

Kern County College of Law

Evidence II

Final Exam

Spring 2025

Instructions:

Answer Three (3) Essay Questions

Time Allotted: Three (3) Hours.

KCCL

Evidence II

Spring 2025

Prof. N. Roth

Question One

It is 2015, and Bob and Carol just got married. It was a beautiful, expensive, and large beach wedding. After the wedding, the couple went to Hawaii for their honeymoon. They signed up to go scuba diving, they went hiking, and they did all sorts of other activities. They also rented A.T.V.s (all-terrain vehicles) so they could drive up and down the beach together. But, during their A.T.V. ride, a terrible accident occurred; Bob was in front of Carol, and had to swerve to miss a turtle that was on the beach. His A.T.V. went right in front of Carol's path, causing her to swerve, lose control, and crash, causing severe damage to her neck and left shoulder. Bob and Carol had already agreed that their finances would be kept separate at all times, despite also agreeing to get married. Bob (who is very wealthy) got offended that Carol blamed him completely for her accident, and he refused to help pay for her medical bills. Carol decided to sue him for her expenses, primarily on a negligence theory. The case ultimately went to trial, but just prior to trial, Bob and Carol realize they've both made huge mistakes and quickly get divorced. Assume the trial occurs in a California court.

1. Carol's attorney seeks to introduce text messages between her and Bob that were sent right after the crash. In those texts, Bob apologizes profusely to Carol, and says that he knows he "really messed up" by not paying close enough attention to potential obstacles along his route. Carol's attorney indicates to the court that his client (Carol) has no personal issues whatsoever with these texts being used as evidence in trial. Bob's attorney objects, stating that the texts are privileged. What result?
2. Bob's attorney seeks to call Carol's treating physician, who first examined Carol after the accident and indicated that she would not need surgery, just some physical therapy. Carol objects, on the basis of the doctor-patient privilege. How should the court rule?

3. Prior to trial, Carol's attorney and an investigator interview a bartender (John), who tells them that in the morning before the accident, Carol got very drunk at the hotel bar. Carol's attorney realizes this is bad for Carol, and decides not to disclose the statement. Carol's attorney also makes notes on her legal pad, stating that John seemed very credible. Bob's attorney tries to interview John at a later date, but John was no longer working at the bar, and Bob's attorney can't find him. Bob demands disclosure of Carol's written statement and notes. Carol's attorney objects. How should the court rule? Is there any additional information that would be helpful to your analysis?

4. Carol ultimately loses her lawsuit, and decides to sue her attorney (Michelle) for malpractice. In the resulting trial, when Michelle is testifying, Carol's new attorney (Frank) seeks to ask Michelle questions about what she told Carol during their initial private consultation. Michelle's attorney objects. What result?

Question Two

Susan works at XYZ corporation, and has a great job. But one Friday evening after arriving home, she listens to a voicemail, left by an unknown number. The voice is that of her drunken boss, David – he screams into the phone that she is fired, and also calls her a number of unmentionable racist, sexist, and xenophobic slurs. She spends the whole weekend in bed, sick to her stomach. The following Monday, she goes into work to gather her things, and she confronts David. To her utter shock, David denies the whole thing, and states that he never called her and that she is not, in fact, fired. Susan is convinced that David is a coward and is simply trying to backtrack. She ultimately quits and sues David and XYZ. David maintains he did not do this, and that the call must have been placed by a third-party using A.I. software to perfectly mimic David’s voice. David and XYZ hire an expert, Dr. George Fitzgerald, to testify. Dr. Fitzgerald has developed his own patented technology, which he states can compare a voice sample to someone’s actual voice and determine if the voice in fact matches. Dr. Fitzgerald advertises that this device has high effectiveness, and is even accurate as to A.I.-generated voices that mimic real people. Assume the trial occurs in a California court.

1. Dr. Fitzgerald testifies that he has a PhD in electrical engineering. While his device has never been used in court before, Dr. Fitzgerald has personally conducted blind clinical trials of his device, and the device produced accurate identifications 95% of the time. After the device was released on the market, five other engineers conducted tests of the device and also concluded the device was accurate. Each of those engineers published the results of their studies in academic journals. Should the court allow Dr. Fitzgerald to testify regarding the results produced by the device as it relates to this case? What other information might be helpful to assist the court?
2. Before Dr. Fitzgerald testifies to his device’s results in this case, he testifies about the length and subject matter of his PhD program. He also discusses several academic articles he has read in the journal “Artificial Intelligence Monthly,” which discuss the real possibility that A.I. will very soon be able to perfectly replicate other people’s voices. Susan’s attorney objects for hearsay. How should the court rule?
3. Dr. Fitzgerald then testifies that, prior to his testimony, he had David say numerous phrases into a recording device, including the same phrases that were left on Susan’s

voicemail, to allow the machine to calibrate. Bob then testifies as to what all the statements were. Susan's attorney objects for hearsay. What result?

4. Dr. Fitzgerald also testifies that David personally told him he did not leave the voicemail, and that this is something Dr. Fitzgerald considered, along with everything else, in coming to his opinion that David did not leave the voicemail. What objections, if any, should Susan's attorney make? What result?

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Question Three

Jason is being prosecuted for robbery. It is alleged that he entered a convenience store, produced a gun, pointed the gun at the lone cashier (Richard), and told the cashier to open up the cash register and give him all of the money. The store had functioning video surveillance that captured the entire incident. Assume the resulting trial occurs in federal court.

1. At trial, the prosecution's first witness is the police officer who responded to the 911 call. The police officer testifies that Richard showed him the video surveillance of the robbery, and the officer then begins to describe what he observed on the surveillance. What objections, if any, should Jason's attorney make to this testimony? How should the court rule?
2. After the officer finishes testifying, the prosecution's next witness is Richard. Richard describes the robbery, and identifies Jason as the perpetrator. On cross-examination, Jason's attorney seeks to ask Richard about a prior conviction for misdemeanor perjury that Richard suffered in an unrelated matter, eight years ago. Jason's attorney also seeks to ask Richard about another, unrelated felony conviction for assault that Richard suffered five years ago. The prosecution objects to both. How should the court rule? What analysis should the court conduct to make its conclusions?
3. After the prosecution admits the surveillance, it is clear that the assailant pointed a gun at Richard, before stealing money from the cash register. Jason's attorney had already made comments off the record about the only defense being whether or not the assailant could be identified as his client, beyond a reasonable doubt. Given this, the prosecution submits a request to the court to take judicial notice of the fact that the assailant obtained the money by force or fear, as required for robbery. The defense objects. What result?
4. After evidence concludes but before closing arguments, the judge calls the attorneys back into chambers. She says that after Richard testified, the judge went to Sammy's Sandwiches, a popular sandwich chain, for lunch. While waiting for her order, Richard

entered the same shop with a friend. The judge wasn't trying to eavesdrop, but Richard was speaking loudly, and told his friend "Yea I just finished testifying and identifying the guy in court, to be honest I didn't even get a good look at his face, but it was probably him, he looks like a bad guy regardless." The judge discloses this to both counsel. The defense then makes a request to call the judge himself as a witness. How should the court rule? Subsequent to the court's ruling, what should happen next?

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QUESTION ONE

1. Ordinarily, the marital communications privilege would apply in this situation, because Bob and Carol engaged in private communications at a time when they were married. Given that they are now suing each other, however, the privilege does not apply, as the privilege does not legally apply in actions between the spouses.
2. This privilege would also potentially apply, given that Carol saw a physician for purposes of treatment, and there is no indication that the communication wasn't private. Given that Carol is suing for damages related to her injuries, however, the privilege will be deemed waived, since Carol has put her physical well-being at issue.
3. The court would acknowledge that the work-product privilege may apply, and will likely deem the interview notes and attorney impressions protected unless Bob's attorney can argue that he has a manifest necessity for discovery of the documents. Bob's attorney would likely have to show his due diligence in trying to locate John, and he would also likely have to establish that he could not prove up the fact in question (Carol's intoxication) by any other means. Even if Bob's attorney did this and convinced the judge that the work-product privilege should be overcome, Carol's own notes about John seeming credible should be redacted under any and all circumstances.
4. Attorney-client privilege applies to private consultations, even if the attorney has not officially been hired yet. But, because Michelle and Carol are now adversaries in a lawsuit, Michelle cannot invoke the attorney-client privilege, since that privilege is meant to protect the client (Carol), not the attorney (Michelle).

QUESTION TWO

1. Given that this trial is occurring in a California court, the court will need to conduct a *Kelly-Frye* hearing to determine admissibility. In a *Kelly-Frye* jurisdiction, in addition to making findings that the new scientific method is sufficient valid and reliable, the court must also find that the method has obtained general acceptance within the relevant scientific community. Here, the only evidence of general acceptance consists of five engineers, which is not a lot. The proponent (David and XYZ corp.) would probably need to establish that the method was more generally accepted among sound engineers before the court could deem the machine's results admissible. As it stands, the court will likely exclude the evidence.
2. The court should overrule the objection. Under *Sanchez*, the hearsay rule is not violated when an expert relays information related to his background, training, and experience in a particular subject. Here, no case-specific information has yet been relayed.
3. Under *Sanchez*, an expert cannot testify to case-specific hearsay unless the information has already been admitted, or unless a hearsay exception applies. Here, the information is case-specific, but there would be a good argument that the statements would not be used for the truth of their contents (and thus, not hearsay). The statements seem to be relevant only in giving the machine the sound of David's voice; the substance or truth of David's statements doesn't seem to be what is being offered. The objection should be overruled.
4. Susan's attorney should object for hearsay and improper expert opinion. Here, this statement definitely seems to be case-specific hearsay, and no exception applies. Additionally, this could not be testified to (nor could Dr. Fitzgerald's ultimate opinion be admitted) unless there was testimony that David's statement is the type of information that sound engineers typically rely upon in giving opinions. Both objections should be sustained.

QUESTION THREE

1. The defense should object to the testimony as violating the best evidence rule (FRE 1001 et. seq.). Ordinarily, the best evidence rule will not bar witness testimony where the facts captured in the writing exist independent of the writing itself. Here, however, the officer was not a percipient witness to the robbery, and his only knowledge of the underlying robbery comes from viewing the video. Thus, the best evidence rule applies, and the court should either require that the video be produced in lieu of the officer's testimony, or determine if a valid reason exists for the video's non-production, pursuant to F.R.E. 1004.
2. For the perjury conviction, the conviction must be admitted; the court has no discretion. See F.R.E. 609(a)(2). For the assault conviction, the court must admit the conviction unless it determines that the prejudicial effect of the conviction substantially outweighs the probative value. See F.R.E. 609(a)(1)(A).
3. While a judge can take judicial notice of certain facts in criminal proceedings, a judge CANNOT take judicial notice of an ultimate fact against a defendant in a criminal case. This would deprive the criminal defendant of his right to have each element of the crime proved to a jury beyond a reasonable doubt. The objection should be sustained.
4. Pursuant to F.R.E. 605, a judge is not competent to be a witness in a trial being heard in the court where the judge sits. The judge should deny the defense's request to call the judge as a witness. At that point, however, if the defense requests a mistrial, the court should grant that request. The judge could then be called as a witness in the second trial, which would necessarily have to take place in front of a new judge.

1)

QUESTION 3 - US v. Jason

1. Police Officer's testimony

- **Best Evidence Rule** - original writings must be produced when a party is attempting to prove the truth of the content contained therein. A writing is any document, recording, video, photographs, etc. that are tangible and contain data or information.
 - Here, because the police officer is describing what he observed on the video surveillance that captured the incident, he is introducing into evidence the content contained in the video. Since the police officer did not witness the event first-hand and responded to the 911 call after the incident, the video surveillance should be produced as the best evidence to show to the trier of fact.
 - The court should sustain and not allow the officer's second-hand testimony about the content of the video.

2. Richard's testimony

- **Lay witness** - a person may deliver witness testimony if they can demonstrate that they have first-hand knowledge of the event in question that would be helpful to the trier of fact and don't have specialized knowledge or skills that would render them to be an expert witness.
 - Here, Richard was present during the robbery, being the cashier at the convenience store when it was robbed, and would have helpful information to convey to the trier of fact from his direct interaction with the robber.
 - **Impeachment** - a witness's credibility may be brought into question by either party, usually during a cross-examination of their testimony.
 - Here, Richard is the prosecution's witness that testified of his recollection of the robbery. Because Jason's attorney is bring up a prior conviction relating to truthfulness during his cross-examination of Richard, he is bringing into question Richard's credibility.
 - **Prior convictions** - a witness may be impeached through the introduction into evidence of prior convictions relating to their untruthfulness/false statements, regardless of it being felony or misdemeanor. If the prior conviction is not related to untruthfulness/false statements, and the witness is also defendant in the case, then the court would need to follow FRE 609 balancing test to determine whether the probative value of the prior conviction would outweigh its prejudicial effect
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(this would NOT have to be substantial). If the witness is not a defendant, then the probative value of the prior conviction would need to substantially outweigh its prejudicial effect.

- Here, Jason's attorney brought up Richard's prior misdemeanor conviction for perjury. The court must admit this into evidence as it is a prior conviction related to untruthfulness/false statements. The fact that the misdemeanor occurred 8 years ago does not matter.
- Objection to Richard's misdemeanor conviction overruled.
- Jason's attorney also brought up Richard's prior felony conviction 5 years ago for assault. Because this prior conviction is unrelated to untruthfulness/false statements, and Richard is not the defendant in the case, the court would have to conduct a balancing test to determine whether this conviction's probative value would substantially outweigh its prejudicial effect. Factors to be considered would be the type of crime relating to the conviction and how long since the conviction. Because the conviction was for assault and it occurred 5 years ago, the court would likely find it to be substantially prejudicial against Richard and have irrelevant probative value.
- Objection to Richard's felony conviction sustained.

3. Judicial Notice - a court may admit facts without formal presentation of evidence, either on its own or on motion of a party, if the fact would be considered to be either generally known in the local community or easily verifiable through a source with unquestionable accuracy.

- Here, the prosecution, a party to the case, submitted a request to the court to take judicial notice of the fact that the assailant obtained the money by force or fear, as required for robbery. Since this is an element to the crime that Jason is being prosecuted for, robbery, it would need to be an element decided upon by the jury and not taken as judicial notice by the court. Although in criminal cases, a jury MAY consider judicially noticed facts to be held as conclusive and not required to, this would be highly prejudicial to the defendant because it would effectively fulfill one of the elements that the prosecution is burdened with proving beyond a reasonable doubt.
- Defense's objection sustained.

4. Competency of Judge as Witness - a Judge must not testify as witness in a trial for a case that they preside over.

- Here, the defense is asking the Judge presiding over the present case to testify as to what she heard witness Richard say outside of court. Although evidence has concluded and closing arguments have not yet been made, the judge should not testify because this would be highly prejudicial against the prosecution's case, although helpful to Jason's defense, and the jury would very likely hold a lot of weight as to the judge's potential testimony.
 - The court should deny defense's request to call the judge as a witness.
 - Subsequent to the court's ruling on this, the judge should recuse herself from the case as he has heard enough to potentially affect not only her ruling over the subsequent verdict (once the jury deliberates) but also potential sentencing if they were to deliver a not guilty verdict. There may be a potential confrontation clause issue, but Richard's new statement has not been offered into evidence and Jason's counsel has already had an opportunity to cross-examine Richard. Also, the statement would not be considered to be testimonial because it was not made pursuant to the investigation into the crime. Because this is new evidence, there is potential for either a new trial or appeal from outcome of this one.
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2)

QUESTION 2 - Susan v. David, XYZ Corp.

1. **Kelly-Frye Test** - when a party seeks to introduce expert testimony/opinion relating to novel methodologies/technology, the relevant evidence relating to use of novel tech would need to be generally accepted within the relative scientific/expert community to be admissible.

- **Expert Witness Opinion** - defined in QUESTION 1

- Here, Dr. Fitzgerald would qualify as an expert in having a PhD in electrical engineering. His relevant testimony would be helpful to the trier of fact because Susan's suit against David and XYZ Corp. stems from a voicemail where the source of the voice is at issue. Dr. Fitzgerald's expertise in A.I. software and development of device that is able to compare voices would help the trier of fact in making a determination. It can be debated whether he would be using standards and controls reasonably relied upon by other experts in the same field due to the novelty of the technology, but the fact that five other engineers have conducted tests of Dr. Fitzgerald's device and have published their studies in academic journals supports that there is growing acceptance in the relevant community. Dr. Fitzgerald would also reasonably rely on the application of the standards to the facts in the case at hand because he is the actual developer of the patented technology and device he would be using to conduct the voice comparison test. Dr. Fitzgerald's advertisement that his device has high effectiveness demonstrates that he has reasonable reliance in application of the standards to the facts in this case and to formulate his opinion. It would be helpful to know if there are any contradictory studies showing different rates of error or reliability in this field of study.

- The court should allow Dr. Fitzgerald to testify regarding the results produced by the device as it relates to this case.

2. **Hearsay** - rule defined in QUESTION 1

- **Expert Basis for Opinion** - an expert may rely on inadmissible evidence to formulate their opinion when the evidence is the type that would be reasonably relied upon by other experts in the same field. They may testify about otherwise inadmissible facts if they would be used as background to their formulation of opinion and may not "backdoor" in hearsay if it would be

case-specific facts that would not have been admitted into evidence in any other way.

(*Sanchez* (CA))

- Here, the statement Dr. Fitzgerald read in the journal "Artificial Intelligence Monthly" discussing the real possibility that A.I. will very soon be able to perfectly replicate other people's voices, is being testified within the context of his background. His testimony about what that articles in the journal say would be considered an out of court statement because he is relaying a statement made in a journal published outside of the court. It would be considered be considered hearsay because it is being offered as truth of a matter being asserted by Dr. Fitzgerald.
- The court should overrule Susan's attorney's hearsay objection because Dr. Fitzgerald is relaying this statement to convey the information that he is relying on, this statement is one that he and other experts in the field would reasonably rely upon to formulate their opinion, and it is a statement not just stemming from this particular case (*Sanchez*).

3. Hearsay (layered) - defined in QUESTION 1. When there are multiple hearsay statements, each statement has to be analyzed for determination of admissibility.

- David's phrases into the recording device - these would be statements made outside of court, but not offered to prove of the matter asserted. They were being used for Dr. Fitzgerald to calibrate his device.
 - Not hearsay
- Bob's testimony about the statements - Bob is relaying the content of the statements recorded by David, which were made outside of the court, for the purpose of calibrating Dr. Fitzgerald's machine. Bob's testimony about the content is not being offered to prove the truth of the matter asserted by the content in the statements, but to demonstrate the phrases that were being analyzed by Dr. Fitzgerald's device in testing the voice recognition software. Due to the content of the messages, the court should apply the CEC 352 balancing test to determine whether the probative value of the evidence would be substantially outweighed by its prejudicial effect. But, if prefaced by Dr. Fitzgerald's testimony that he asked David to speak the phrases into the machine for calibration purposes, it is likely that the jury would not find the statements made in this context prejudicial.
- Objection for hearsay overruled.

4. Hearsay (layered) - see above

- **Expert Basis for Opinion** - see above
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- David's statement to Dr. Fitzgerald that he did not leave the voicemail was made by David to Dr. Fitzgerald outside of the court, while Dr. Fitzgerald was doing his testing. The statement was an assertion that David did not leave the voicemail. This would be hearsay as it would be offered to prove the truth of the matter asserted. This is a hearsay statement with no available exception or exemption for admission and it would not have been necessary for Dr. Fitzgerald or any other expert to reasonably rely upon when formulating their opinion.
 - **Admission by Party Opponent** - an exemption from hearsay that would deem statements made by a party opponent not hearsay.
 - Here, David's statement to Dr. Fitzgerald could not be regarded as admission by party opponent because it is evidence being offered by the same party. Not applicable.
 - Susan's attorney should make a CEC 352 objection because it would be highly likely that the jury would consider David's statement to Dr. Fitzgerald as truth, as it was being considered by the expert, and be highly prejudicial to Susan.
 - Objection would be sustained.
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3)

QUESTION 1 - Carol v. Bob

1. **Hearsay** - an out of court statement offered to prove the truth of the matter asserted is generally inadmissible.

- Here, the text messages sent between Bob and Carol were made out of court and being offered to prove the assertion of Bob's culpability in the accident because he is apologizing to Carol in the messages and admitting that he was not paying close enough attention to potential obstacles along his route. They would not be admissible, unless an exception applied.
- **Party Opponent Admission** - a hearsay exemption that deems a statement non-hearsay if made by a party opponent in a case.
 - In this civil case, Bob is Carol's adversary, so any statements made by him can be admitted into evidence.
- **Marital Communications Privilege** - any communications between spouses during a valid marriage are protected from disclosure if meant to be in confidence between the spouses and not related to anyone outside of the marriage. They can be invoked by either spouse in either civil or criminal cases.
 - Here, the the text messages in question were made between Bob and Carol right after the crash of that occurred in their honeymoon and before they divorced, so they would be protected by the marital communications privilege. Either party can invoke this privilege to avoid admissibility. Bob's attorney would argue that Carol would need to be the person waiving privilege from disclosure, not her attorney and that his client has not waived privilege. Because this it is being brought up in a suit between former spouses, the privilege has been waived.
- Defense's objection overruled, the text messages would be admitted into evidence.

2. **Expert Witness Testimony** - a witness can testify as an expert if their testimony would be helpful to the trier of fact, they are qualified as an expert through their above-average skills, experience, or knowledge, they rely on either first-hand knowledge of facts in the case or facts provided to them, they use standards and controls reasonably relied upon by other experts in the same field, they reliably apply these standards to the facts, and they have reasonable reliance in their opinion.

- Here, Carol's doctor was called to testify about his first-hand knowledge after having examined Carol following the accident and to relay his opinion that she would not need
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surgery, just some physical therapy. His qualification as a physician was not called into question.

- **Doctor-Patient Privilege** - any confidential communications between a doctor and their patient that are pertinent to medical diagnosis of a condition or treatment are privileged in the state of California. This privilege is waived if the medical condition is at issue in a civil matter.
 - Here, Carol was treated by her physician following the accident in question in the case. Because Carol is suing Bob for her expenses incurred due to the accident and relevant injuries (severe damage to her neck and left shoulder), this is at issue in the case and she has waived the privilege.
- The court would overrule Carol's objection and allow the physician's testimony.

3. Attorney Work Product - any work conducted by an attorney or their agent in preparation for litigation/trial, including notes on mental impressions and strategies, are deemed to be work product and generally inadmissible as evidence, unless an adverse party seeks to attain same or similar information and can show the court that they are unable to attain it, despite best efforts and diligence, and would suffer undue hardship if not allowed access to it.

- Here, Carol and an investigator she hired and paid for interviewed John the bartender in preparation for this case, seeking additional information that may help her client. Carol's notes made on her legal pad include her mental impressions that John seemed very credible. Although Bob's attorney is seeking disclosure because the bartender is no longer working at the bar and he is unable to find him, this would not qualify as "undue hardship" as he would have to demonstrate that he made other attempts to seek similar information as to the content of John's statement to Carol and her notes. It would be helpful to know what other measures, if any, Bob's attorney took to obtain this information.
- The court should dismiss Bob's attorney's request for disclosure of Carol's attorney's work product.

4. Attorney-Client Privilege - any communications between an attorney and their client that were intended to be confidential and related to the client's seeking legal services are protected from disclosure under this privilege. The client is the holder of the privilege and it would be waived if they brought suit against the attorney because it would bring the communications at issue.

- Here, Carol had hired Michelle as her attorney for the legal services in the civil suit against Bob. Carol is now suing Michelle for malpractice, so she, as the client, as effectively waived the attorney-client privilege. Michelle's objection would be irrelevant because she is not the holder of the privilege.
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- Michelle's attorney's objection would be overruled.

END OF EXAM
