor discusses her educational background, professional certifications as a CPA, and work experience in forensic accounting. Taylor says she is basing her opinion on her analysis of the company's financial records, Emily's bank records, and Emily's Instagram account, which shows her taking lavish vacations and wearing designer clothing that is not commensurate with her pay scale. Taylor states that in her opinion Emily improperly diverted company funds to Emily's account and is therefore guilty.

Relevance. The expert testimony of Taylor is relevant to assist the jury in understanding how the company's funds were diverted into Emily's bank account.

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

1. The expert's scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
2. The testimony is based on sufficient facts or data;
3. The testimony is the product of reliable principles and methods; and
4. The expert has reliably applied the principles and methods to the facts of the case.

Subject Must be Appropriate for Expert Testimony. A subject is appropriate for expert testimony if an expert's opinion would assist the trier of fact. Expert testimony is appropriate in this case as it would assist the jury in understanding complex financial issues that require specialized knowledge. This is an issue beyond the experience of most jurors and it would assist the trier of fact in determining if the embezzlement occurred.

Qualifying as an Expert: A person can qualify as an expert witness by a showing of knowledge or experience. Here, Taylor has the necessary background and experience to qualify as an expert in forensic accounting.

Basis for the Expert's Opinion – the reasonable reliance test: An expert's opinion can be based on any data that experts in the field ordinarily use, but it must apply reliable principles to sufficient data related to the case.

Here Taylor is basing her opinion on her analysis of the company's financial records, Emily's bank records, and Emily's Instagram account which shows her taking lavish vacations and wearing designer clothing that is not commensurate with her pay scale. The company's financial records and Emily's bank records appear to be the type of information that other financial analysts would use and thus would meet the reasonable reliance test. It is questionable whether financial analysts would use someone's Instagram account as the basis of their opinion. If other financial analysts would not use an Instagram account, then it must be excluded as a basis for the opinion.

Expert Opinion: An expert may state an opinion or conclusion based on the facts the expert believes to be true or may answer a hypothetical question that asks the expert to make assumptions. In criminal cases, an expert's freedom to state conclusions is narrowed. An expert may not testify specifically that a defendant did or did not have a mental state that is an element of a crime

Opinion on Ultimate Factual Issue is Permitted. An expert is permitted to give an opinion on the ultimate factual issue in a case. Here, the expert would be permitted to

give an opinion as to whether Emily improperly diverted funds. The expert would not be permitted to make a legal conclusion that Emily is guilty.

3. The defense seeks to introduce a thesis Emily wrote on the ethical implications of employee accountability in financial management to show that Emily understands ethical standards in financial management and did not intend to commit embezzlement.

   Relevance: The purported relevance is to show that Emily understands ethical standards in financial management and did not intend to commit embezzlement.

   Hearsay: While the thesis is not hearsay as it is not being offered for its truth. It is being offered to show Emily's knowledge and intent.

   403. Relevant evidence may be excluded if it's probative value is substantially outweighed by undue prejudice, confusion of the issues, ect.

   The students should analyze the thesis' admissibility under the 403 standard.

4. The defense calls Lisa, who will testify about Emily's honest business practices over the past decade.

   Relevance: Relevant for character evidence purposes.

   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.

   Despite the general rule that propensity evidence is not admissible, both the FRE and CEC allow a criminal defendant to introduce character evidence. Character evidence to prove a person's actions in conformity with that character is allowed in the case of a criminal defendant who introduces evidence about his or her own good character to support an inference that he or she did not commit a charged crime. If the defendant first introduces such evidence, the prosecutor is entitled to rebut that evidence to suggest that he or she is guilty.

   Character evidence is admissible in a criminal trial if offered by a defendant as circumstantial evidence—through reputation or opinion evidence—to show his own character, as long as the character evidence the defendant seeks to introduce is **relevant** to the crime with which the defendant is charged.

   Here, the defense is calling Lisa as a character witness. Lisa will be permitted to testify to her opinion of Emily's honesty and Emily's reputation for honesty. She will not be permitted to testify to specific acts.

Question 2 – Judge O'Keefe

Darren is on trial for aggravated assault after allegedly attacking a rival during a bar fight. Assume the following occurred in the jury trial of Darren. 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. Use the **Federal Rules of Evidence.**

1. In a motion in limine, the prosecution seeks to introduce evidence of Darren's prior misdemeanor conviction for fraud, which occurred 10 years ago, and his prior felony conviction for assault, which occurred 2 years ago, to impeach his credibility if he testifies. Additionally, the prosecution argues that evidence of the prior conviction for assault establishes Darren's character for violence, which is relevant to the current charge.

Relevance: Evidence is relevant if it has some tendency to prove or disprove a material issue. The prosecution is seeking to impeach Darren with his prior convictions. The prosecution also wants to show Darren's propensity for violence.

Impeachment with a Prior Conviction. Impeachment is the casting of an adverse reflection on the witness's credibility.

Impeachment: Crime Involving Dishonesty or False Statement. Under the Federal Rules, a witness' character for truthfulness may be attacked 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. The trial court has no discretion – not even under FRE 403 to disallow impeachment by such crimes. The only time when admission of this evidence is not automatic is when a ten-year period has elapsed since the date of conviction or the witness's release from confinement related to the conviction (whichever date is later). In that circumstance, the evidence is subject to a balancing test under Rule 609(b).

Felony Not Involving Dishonesty. A witness' character for truthfulness may be attacked, under the Federal Rules, by any felony whether or not it involves dishonesty or a false statement. However, if the felony does not involve dishonesty or false statement, the trial court ***may*** exercise discretion to exclude it under one of the following standards:

> **Accused in a Criminal Case.** If in a criminal case, the witness being impeached is the accused, the felony conviction will be admitted only if the government shows that its probative value as impeachment evidence outweighs its prejudicial effect. In this context, the prejudicial effect is the likelihood that a jury would

misuse the conviction as propensity for the person to commit a crime as opposed to the permitted use as their propensity to be untruthful in court.

Character Evidence: Using prior assault conviction for propensity. Character evidence is prohibited to prove conduct in conformity unless the defendant opens the door to his good character.

Students should analyze whether the evidence is admissible.

2. The prosecution calls Morgan, a bartender at the bar where this incident occurred. She testifies that she saw Darren at the bar. She states, "He looked suspicious and angry before the fight broke out." Morgan also testifies that she heard David, another bar patron, say, "I saw Darren throw the first punch" immediately after the fight.

   Relevance: Morgan's testimony about her observation at the bar is circumstantial evidence that he was involved in the fight. David's statement, related by Morgan, is direct evidence that Darren was the initial aggressor of the fight.

   Lay Witness Opinion Testimony. Lay witness 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 within the scope of Rule 702. Maria's testimony about James looking really angry would be admitted as proper lay witness opinion testimony. The court would likely allow the characterization as suspicious as well.

   Hearsay. Out of court statement offered to prove the truth of the matter asserted. David's statement is hearsay.

   Excited Utterance: A statement relating to a startling event or condition made while the declarant was under the stress or excitement that it caused.

   Present Sense Impression: A statement describing or explaining an event or condition made while or immediately after the declarant perceived it. David made his statement shortly after the fight.

3. The defense calls Tom, who will testify that David was fired from his job for stealing and that David hates Darren and would do anything to get back at him.

   Relevance: Darren is seeking to impeach David, who identified him as the initial aggressor in the fight.

   Impeachment Bad Acts Not Resulting in a Conviction. You can impeach the witness with proof that the witness has committed untruthful acts even if the acts have not

resulted in the witness' conviction if the act of misconduct is probative of truthfulness. The theory is that if the witness has been willing to commit untruthful and deceitful acts in the past, the witness may be willing to lie on the stand.

There are several important controls on the use of information about a witness' past acts that did not lead to a criminal conviction:

1. **Counsel must inquire in good faith** with some reasonable basis for believing that the witness may have committed the bad act inquired about.
2. **Extrinsic evidence is not permitted**. A specific act of misconduct offered to attack the witness's character for truthfulness can be elicited only on cross-examination of the witness. If the witness denies the act, the cross-examiner cannot refute the answer by calling other witnesses or producing other evidence. The opponent must accept the answer the witness gives. It is usually not improper for the cross-examiner, acting in good faith, to continue the cross-examination after a denial in the hope that the witness will change his answer. For example, the opponent can remind the witness of the penalties for perjury.
3. **Cannot Reference Consequences of the Bad Act**. Federal Rule 608(b) bars any reference during interrogation to consequences (like termination of employment, discipline) the witness may have suffered as a result of his prior bad act.

This impeachment evidence will not be admissible as David did not testify. Rather, his hearsay statement was relayed by Maria. Calling Tom as a witness is extrinsic evidence. You also cannot relate the consequence of the act – David being fired.

Impeachment Bias: Evidence that a witness is biased or has an interest in the outcome of a suit tends to show that the witness has a motive to lie. A witness may always be impeached by extrinsic evidence of bias or interest, provided a proper foundation is laid. Evidence that is substantively inadmissible may be admitted for impeachment purposes if relevant to show bias or interest.

Foundation. Most courts require that before a witness can be impeached by extrinsic evidence of bias or interest, he must first be asked about the facts that show bias or interest on cross-examination. If the witness on cross-examination admits the facts claimed to show bias or interest, it is within the trial judge's discretion to decide whether extrinsic evidence may be introduced as further proof of bias or interest. Even though it is shown that a witness is biased, no evidence may be introduced to show that he was justified in his bias.

Students should analyze whether the evidence is admissible.

Question 3 – Prof. Lizardo

QUESTION 3: ANSWER OUTLINE – BLAZE

Please note: Below is an issue outline only. The students are expected to use IRAC, not do an outline. The argumentation is key. Students should argue and analyze both sides of the issue. Finally, a trial court ruling or conclusion should be reached.

1. <u>TESTIMONY OF PASSERBY</u>

Relevance- Evidence must be both logically relevant and legally relevant to be admissible.

<u>Logical Relevance (Tendency Test)</u>

- Evidence is logically relevant if it has any tendency in reason to prove or disprove a material fact in dispute.
- Here, Prosecution is offering the testimony of Passerby to establish the identity of the arsonist as Blaze. Also, this is circumstantial evidence that Blaze was at the closed restaurant and that he was observed carrying a gas can and shaking his hands. This is circumstantial evidence that links Blaze as the arsonist due to time, proximity, Passerby's observations of the gas can and his call to the fire department.
- Defense may argue that the testimony is not logically relevant because there was no line up or positive identification of Blaze, so it is speculation.
- Conclusion- trial court will rule- logically relevant

<u>Legal Relevance (Balancing Test)</u>

- The trial judge has the discretion to exclude evidence if the probative value is substantially outweighed by the danger of unfair prejudice, confuse the jury, mislead the jury or waste the court's time.
- Argumentation
- Conclude- legally relevant

<u>Lay Witness- Passerby's Observations</u>

- Lay Witness must be rationally based on the perception or observation of the witness
- Helpful to court
- Passerby is a lay witness since he has firsthand knowledge of Blaze's conduct by the closed restaurant of running and carrying a gas can. Seeing the smoke causes Passerby to call the fire department.

2. <u>TESTIMONY OF DR. HERTZ</u>

<u>Relevance</u>

HEARSAY, "I did this by lighting a barbecue."

- Out- of court statement offered to prove the truth of the matter asserted.
- Exceptions:
  - Party Admission- offered against the party
  - Declaration Against Interest- Argue that Blaze would need to take 5th Am.

Note: Statement may be argued as Hearsay. However, Privileges is a key issue and should be discussed next. This statement may have logical relevancy issues since the statement sounds like an accident.

DOCTOR- PATIENT PRIVILEGE

- Protection of confidential communication between a doctor and patient for medical diagnosis or treatment. Here, Blaze is the patient seeking medical treatment for his second-degree burns.
- The observation by Dr. Hertz that a strong odor of gasoline is emitting from Blaze's hands, and the burn treatment may be protected under this privilege unless there is an exception.
- Blaze's statement on how he burned his hands (lighting a barbecue) - see Hearsay.
- The doctor's notes may be privileged unless there is an exception.
- Exception: Crime
- Argue, analyze, conclude

3. TESTIMONY OF FIRE MARSHALL BILL

Relevance- helps determine if the fire was arson and the factors leading to arson**Expert Witness:**

- Qualifications of experts: foundation includes special knowledge, training, experience, background, education
  Helpful to the jury, beyond common experience
- Experts may consider eyewitness statements such as Passerby- reasonable reliance
- Fire Marshall Bill may give expert opinion this was arson due to several factors, including but not limited to: the V-shaped burn pattern of an accelerant on the

  kitchen floor, the use of the "sniffer" tool, the statement of Passerby who saw a male carrying a gas can.
- **CEC Kelly Test-** Admissibility of new or novel procedures
  The "sniffer" specialized device is a tool used in investigating arson.
  May be subject to CEC Kelly Test- general acceptance, reasonable reliance on the sniffer
- Argue and conclude

4. TESTIMONY OF LAW CLERK

Relevance- can prove a consciousness of Blaze's guilt. However, Defense will argue Privilege.

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

HEARSAY, Throwing the gas can into the river

- Exception- Admission by Blaze, Declaration against Interest
  If offered by Prosecution. See Privileges.

<u>ATTORNEY – CLIENT PRIVILEGE</u>

- 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. Here, Blaze is the client, and holder, Atticus, is his attorney. There is a third-party present law clerk present at the meeting.
- "**Reasonably Necessary"- Law Clerk to Attorney**
- Blaze's admission about throwing the gas can into the river may qualify for the crime exception. However, the exception is generally limited to future crimes. Blaze did not ask his attorney to hide the gas can, just advised Atticus of his conduct in getting rid of the gas can. Furthermore, the statements by Blaze to Atticus may be argued as "consciousness of guilt."
- Generally, the presence of the law clerk may be argued that the staffer is reasonably necessary for Atticus, the attorney, to do his work.
- However, Blaze's statements about getting rid of evidence may be deemed admissible under the crime exception. Also, Atticus's direction for Blaze to get rid of the clothing may be argued as falling under the crime exception. There may be ethical violations by Atticus in telling Blaze to get rid of evidence.

- Conclude

<u>Prop 8</u> (Note: Prop 8 is a minor issue. It is included because recent Cal Bar essays answers have included this issue)

- 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 being excluded under CEC 352, if the unfair prejudice outweighs the probative value. Furthermore, Prop 8 has several exceptions.
- Evidence offered is exempt from Prop 8 because the evidence has probative value in determining the identity of the arsonist and the location of the gas can.
- Risk of unfair prejudice this appears to be outweighed by the probative value in showing that the defendant is the arsonist.

1)

1.John's Testimony

John is going to testify that he received an email from Emily's email stating, "I am going to have to move funds around to cover the shortfall."

Logical Relevance (Tendency Test)

Evidence is logically relevant if it has the tendency to prove or disprove a fact of consequence.

Here, John received an email from Emily's email account before the accounting discrepancies were discovered that stated, "I am going to have to move funds around to cover the shortfall." Emily is on trial for embezzlement because she transferred money from her employer to her personal account. This was allegedly done through a series of complex financial transactions. Emily's statement made via email shows that she was aware of a shortfall in an account and that she was going to move funds around to cover it. This would tend to prove that Emily moved funds around intentionally and would tend to prove that she executed complex financial transactions. It would also prove that she was aware of a shortfall in the books. good

The court will find John's testimony as logically relevant.

Legal Relevancy (Balancing Test)

In order to determine if evidence is legally relevant the court will balance the probative value of the evidence against its prejudicial value. The court has the discretion to find evidence as inadmissible if it is unfairly prejudicial to the defendant, if it wastes time, or could confuse the jury.

Here the defense will argue that the email is prejudicial to Emily. However, legal relevancy is a relatively low bar. Further it is not just whether it was prejudicial to Emily, it would be if it was unfairly prejudicial. Here the email would not waste time, nor would it confuse the jury. As discussed above, John's testimony of the statement has high probative value as it shows Emily's knowledge and potentially guilt in the embezzlement case. Therefore John's testimony should be considered legally relevant because the probative value outweighs the prejudicial value.

The court will find John's testimony as legally relevant.

Witness Competency

A witness will be deemed competent unless shown otherwise. Here there are no facts that show John would not be a competent witness.

Lay Witness

A lay witness is a witness that does not have any special knowledge or skill. They can testify to what they have personal knowledge of as long as they are competent, truthful, and the testimony is helpful to the jury. They may not give opinion on legal conclusions. Here John is Emily's co-worker and does not proport to have any special qualifications, therefore John is a lay witness and can testify to what he has personal knowledge of regarding Emily's case.

Hearsay

Hearsay is an out of court statement offered for the truth of the matter asserted. It is inadmissible, unless an exemption or exception applies.

Here, Emily's statement of "I am going to have to move funds around to cover the shortfall" is hearsay as it is an out of court statement and would be inadmissible for the truth of the matter asserted.

Non-Hearsay

Hearsay is generally inadmissible because it is considered unreliable. However, hearsay can be admitted for a non-truth of the matter purpose and be admissible.

Here if Emily's statement is being presented by the prosecution to show Emily's state of mind or just knowledge of the shortfall, it is possible that it would be admissible as it is not being offered for the truth of the matter asserted. The defense will argue that the prosecution is not using it just to show Emily's state of mind and is offering it to show that Emily was aware of a shortfall and was moving funds around to hide her embezzlement.

The court will not admit the statement as non-hearsay.

Statements Against Interest

If a declarant is unavailable, there are exceptions to admissibility of the hearsay. A declarent will be considered unavailable if they are not testifying due to privilege, they are absent despite the court's best efforts, they are disqualified, or they are dead. Here Emily is the defendant and has the right not to testify at her trial. There are no facts to indicate whether Emily will be testifying, however if she does indeed choose not to testify, she will be considered unavailable.

If a declarant is unavailable, statements made against their own interest will be considered a hearsay ~~exemption~~ exception. A statement against one's own interest is considered more reliable because a person will not usually make a statement against themselves that would subject them to ~~ridicule, shame, or criminal liability.~~ Here the defense will argue

• No, this is CEC only
call was FRE

that Emily merely made a statement of an adjustment she was going to make. That is not inherently against one's own interest. She did not saw what caused the shortfall.

Admission

Another exemption to hearsay inadmissiblity is an admission by the declarant. Here the defense will argue that stating she was going to move funds was not an admission of anything other than moving funds. It does not show guilt and would not necessarily be considered an admission.

The court will find that Emily's statement is not admissible under a hearsay exemption.

Business Records

Business records are an exception to the inadmissibility of hearsay, if they are made at or near the time of the occurrance, they were made in the regular course of business, and the custodian of records can testify to their authenticity. Here, Emily made the statement in an email. An email is a form of conversation, not necessarily a business record such as an invoice or an inventory count sheet. Also, John deleted the email and facts do not indicate that there is a custodian to testify about the email itself.

The court will find Emily's statement as inadmissible hearsay.

FRE Residual Exemption

Under the FRE Residual Exemption, the court can determine hearsay is exempt if justice would not be found without it. It must be reliable and the opposing side must have notice.

Authentication

Any tangible piece of evidence must be authenticated.

Writing

A writing is a tangible piece of evidence that covers a broad subject matter including books, logos, or even graffiti. Here Emily's email to John would be considered a writing and must be authenticated.

Primary methods of authentication are personal knowledge or expert testimony. However, the email is not available and is not produced in court, therefore it has not been authenticated and cannot be entered into evidence.

John's testimony will be found inadmissible by the court, because he is testifying to a document that cannot be produced that contains inadmissible hearsay.

Can John testify under Secondary Evid Rule since deleted was in good faith?

2.**Taylor's Testimony**

Logical Relevance (Tendency Test)

See supra

Here, Taylor is giving testimony about the company's financial records as well as Emily's financial records. This would tend to prove whether or not funds were moved between the company's account and Emily's personal account and would tend to prove her guilt. Therefore Taylor's testimony is logically relevant.

Legal Relevance (Balancing Test)

See supra

Taylor's testimony is highly probative as it will give an analysis of the financial records and could prove if money was transferred to Emily from the Co's account. This will prove the fundamental element to embezzlement that the funds Emily was in charge of were in fact taken and transferred to her account. Taylor's testimony would not confuse the jury or waste time, and would not be unfairly prejudicial. Therefore, Taylor's testimony is legally relevant.

Competency

See Supra

There are no facts to indicate that Taylor would not be truthful and competent to testify.

Expert Witness

A witness can give expert testimony if the proper foundation is laid. An expert witness must have special knowledge of a subject matter obtained through education or experience. They can give testimony and opinions on the subject matter in which they are an expert in, but not offer legal conclusion opinions.

Here Taylor is a licensed CPA and has accounting education and experience in forensic accounting. This would qualify her as an expert witness in financial and accounting subject matter.

Taylor is testifying that she has reviewed and analyized the company's financial records, Emily's bank records, and Emily's social media showing her lavish lifestyle. All of these are within the subject matter that Taylor is an expert in and her opinion is admissible regarding this analysis.

Taylor states that it is her opinion Emily improperly diverted company funds to Emily's account and is therefore guilty. The opinion that Emily improperly diverted funds into her own account would be admissible expert testimony. However, the defense will object to her opinion that Emily is guilty as that is a legal conclusion and is outside of Taylor's expertise. good

The court will admit Taylor's testimony, including her opinion that Emily diverted funds into her own account, however her conclusion that Emily is guilty would not be admissible. The court will strike that portion of the Taylor's statement and give the jury the instruction to not considered Taylor's opinion of Emily's guilt. good

3. Emily's Thesis

Logical Relevance (Tendency Test)

See Supra

Here Emily has written a thesis on the ethical implications of employee accountability. The prosecution will object to the relevance of the thesis. However, relevance has a low bar. The defense will state that the thesis is relevant because it tends to prove that Emily understands the ethical standards of her position and had no bad intent.

Emily's thesis will be found logically relevant.

Legal Relevance (Balancing Test)

See supra

Here Emily's understanding of accountability in financial management as some probative value. It does not have any prejudical value and is not likely to confuse the jury. The prosecution may argue that it is wasting time to review a thesis, however the court will overrule the prosecution's objection. Because the probative value, however small, outweighs the prejudicial value the court will find the thesis legally relevant.

Authentication

See supra

Writing

See supra

Here, if the defense seeks to introduce Emily's thesis, it must be authenticated. It can be authenticated by Emily herself as she is familiar with the document. However, the defense will likely not ask Emily to testify at her own trial, and E has the right to not testify. It can also be authenticated by another party that is familiar with the thesis such as one of Emily's professors. good

4. Lisa's Testimony

Logical Relevance (tendancy test)

See supra

Lisa will testify that Emily is generally an honest person and has had honest business practices over the past decade. The fact that Emily is on trial for embezzlement, her character is highly relevant, especially her truthfulness. Therefore Lisa's testimony is logically relevant.

Legal Relevance (balancing test)

See supra

There is nothing to indicate that there is anything prejudicial in Lisa's statement, therefore the probative value outweighs the prejudcial value and will be found legally relevant.

Character Evidence

Evidence of a defendant's character is not admissible to show conduct in conformity. However, it can be admissible to show one's reputation. The defense can offer evidence of their character to show that they are truthful or honest.

This is what the defense is showing through Lisa's testimony. In order for it to be admissible the defense would have to lay the foundation of the relationship between Lisa and Emily to show that Lisa has knowledge of Emily and her honest business practices.

However, now that the defense has opened the door to Emily's character the prosecution can cross-examine Lisa and put Emily's character at issue.

Lisa's testimony will be admissible.

END OF EXAM

overall - very good & well organized

80

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1. Prior Convictions

Logical Relevance (Tendency Test)

Evidence will be considered logically relevant if it has the tendency to prove or disprove a fact of consequence.

Here the prosecution is seeking to introduce evidence of Darren's prior charges. One a misdemeanor conviction for fraud and a felony conviction for assault. The prosecution will argue that both of the convictions are relevant, as the fraud charge shows Darren's propensity for dishonesty and the assault charge shows Darren't violent character. Darren's truthfulness would tend to prove that he is not credible and cannot be believed and the assault charge would show that he has been violent in the past. Both of these could be a fact of consequence and the court will find the convictions logically relevant.

Legal Relevance (Balancing Test)

In order to determine if evidence is legally relevant the court will weigh the probative value against the prejudicial value of the evidence. If the evidence is unfairly prejudicial, will waste time, or confuse the jury the court will find the evidence as inadmissible because it is not legally relevant.

Here, as discussed above, Darren's convictions have high probative value, however they also have high prejudicial value. His conviction for fraud could be considered as unfairly prejudical as the jury will determine that Darren is lying if he testifies. His assault conviction is also highly prejudical as the jury could assume if he was guilty once he would be guilty again.

It is likely that the court would find the convictions has highly prejudicial and would not allow admissibility.

Impeachment

The prosecution is making a motion in limine in order to get the convictions admitted into evidence. A motion in limine is a motion made directly to the judge and heard outside of the jury's ability to hear the argument or even that there is potentially evidence of a prior conviction.

Prior convictions can be used to impeach a witness's credibility. Any witness can be impeached. Impeachment of a witness is seeking to question their consistency, credibility, or reliability.

Here the prosecution wants to use the convictions as impeachment evidence. This can only be used to impeach Darren if he testifies. Darren is on trial for aggravated assault. It is his Fifth Amendment right to not testify in his

criminal proceedings. If he does testify, then he will open the door to the prosecution to impeach his character. There are no facts that indicate that Darren is willing or going to testify.

Per the Federal Rules of Evidence (FRE) a prior conviction is admissible whether it is a misdemeanor of felony if it shows the potential for dishonesty. However, it must be less than 10 years old. Here Darren's fraud conviction would show his propensity to lie, however it occurred ten years ago and is likely not admissible.

A felony conviction that is less than 10 years old can be admitted, however the court must weigh the prejudicial value of the conviction to determine it's admissibility. Here the prosecution has argued that the evidence of the prior conviction for assault establishes Darren's character of violence. However, Darren is currently on trial for aggravated assault, which is the same type of charge. The defense will argue that a prior conviction of the same type as the current charges would be unfairly prejudicial to the defendant as the jury will likely think if Darren was found guilty once he is more likely to be guilty this time. good

The court will not admit either of Darren's prior convictions as evidence.

2. Bartender's Testimony

Logical Relevance (Tendency Test)

See Supra

Morgan, the bartender will testify that Darren was looking angry before the fight broke out. She will also state that she heard another bar patron say that he saw Darren throw the first punch. Darren's demeanor before the fight would tend to prove the element of an imminent threat being felt by David, which is an essential element of assault. Further, the bar patron being overheard saying that Darren threw the first punch would tend to prove Darren to be the instigator in the fight and guilty of aggravated assault.

Morgan's testimony will be found logically relevant.

Legal Relevance (Balancing Test)

See Supra

As discussed above Morgan's testimony has high probative value. There is nothing to indicate that it would be unfairly prejudicial, waste time or confuse the jury. Therefore Morgan's testimony will be found legally relevant.

Hearsay

Hearsay is an out of court statement offered for the truth of the matter asserted. It is inadmissible unless an exemption or exception applies.

Here Morgan will testify that she heard David say "I saw Darren throw the first punch" immediately after the fight. This is an out of court statement made by David and is being offered to prove that Darren started the fight, therefore it is hearsay and inadmissible unless an exemption or exception applies.

There is nothing to indicate that David is unavailable, therefore none of the exceptions due to unavailability apply.

Present Sense Impression

The prosecution will argue that Morgan's testimony that she heard David say, "I saw Darren throw the first punch" should be admissible as a present sense impression exception. In order for the present sense impression to apply the statement must be made about something the declarant has knowledge of and is being made at the time of the occurrence. Here, David made the statement immediately after the fight about what he perceived had happened. However, Morgan did not see the fight and is merely relaying what David said.

Morgan's statement of what David said would be inadmissible hearsay. Because David may be available, the prosecution should call David to the stand and submit his testimony as evidence.

missed: Excited Utterance

Witness Competency

A witness is assumed to be competent unless shown otherwise. Here, there is nothing to indicate that Morgan is not a competent witness.

Lay Witness

A witness that does not possess any special skills or expertise is considered a lay witness and may testify to what they have personal knowledge of. They may also give opinions on things that a reasonable lay person would have knowledge of and if it is helpful to the jury.

Here, Morgan will testify that she saw Darren at the bar and that "he looked suspicious and angry before the fight broke out." The defense will argue that this statement is Morgan's opinion of how Darren was feeling and not her observations of Darren's behavior. The prosecution will argue that a reasonable lay person knows what someone looks like when they are angry and that her opinion is based on what she is observed. The court will likely allow Morgan to state her opinion on Darren's anger. However, someone looking suspicious could be arguably subjective. The court will sustain the defenses objection to Morgan's opinion that Darren looked suspicious

because it is not something a lay person could conclude. Instead the prosecution should use Morgan's testimony to describe Darren's behavior's that night and allow the jury to determine if those actions were suspicious.

The court will find Morgan's testimony admissible in part and inadmissible in part because a lay witness could opine about someone being angry, but could not necessarily opine about whether that person was being suspicious.

3. Tom's Testimony

Logical Relevance (Tendency Test)

See supra

If the prosecution is able to subpoena David to testify, and he testifies as a percipient witness that saw Darren throw the first punch the defense will be allowed to impeach David on cross-examination. If Tom is called as an impeachment witness and testifies that David was fired from his job for stealing and that David hates Darren, his testimony would tend to prove that David may have a bias against Darren and/or may not be credible or truthful in his testimony. Therefore, the court will find Tom's testimony logically relevant.

Legal Relevance (Balancing Test)

See supra

As discussed above, Tom's testimony that David was fired from his job for stealing and that he hates Darren would have high probative value. While it would be prejudicial against David, it would not be prejudicial for Darren. In fact, it would be beneficial for Darren's defense. It would also not confuse the jury or waste time. Therefore, Tom's testimony would be found legally relevant.

Impeachment

Any witness may be impeached. Impeachment of a witness calls into question their consistency, reliability, and/or honesty.

Here Tom will testify that David was fired from his job for stealing. While conduct that calls into question a witness's truthfulness is admissible, impeachment is not meant to be a smear campaign. Stealing is not necessarily a crime that would show that someone is untruthful, such as something like perjury would. Therefore, Tom testifying that David was fired from his job for stealing would not be admissible testimony for impeachment.

However, the fact that David hates Darren and would do anything to get back at him may be admissible to show David's bias. He does not like Darren and could be biased to think that Darren threw the first punch. He could have an underlying motive for wanting David to be found guilty and would be willing to lie to make it happen.

Tom's testimony that David hates Darren and would do anything to get back at him would be admissible to impeach David.

END OF EXAM

82

3)

1. Passerby's Testimony

Logical Relevance (Tendency Test)

Evidence is logically relevant if it has the tendency to prove or disprove a fact of consequence. Here Passerby was driving by the restaurant and saw a male dressed in black running in the alleyway carrying a gas can and shaking his hands. This was near or at the time that the restaurant was on fire. The description of the man running near the restaurant proves that there was a person in the vicinity with a gas can. Further, Passerby called the fire department and gave the statement to the first responders to the scene (Fire Marshall Bill). The description of a potential suspect tends to prove what the suspect looked like and that they had a gas can in their hand. This would tend to prove the fire was arson and would be found logically relevant.

good incorp. of facts

Legal Relevance (Balancing Test)

In order to determine if evidence is legally relevant the court will weigh the probative value of the evidence against the prejudicial ~~value.~~ effect If the court finds that the evidence is unfairly prejudicial, wastes time, or could confuse the jury they will find the evidence as inadmissible and not legally relevant. There is nothing to indicate that Passerby's testimony is unfairly prejudical or would case any confusion, therefore the court will find Passerby's testimony legally relevant.

Witness Competency

A witness will be deemed competent unless shown otherwise. There is nothing in the facts that would indicate that passerby is not competent to testify.

Lay Witness

A lay witness is a witness that does not have any special knowledge or skill. ~~They~~ The witness can testify to what they have personal knowledge of as long as ~~they are~~ it is competent, truthful, and the testimony is helpful to the jury. ~~They~~ Witness may not give opinion on legal conclusions.

Here Passerby will testify that he perceived a man dressed in black and running in the alleyway carrying a gas can and shaking his hands. This is what Passerby had personal knowledge of and he did not give any opinion or legal conclusions. Therefore his testimony is admissible lay witness testimony.

Hearsay

Hearsay is an out of court statement offered for the truth of the matter asserted. It is inadmissible, unless an exception applies.

Passerby's statement to the fire department and to Fire Marshall Bill are statements made out of court and could be considered inadmissible hearsay unless an exception applies.

Here the statement is not being offered for the truth of the matter asserted. Instead Passerby is testifying to what he saw and what he said to the Fire Marshall, not that what he said was the truth. Therefore it is non-hearsay and is admissible. Isn't Passerby a percipient Wtn ?

2. Dr. Hertz's Testimony

Logical Relevance (Tendency Test)

Evidence is logically relevant if it has the tendency to prove or disprove a fact of consequence.

Dr. Hertz will testify that Blaze was treated for second-degree burns. He will also testify that Blaze had a strong odor of gasoline on his hands, and said "I did this by lighting the barbecue." This would prove that Blaze was indeed burned on his hands and that there was likely gasoline on his hands which would be an accelerant and could tend to prove that his kitchen fire was the result of arson. Therefore Dr. Hertz testimony will be found logically relevant.

Legal Relevance (Balancing Test)

In order to determine if evidence is legally relevant the court will weigh the probative value of the evidence against the prejudicial value. If the court finds that the evidence is unfairly prejudicial, wastes time, or could confuse the jury they will find the evidence as inadmissible and not legally relevant. Dr. Hertz testimony could be prejudicial to Blaze, as it could lead the jury to reach the conclusion that he was responsible for the fire, however it is not unfairly prejudicial. It would not waste time and it would not confuse the jury, therefore the court will find Dr. Hertz testimony to be legally relevant.

Doctor/Patient Privilege

The general rule for communication between a doctor and a patient is that confidential communication is protected by Dr/Pt. privilege.

The parties to the privilege are a doctor, in this case Dr. Hertz, an ER Doctor and a patient that seeks out the doctor for diagnosis or treatment.

The communication between the Dr. and the patient is privileged if it is a confidential communication made to seek diagnosis or treatment and is not disclosed to a third party so far as the patient knows, unless the third party is necessary to the dr. to give the treatment or the diagnosis.
reasonably

The patient is the holder of the privilege and can refuse to disclose or prevent others from disclosing the confidential information unless it is waived or is within an exception.

Here, Blaze saw Dr. Hertz in the ER to seek treatment for burns he received to his hands. Blaze told the Dr. that he received the burns from lighting his BBQ. The Dr. included in his notes the diagnosis and that Blaze had an odor of gasoline emitting from his hands. The Dr. patient privilege would cover what was in the doctor's notes. Therefore, the communication between Dr. Hertz and Blaze is confidential and Blaze can assert privilege to prevent Dr. Hertz from disclosing the information from the visit. missed: Crime Exception Discuss

Hearsay

See Supra organization: Discuss HS before Privileges

Blaze stated, "I did this by lighting the BBQ." This is a statement that was made by Blaze, out of court and is likely being offered to prove its contents and is inadmissible unless an exception applies.

Admission

An admission can be an exception to hearsay for admissibility. The admission does not have to be regarding guilt or liability. If Blaze waves the Dr. patient privilige, then Dr. Hertz could be allowed to testify that Blaze said he had burned his hands on the BBQ.

The court will not admit Dr. Hertz's testimony because it is covered by doctor/patient privilege and there is no indication that Blaze waived his right to the privilege and no exception applies. actually, there is: Crime Exception - discuss

3. Fire Marshall Bill's Testimony

Logical Relevance (Tendency Test)

Evidence is logically relevant if it has the tendency to prove or disprove a fact of consequence.

Bill will testify that he saw burn patterns that indicate a presence of an accelerator on the kitchen floor. This would tend to prove that the fire was caused by arson using an accelerant. This would be a fact of consequence in the charges against Blaze, therefore the court will find it logically relevant.

Legal Relevance (Balancing Test)

In order to determine if evidence is legally relevant the court will weigh the probative value of the evidence against the prejudicial value. If the court finds that the evidence is unfairly prejudicial, wastes time, or could confuse the jury they will find the evidence as inadmissible and not legally relevant.

As discussed above Bill's testimony would be highly probative. There is nothing to indicate that his testimony would be unfairly prejudical, waste time, or confuse the jury, therefore it is legally relevant.

Expert Witness

A witness can give expert testimony if the proper foundation is laid. An expert witness must have special knowledge of a subject matter obtained through education or experience. They can give testimony and opinions on the subject matter in which they are an expert in, but not offer legal conclusion opinions.

Here the facts indicate that Fire Marshall Bill is an experienced arson expert. This lays the foundation for him to give expert testimony in the area of fires, specifically fires that may have been caused by arson. Bill was able to personally inspect the restaurant, giving him personal knowledge of what was there. He located a burn pattern that indicated a presence of an accelerator and also used a sniffer to detect the presence. Bill gave the opinion that the fire was intentionally set using gasoline. This is likely an admissible opinion. What Bill would not be able to opine was who set the fire.

Fire Marshall Bill's testimony is admissible as expert testimony.

4. Law Clerk's Testimony

Logical Relevance (Tendency Test)

Evidence is logically relevant if it has the tendency to prove or disprove a fact of consequence.

Here the law clerk will testify to the conversation between Atticus and Blaze at the office. She will testify that Blaze threw the gas can in the river and that he was wearing black clothing at the time, which matches the description that Passerby gave of the person running away from the scene. Further, the law clerk will testify that Atticus told Blaze to destroy the clothing. This testimony tends to prove Blaze's guilt for the arson and would be found logically relevant.

Legal Relevance (Balancing Test)

In order to determine if evidence is legally relevant the court will weigh the probative value of the evidence against the prejudicial value. If the court finds that the evidence is unfairly prejudicial, wastes time, or could confuse the jury they will find the evidence as inadmissible and not legally relevant.

As discussed above the law clerk's testimony would be highly probative. Although it would be prejudicial to Blaze, it would not be unfairly prejudicial, waste time, or confuse the jury. Therefore the law clerk's testimony would be found legally relevant.

Attorney/Client Privilege

The general rule for confidential communication between an attorney and a client is that it is privileged and is inadmissible unless waived or if an exception applies.

The parties in the attorney/client privilege is a licensed attorney and someone seeking legal advice. Whether or not they are actually a client does not matter, it can apply to current clients, or potential clients.

The communication between the attorney and client is privileged if it is legal advice sought by the client in anticipation for litigation. It is considered privileged if it is not disclosed to a third party (as far as the client is aware) unless that third party is reasonably necessary to the attorney to do the consultation. In this case, the law clerk joined the conversation between Blaze and Atticus. A law clerk can be fundamental to an attorney in doing their work and preparing for a case, therefore the law clerk's presence would not be considered an un-necessary third party and would not violate the confidential nature of the conversation.

Blaze discussed what happened at the restaurant during a consultation with Atticus who is stated to be his attorney. It can be inferred that this was a professional conversation and was made to obtain legal advice and/or to prepare Blaze's defense against arson charges. Therefore, the conversation was confidential.

There is nothing to indicate that Blaze waived his right to the attorney/client privilege.

However, the attorney/client privilege is excepted if the conversation was used in furtherance of a crime. Atticus told Blaze to destroy the clothing. This clothing could have been evidence and was a crime to destroy. Because Atticus furthered the cover up of the arson the communication between Atticus and Blaze is no longer protected by attorney/client privilege.

Law Clerk's testimony will be admissible because it is an exception to the attorney client privilege due to a furtherance of a crime.

END OF EXAM

- overall, very good.
- Did miss some issues