

MONTEREY COLLEGE OF LAW

EVIDENCE

Final Examination

SPRING 2017

Professor J. Davenport

INSTRUCTIONS:

There are three (3) questions in this examination.

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

QUESTION 1

Hansen and Whitney are a married husband and wife. They are both charged with receiving and selling stolen laptops, a California state crime. The trial court granted their motion to sever the case and try them separately. Before the case was severed, Hansen and Wendy met with Adele, an attorney. After the severance, each retained new counsel. The trial against Hansen proceeded first.

Assume the following occurred in a California state court. Discuss all evidentiary issues and arguments that would likely arise in each section below, including objections, if any, and the likely trial court ruling on the admissibility of the evidence.

Answer according to California Law.

1. During the prosecution's case-in-chief, Whitney voluntarily testified that she and Hansen consulted Adele, an attorney. In the presence of Adele, and her paralegal, Hansen said to Whitney: "You know, Whitney, we really did know the laptops were stolen since we only paid \$30.00 each for them."
2. Further, Whitney testified that she did not respond to her husband's statement about the laptops because she was nervous, but she did wink at her husband.
3. Next, the prosecution called Perry, the paralegal for Adele. Perry testified that he was present during the meeting with Adele, Hansen and Whitney and that Adele asked him to video-tape the conversation.
4. Next, the prosecution introduced a copy of the video-tape and the transcript of the meeting between Adele, Hansen and Whitney.

QUESTION 2

Sam, a confidential informant, tells police that Bob and Frank are selling heroin out of an apartment and that he has purchased large amounts of heroine from Frank on several occasions. Based on Sam's information, Police execute a lawful search warrant at the apartment locating 10 pounds of heroin and other evidence of heroin sales. Bob and Frank are arrested.

At the police station, Bob is properly questioned by police and during a tape-recorded interview states that he was selling heroin and that Frank just happened to be in the apartment at the time the search warrant was conducted. Both men are arrested on conspiracy to distribute a controlled substance. The cases are severed and Sam testifies against Bob at Bob's preliminary hearing. Sam dies prior to testifying in Frank's case. Subsequently, Bob enters into a plea agreement with the prosecution for a reduced sentence in exchange for his testimony against Frank. At the trial Bob testifies that it was Frank, not Bob, who was selling heroin and that Bob was simply a user of heroin.

Assume the following occurred in the federal jury trial of Frank. Discuss all the evidentiary issues and arguments that would likely arise in each section below, including objections, if any, and the likely trial court ruling on the admissibility of the evidence.

1. The prosecutor seeks to introduce a transcript of Sam's testimony at the preliminary hearing.
2. The prosecution calls Wendy, an FBI agent, to testify to the contents of a piece of paper with the telephone number of Frank's supplier which was found in Frank's pocket at the time of the arrest. The agent testifies that she lost the paper and has no independent recollection of the number but that she accurately transcribed the number onto a note pad at the time of arrest. The prosecutor seeks to introduce the agent's hand written note in evidence to establish Frank's connection with his supplier.
3. The prosecutor seeks to introduce evidence that Frank has been investigated for selling drugs in the past but no charges were ever filed.
4. Frank seeks to introduce Bob's tape-recorded statement as proof that it was Bob, not Frank, who was selling heroin.

QUESTION 3

Tommy is federally prosecuted with embezzlement. Tommy's father, Ed was diagnosed with dementia and terminal cancer on January 1, 2014. Ed died of his illness on January 1, 2015. Upon reconciliation of Ed's estate, Ed's daughter, Sally, who was expecting a large inheritance, learned that her father's estate had been depleted down to a few thousand dollars. Sally hired a forensic accountant to review Ed's bank accounts. Sally learned that through a sophisticated series of transactions over one million dollars had been transferred from Ed's accounts to accounts owned by Tommy. The transfers took place between January 1, 2014 and January 1, 2015. Tommy claims the money was a gift. The prosecutor's theory is that Tommy took the money from Ed without Ed's knowledge or consent.

Assume the following occurred in the federal jury trial of Tommy. Discuss all the evidentiary issues and arguments that would likely arise in each section below, including objections, if any, and the likely trial court ruling on the admissibility of the evidence.

1. Prosecutor asks the court to take judicial notice of court documents showing that Sally obtained a conservatorship over Ed on January 1, 2014 based on the fact that Ed no longer had the mental capacity to control his own financial affairs.
2. Prosecutor calls the forensic accountant hired by Sally to testify that in his opinion, Tommy had been embezzling from father's account. This is the first case Expert has handled after completing his schooling to become an accountant. Expert testifies that his opinion is based on his review of Ed's financial records and a review of Ed's diary entries from the relevant time period which consist of negative statements about Tommy including "Tommy is a dirty scoundrel."
3. Sally testifies for the prosecution that she knows her father and in her opinion, Ed would have never given Tommy such large amounts of money.
4. Tommy is convicted of embezzlement. Tommy's attorney brings a motion for a new trial based on the proposed testimony of jurors who would testify that one juror believed Tommy was not guilty, but he changed his vote to guilty after another juror threatened him.

Evidence – Answer Outline - Spring 2017 Final Exam -

QUESTION # 1: ANSWER OUTLINE (WHITNEY-PERRY-VIDEO)

1. WHITNEY'S TESTIMONY

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

Logical Relevance

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

Prosecution is offering Whitney's testimony to establish the existence of a disputed fact, that Hansen **had knowledge** the laptops were in fact stolen goods. It may also be used to establish that both husband and wife were involved in a conspiracy to fence stolen items because Hansen acknowledged paying a very small amount of money (\$30) for a laptop. The element of knowledge is part of the elements that need to be proven in the stolen goods charge.

Legal Relevance

Trial Court has the discretion to exclude evidence if the probative value is substantially outweighed by the danger of unfair prejudice. The risk of unfair prejudice appears to be outweighed by the probative value in establishing the element of scienter or knowledge.

PROP 8

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

-However, Prop 8 is subject to being excluded under CEC 352, if the unfair prejudice outweighs the probative value. Prop 8 has many exemptions, privileges being one of them. Also, Hearsay law is exempt from Prop 8.

HEARSAY

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

-Whitney is repeating what her husband said in a meeting with the attorney. The statement by Hansen: "we really did know the laptops were stolen" is to prove the truth of the matter asserted, that Hansen knew, but also Whitney knew the items were "hot." Therefore, the statement is hearsay.

ADMISSION BY A PARTY

A statement is not inadmissible when offered against the declarant in a case where he is a party. Here, Hansen is the declarant/defendant in a criminal case, so he is a party.

Party who is offering the stolen laptops statement – is the prosecution, who is the opponent party. Thus, the statement will be deemed admissible.

STATE OF MIND-HANSEN

A statement of the declarant's then-existing physical or mental condition is admissible to show the condition or the declarant's mind set. To prove Receiving and selling stolen property, the prosecution must establish the

element of knowing the items are stolen. By Hansen's comment to Whitney acknowledging the items had to be stolen since they only paid \$30.00 each is indeed a way the prosecution can satisfy this element.

CO-CONSPIRATOR ADMISSION

Although conspiracy was not charged, this is not needed to consider this exception. The statement by Hansen about the stolen items must be made while the declarant was participating in the conspiracy and in furtherance of the conspiracy.

Here, the conspiracy would have ended and the statement made in the attorney's office would **not** be admissible under this exception to hearsay.

DECLARATION AGAINST INTEREST

Should Hansen claim the Fifth Amendment privilege not to testify, he is deemed "unavailable" for purposes of this exception to hearsay. The Hansen statement is based on his own personal knowledge that paying a mere \$30.00 for laptops was indeed a tip off that the goods were stolen and this was against his (the declarant's) pecuniary interest.

SPOUSAL TESTIMONIAL PRIVILEGE: EFFECT OF DIVORCE

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

Here, Whitney was charged as a defendant and it is reasonably inferred that she waived her Miranda rights since she is voluntarily testifying against her husband.

MARITAL COMMUNICATIONS PRIVILEGE: NOT A PRIVATE SETTING

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

Hansen and Whitney are legally married at the time of Whitney's testimony which she gave voluntarily. The presumption of confidential communications exists in the marriage relationship.

However, the issue is that the communication about knowledge of the status of the items as stolen was **not in a private confidential setting** since Hansen and Whitney were not alone and third parties, Adele and Perry were present. This privilege would not prevent Whitney from testifying against her husband.

ATTORNEY –CLIENT PRIVILEGE: JOINT CLIENTS INTERVIEW

The attorney client privilege allows the client the right to refuse to disclose confidential legal information between a client and the attorney. The attorney has separate ethical violations aside from the privilege. The holder of the privilege is the client.

Joint clients, both Hansen and Whitney discussed the pending stolen goods charge with Adele, the attorney. Both Hansen and Whitney are the holders.

Here, Whitney is waiving the privilege. However, since both husband and wife sought Adele out for legal advice and at the time, Adele was in a meeting with both prospective clients at the same time, the statement by Hansen about the hot laptops is likely protected under this privilege and should not be disclosed. The attorney – client privilege will prevail and is not defeated by a paralegal's presence she that support person may be deemed **reasonably necessary** to the attorney.

Under CEC 962, an argument may be made by Prosecution that since Hansen and his wife consulted Adele on a "matter of common interest" and since there were two parties (holders) and the communication is being offered against Hansen, an exception applies, therefore no privilege. However, this exception generally applies to civil cases, not criminal ones, such as this stolen items trial. A valid waiver from both Hansen and Whitney may be of assistance to the court.

2. WHITNEY'S SILENCE/WINK

RELEVANCE – Defined supra. Whitney's silence to her husband's statement that they **both** knew that the laptops were stolen may prove a probative fact, the element of knowledge that is required in this crime. The winking may be a secret code communication between the couple that suggests Whitney had Hansen's back prior to the divorce.

ADOPTIVE ADMISSION: HEARSAY EXCEPTION

HEARSAY- Defined supra.

Under the CEC, an adoptive admission is where a party expressly or impliedly adopts or acquiesces to the statement of another.

Here, Hansen is a co-defendant in a trial on stolen laptops and by his statement that he and his wife knew the items were stolen due to the low price of \$30.00 strongly suggests that a reasonable response would be a denial by Whitney unless the statement was true. Since the co-defendants trial was severed by the court, Whitney will be tried separately unless there was an immunity grant from the prosecution.

The prosecution may bring out on the direct testimony of Whitney that she did not reply to Hansen's statement because she was nervous in an attorney's office, and not that she was guilty of knowing the items were hot.

WINKING

Whitney's wink at her husband may be argued as an adoptive admission on her part that she knew the laptops were stolen. The conduct in winking at her husband may be construed as her "state of mind" in knowing the items were hot. However, at this time, Whitney is not on trial since the case was severed. The winking may be ambiguous, not intended as a communication or as an assertion, but also not relevant.

LIMITING INSTRUCTION

The statement regarding the knowledge of the status of the laptops is relevant against Hansen, but not Whitney at this trial. It may be argued by the defense to show that Whitney is now biased against her now ex-husband due to the divorce.

MARITAL CONFIDENTIAL PRIVILEGE/SPOUSAL TESTIMONIAL

Defined supra.

The silence by Whitney is not a form of communication at all, so likely this privilege along with spousal testimonial privilege will fail.

3. THE PARALEGAL'S TESTIMONY: THIRD PARTY'S PRESENCE

RELEVANCY

ATTORNEY – CLIENT PRIVILEGE AND “REASONABLY NECESSARY “

Perry, the attorney's paralegal was a third party and was present at the interview with the joint clients. The privilege extends to an attorney's support staff, such as a paralegal, if the staffer is “reasonably necessary” to the relationship.

Here, Perry is not the holder of the privilege as this belongs to Hansen and Whitney. However, the facts do not call for Perry to testify as to the joint client interview. Rather, Perry is being asked foundational questions about the video-tape and transcript.

4. INTRODUCTION OF THE VIDEO-TAPE COPY /TRANSCRIPT

RELEVANCY- defined supra. The tale is relevant because it corroborates what Hansen/Defendant said about knowing the laptops were stolen items. The problem is that the video-tape is part of an attorney- client interview and may be protected under the privilege along with the work product rule. See below.

AUTHENTICATION/PROPER FOUNDATION -WRITINGS

Secondary evidence rule: California abolished the Best Evidence Rule in favor of the Secondary Evidence Rule, where duplicates or copies of the original are presented when the contents of the writing are in issue. The video-tape copy and a genuine transcript of the meeting are “writings” since the contents of the meeting are in issue and there is a broad interpretation of writing. This is contrasted to the Best Evidence Rule used by the FRE to prove the material terms of a writing and subject to the original being produced unless an exception applies.

For proper authentication, or proving the video and transcript are genuine, Perry could testify as to the items being genuine if he recognized the copy of the tape, and could testify the tape and video were fair representation and were an accurate depiction of the meeting with Adele, Hansen and Whitney. Since Perry was the transcriber for the video-tape copy, he had personal knowledge due to being present and may lay the proper foundation for both items.

ATTORNEY WORK PRODUCT DOCTRINE/PRIVILEGE

The attorney work product rule protects an attorney's mental impressions and trial strategies from discovery. The opponent may only discover work product items through a showing of “substantial need.”

Here, the prosecution wants what may be deemed “confidential attorney-client” discussions between the joint clients, Hansen and Whitney. The fact that Perry, a paralegal, was present does not defeat the privilege since Perry will be considered a “reasonably necessary” staff member of Adele's.

Since this is a criminal trial and not a civil one,(where there is not an attorney-client privilege when there are joint clients), a trial court is likely to rule that **both** the transcript and copy of the attorney-client interview is indeed protected by the attorney-client privilege and work product. Therefore, both items are inadmissible because the meeting was intended to be confidential for the purpose of seeking legal advice. The video-tape copy and transcript are akin to an attorney's notes of the client interview.

Question 2

Sam, a confidential informant, tells police that Bob and Frank are selling heroin out of an apartment and that he has purchased large amounts of heroine from Frank on several occasions. Based on Sam's information, Police execute a lawful search warrant at the apartment locating 10 pounds of heroin and other evidence of heroin sales. Bob and Frank are arrested.

At the police station, Bob is properly questioned by police and during a tape-recorded interview states that he was selling heroin and that Frank just happened to be in the apartment at the time the search warrant was conducted. Both men are arrested on conspiracy to distribute a controlled substance. The cases are severed and Sam testifies against Bob at Bob's preliminary hearing. Sam dies prior to testifying in Frank's case. Subsequently, Bob enters into a plea agreement with the prosecution for a reduced sentence in exchange for his testimony against Frank. At the trial Bob testifies that it was Frank, not Bob, who was selling heroin and that Bob was simply a user of heroin.

Assume the following occurred in the federal jury trial of Frank. Discuss all the evidentiary issues and arguments that would likely arise in each section below, including objections, if any, and the likely trial court ruling on the admissibility of the evidence.

1. The prosecutor seeks to introduce a transcript of Sam's testimony at the preliminary hearing.

Hearsay: OOC statement offered for TOMA.

Former Testimony

The testimony of a now unavailable witness given at a trial, hearing or in a deposition taken in accordance with law is admissible in a subsequent trial as long as there is sufficient similarity of parties and issues so that the opportunity to develop testimony or cross examine at the prior hearing was meaningful.

Requires Identity of Parties, Identity of subject matter, Under Oath and Opportunity to develop testimony at a prior hearing. Here, Sam testified against Bob not Frank. Frank did not have an opportunity to cross examine Sam and thus, the exception does not apply.

Confrontation Clause:

The accused in a criminal case has the right to confront and cross examine the witnesses against him. Here, Sam is unavailable. His statement is testimonial in nature because it was made to prove past events relevant to a later criminal prosecution and Frank did not have an opportunity to cross examine Sam prior to trial.

2. The prosecution calls Wendy, an FBI agent, to testify to the contents of a piece of paper with the telephone number of Frank's supplier which was found in Frank's pocket at the time of the arrest. The agent testifies that she lost the paper and has no independent recollection of the number but that she accurately transcribed the number onto a note pad at the time of arrest. The prosecutor seeks to introduce the agent's hand written note in evidence to establish Frank's connection with his supplier.

Best Evidence objection.

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

Best evidence rule applies in two situations: Where the writing is legally operative or dispositive or where the knowledge of a witness concerning a fact results from having read it in the document. In this situation, the knowledge of the FBI agent comes from reading the paper in Frank's possession, so the best evidence rule would apply.

Admissibility of Secondary Evidence. If the proponent of the writing cannot produce the original in court, secondary evidence of its contents will be admitted if a satisfactory explanation is given for the non-production. This includes loss or destruction of the original if it was lost or destroyed in good faith. Thus, secondary evidence in the form of the FBI agent's testimony would not violate the best evidence rule.

Hearsay/Present Recollection Revived/ Past Recollection Recorded.

The phone number is an out of court writing being offered for its truth: that it is the phone number of the supplier. Therefore, there must be a hearsay exception/exemption that applies or it will be excluded.

Admission of a Party Opponent: could get it in under this theory but still have the problem that the W has no independent recollection.

Present Recollection Revived

A witness may use any writing or thing for the purpose of refreshing her present recollection. She may not read from the writing while she testifies since it is not authenticated and not in evidence. It can be used solely to refresh her memory.

Past Recollection Recorded

Where a witness states that she has insufficient recollection of an event to enable her to testify fully and accurately, even after she has consulted a writing given to her on the stand, the writing itself may be read into evidence if a proper foundation is laid for its admissibility. The foundation must include proof that:

1. The witness at one time had personal knowledge of the facts recited in the writing
2. The writing was made by the W or under her direction or that it was adopted by the W
3. The writing was timely made when the matter was fresh in the mind of the W
4. The writing is accurate, and
5. The W has insufficient recollection to testify fully and accurately.

If admitted, the writing may be read into evidence and heard by the jury, but the document itself is not received as an exhibit unless offered by the adverse party.

3. The prosecutor seeks to introduce evidence that Frank has been investigated for selling drugs in the past but no charges were ever filed.

Prior Act of Misconduct Impeachment.

Not proper impeachment as a prior bad act because the “bad act” must be one that is probative of truthfulness (an act of deceit or lying).

Impermissible as character evidence.

The defendant has not raised his character in this case. Furthermore, prior specific instances of conduct are not admissible. Under a character theory, this is clearly propensity evidence.

Specific Acts of Misconduct Relevant for Some other Purpose.

The prosecution could attempt to introduce this evidence on the theory of knowledge. This would be a tenuous argument. (The assertion by the prosecution would be that because he has been investigated for drug sales in the past, he knew he was involved in drug sales in the present case – this is a thinly veiled propensity argument). The only way this would become relevant on a non-propensity theory is if Frank made an allegation that he did not know what drugs were, had never seen them, ect.

If the court found the evidence qualified as an act of misconduct relevant on the issue of knowledge, there is still a significant likelihood that the evidence would be excluded on 403 grounds.

4. Frank seeks to introduce Bob's tape-recorded statement as proof that it was Bob, not Frank, who was selling heroin.

Impeachment: Prior inconsistent statement

For purposes of impeaching the credibility of a witness, a party may show that the W has on another occasion made statements that are inconsistent with some material part of his present testimony. It may be proved either by cross examination or extrinsic evidence. A proper foundation must be laid. Bob must have an opportunity to explain or deny the inconsistent statement.

Hearsay: OOC statement offered for TOMA.

Evidentiary Effect: Frank can introduce the inconsistent statement to show that Bob may be lying in his testimony now. Frank cannot use it as substantive proof (that it was Bob and not Frank who was selling heroin) because the statement was not made under oath at a prior trial, hearing, or deposition.)

Question 3

Tommy is federally prosecuted with embezzlement. Tommy's father, Ed was diagnosed with dementia and terminal cancer on January 1, 2014. Ed died of his illness on January 1, 2015. Upon reconciliation of Ed's estate, Ed's daughter, Sally, who was expecting a large inheritance, learned that her father's estate had been depleted down to a few thousand dollars. Sally hired a forensic accountant to review Ed's bank accounts. Sally learned that through a sophisticated series of transactions over one million dollars had been transferred from Ed's accounts to accounts owned by Tommy. The transfers took place between January 1, 2014 and January 1, 2015. Tommy claims the money was a gift. The prosecutor's theory is that Tommy took the money from Ed without Ed's knowledge or consent.

Assume the following occurred in the federal jury trial of Tommy. Discuss all the evidentiary issues and arguments that would likely arise in each section below, including objections, if any, and the likely trial court ruling on the admissibility of the evidence.

1. Prosecutor asks the court to take judicial notice of court documents showing that Sally obtained a conservatorship over Ed on January 1, 2014 based on the fact that Ed no longer had the mental capacity to control his own financial affairs.

Relevance:

If Ed is no longer capable of controlling his financial affairs, he doesn't have capacity to make financial transactions (including gifts) to Tommy.

Judicial Notice:

Judicial notice is the recognition of a fact as true without formal presentation of the evidence.

A fact that may be judicially noticed if it is one that is not subject to reasonable dispute because it is a matter of common knowledge in the community or a fact capable of certain verification.

A court may take judicial notice of a record such as a court record.

When the court takes judicial notice, the judge recognizes the existence of the record. The court does not make a determination that the assertions made in those records are true.

If the record is offered for a purpose other than to prove the truth of the matter asserted (for example, to show notice of a similar lawsuit), there is no hearsay issue.

If the record is offered for the truth of the matter asserted in the record, a hearsay exception must apply for it to be admissible

Hearsay:

OOC Statement offered for TOMA

Even if the court will take judicial notice of a document, it is not admissible for the truth of the matter asserted unless it falls within a hearsay exception.

If the purpose of the document is to show that D had knowledge of his father's incompetence to control his financial affairs, then the documents would be admissible on this issue because they are offered for the non-hearsay purpose of knowledge

If the DA seeks to admit the document to show that the father was conserved and the facts relating to the conservatorship, then the document would be inadmissible hearsay.

The opponent should ask for a limiting instruction if the court takes judicial notice to show knowledge

2. Prosecutor calls the forensic accountant hired by Sally to testify that in his opinion, Tommy had been embezzling from father's account. This is the first case Expert has handled after completing his schooling to become an accountant. Expert testifies that his opinion is based on his review of Ed's financial records and a review of Ed's diary entries from the relevant time period which consist of negative statements about Tommy including "Tommy is a dirty scoundrel."

Expert testimony:

Expert testimony is appropriate when the subject matter of testimony is beyond common experience and it is offered to assist the trier of fact in understanding the evidence. Here, the transactions occurred through sophisticated transactions that would likely be the proper basis for expert testimony.

Qualifications to be an Expert

The federal rules do not outline any specific educational, training or other requirements to be an expert. The fact that this is the expert's first case, will go to the weight of his testimony, not his qualifications if he otherwise has the necessary education and training.

Basis of Testimony

For the basis of the expert's opinion to be proper, the information relied upon must be of a type reasonably relied on by other experts in the field. Experts can rely on inadmissible evidence (like hearsay) such information is reasonably relied upon by other experts in the field.

The expert has two bases for his testimony: His review of the financial documents and the diary entries.

The financial documents are clearly the type of information that accounts would rely upon in making their determination if there was embezzlement. As such, it is a proper basis for expert opinion testimony.

The Diary entries are clearly not a type that would be relied upon by experts in the field. Even if the diary entries came within a hearsay exception (such as state of mind), this should be excluded as a basis for the expert's opinion.

Ultimate Issue

Experts can give opinions on ultimate factual issue if the opinion will help the jurors to decide an issue that is beyond their scope of common knowledge. Experts cannot give opinions on ultimate legal issues.

3. Sally testifies for the prosecution that she knows her father and in her opinion, Ed would have never given Tommy such large amounts of money.

Speculation objection; improper opinion testimony objection.

Opinions by lay witnesses are generally inadmissible. Under the Federal Rules, opinion testimony by a lay witness is admissible when:

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

The court should rule that this testimony is inadmissible. The statement is speculative and not based on something that Sally personally observed and thus is not within the proper scope of lay testimony.

4. Tommy is convicted of embezzlement. Tommy's attorney brings a motion for a new trial based on the proposed testimony of jurors who would testify that one juror believed Tommy was not guilty, but he changed his vote to guilty after another juror threatened him.

Competence of Juror as Witness

As a general rule, jurors will not be allowed to testify to matters occurring within the jury room, although an irregularity occurring within the jury room (such as a juror bring a prejudicial newspaper article to the deliberation) is within the scope of permissible testimony.

A juror is competent to testify about whether

- Extraneous prejudicial information was improperly brought to the jury's attention
- An outside influence was improperly brought to bear upon any juror; or
- A mistake was made in entering the verdict on the verdict form

A juror may not testify about:

- Any statements made or incidents that occurred during the jury's deliberations
- The effect of anything on that juror's or another juror's vote;
- Any juror's mental processes concerning the verdict or indictment

The court may not receive a juror's affidavit or evidence of a juror's statement on any of these matters. This information would not be admissible in a motion for a new trial.

1)

ROG 1

Evidence

Evidence is any testimony or tangible item that has a tendency to show that a disputed claim or defense is more likely or not to have an impact on a disputed fact of consequence.

210 / 401 - Relevance

Relevant evidence is any evidence that has a tendency to make a fact more or less probable than it would be without that fact.

the prosecution is trying to get this information in to show they had knowledge for receiving and selling stolen laptops which is a primary factor in the charged case.

Spousal Immunity / Confidential Marriage Communications

Good
During a marriage both spouses have the privilege of spousal immunity and Confidential Marriage Communication Privilege. For Spousal Immunity both spouses hold the privilege and either spouse can waive the privilege to testify against the other. This privilege lasts for the life of the marriage, and allows either spouse from testifying about any topic during the valid marriage. The exception to this rule is that if its a domestic violence crime or a crime against one of either spouses child the privilege does not apply.

Confidential Marriage Communications apply to married couples as well but is intended more for intimate confidential communications within the marriage (Pillow Talk). This

privilege is held by each spouse and continues even after the marriage ends unlike Spousal immunity which only applies during a valid marriage. Either spouse may assert this privilege against the other spouse which would prevent them from testifying.

Good
During the prosecutions case in chief, whitney voluntarily testified that she and her Husband had consulted an Attorney, Adele. (Attorney-Client Privilege discussed below). Whitney can waive her privilege of spousal immunity and disclose what was said during the marriage if she choose. Hansen will argue that the CMC privilege would apply but this was not a confidential communication in regards to the marriage, so he would be unsuccessful with this argument.

Attorney - Client Privilege

Good
Communications between an attorney and their client are considered confidential and cannot be disclosed. Both Hansen and Whitney were using the same attorney and therefore anything that was said during the legal consultation would be considered privileged. Even after there cases were severed and they obtained new counsel was obtained they would both have the privilege. There is a crime fraud exception but the facts do not indicate that is an issue since they were receiving legal services after being charged with a crime. whitney could testify to anything she saw Hansen do, but she could not testify that Hansen said to whitney, in the presence of Adele and her paralegal, "you know Whitney, we really did know the laptops were stolen since we only paid 30 each for them."

Whitney and the state would argue that the presence of the paralegal would cause an eavesdropper situation, but the argument would not, since the paralegal is working for the attorney and that information would still be considered confidential.

Based on the above analysis, Whitney's statement would not likely be allowed into evidence.

Hearsay

Good!
Hearsay is any out of court statement by an out of court declarant used to prove the truth of the matter asserted.

The prosecution would argue that a hearsay exception would exist but the attorney client privilege would supercede any Hearsay exceptions.

ROG 2

Relevance

see Definition above

The prosecution would like to get this "wink" into evidence, and the statement she did not respond to show that she was guilty and had knowledge of the stolen computers.

Whitneys continued testimony would not be allowed in based on the analysis of above as it would still be considered attorney client privilege, but in the event it was not, it might be argued that it could be considered an adoptive or implied admission of knowledge or intent.

Rog 3

Writing

A video-tape would be considered a writing and for a writing, four things need to be evaluated; relevance, Authentication, Secondary/Best Evidence and Hearsay.

210 / 401 - Relevance

See above.

This evidence is also being used by the prosecution to possibly enter into evidence a Video-tape conversation of the attorney interview and could be considered relevant to show the interview.

Authentication

The prosecution is trying to call the paralegal for Adele to lay the proper foundation regarding the video-taped conversation of the attorney visit. The paralegal Perry would testify to taping the conversation and stolen it property.

Attorney Work Product / 352

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair Prejudice, confusion of the issues, misleads the jury or needlessly cumulative.

This evidence would be highly prejudicially and would be considered work product. Any information prepared or gathered in the preparation of litigation is considered privileged and would not be admissible. This is a taped interview of Hansen and Whitney and based on the same attorney privilege analysis above would ilklely be excluded.

Secondary / Best Evidence Rule

This is a California court and the Secondary evidence rule would apply. California does not have a preference for the originals unless the original documents or terms of the document are in gone dispute and it would be unfair to the other side. The secondary evidence only apply when dealing with legally operative words or a contract or if the person testify knowledge was solely based on the item in dispute.

In this case, all parties were present and knowledge would not be based on the tape, therefore the tape would not be considered secondary evidence.

Rog 4

The prosecution is trying to introduce copy of the video-tape and the transcript of the meeting between Adele, Hansen and Whitney.

The video tape would not be allowed into evidence for the reasons listed above.

The transcript could be used to assist the jury if the judge let the tape be played in court, but the transcripts would not be admitted into evidence as the tape would be considered the evidence.

END OF EXAM

2)

Rog 1**Evidence**

Evidence is any testimony or tangible item that has a tendency to show that a disputed claim or defense is more likely or not to have an impact on a disputed fact of consequence.

210 / 401 - Relevance

Relevant evidence is any evidence that has a tendency to make a fact more or less probable than it would be without that fact.

Here the prosecutor is seeking to introduce a transcript of Sam's testimony at a prior preliminary hearing. The facts are unclear as to what that testimony would be but it can be assumed it would be similar to the information that Sam provided to police, and that information was used to obtain a lawful search warrant at the apartment. This information would be relevant.

Hearsay

Hearsay is any out of court statement by an out of court declarant used to prove the truth of the matter asserted unless there is a hearsay exception, or exclusion.

Former Testimony.

In order for the prosecutor to be able to have sam's former testimony be introduced, it must qualify as an exception to hearsay. Sam is Unavailable because he died. His prior testimony was a preliminary hearing against Bob. Bob had the opportunity to cross exam Sam. This is Jury trial against Frank, and the facts indicate that Sam died before he could ever testify against Frank. The Former Testify against bob would not be admissible against Frank.

Great job!

6th Amendment / Confrontation Clause

This would also bring up a Confrontation Clause issue. This is a criminal trial, and in criminal cases the defendant has the right to confront witnesses against him. Sam is dead and therefore he can not be confronted. If the Former Testimony did not keep out this evidence, the Confrontation Clause likely would.

Rog 2

401

See Def above.

The prosecutor is seeking to introduce the phone number found in Franks pants at the time of arrest. This would be relevant in a sales case for the large amount of heroin.

Hearsay

See above

Past Recollection Recorded / Refreshed.

Great!
Wendy is called to testify to the contents of a piece of paper she had located with phone number of Franks supplier in his pants pocket. The prosecution would have to lay the proper foundation to establish if Wendy remembered locating the note, how she found the note, how the note looked and if she remembers numbers on the note. They would ask her if she correctly transcribed the note on her note pad. Assuming that Wendy still has no independent recollection of the number she could then with the permission of the court, read the number into evidence like testimony. Wendy would not be allowed to introduce her had written note into evidence.

The defense would argue the note was incorrect and imply that Wendy was not being completely truthful. The defense would also try to establish how Wendy knows that the numbers were actually to Franks supplier and not just a friend for drinks.

Secondary / Best Evidence Rule

This is a Federal court and the Best evidence rule would apply. Federal courts have a preference for the original, unless good cause can be shown as to why an original cannot be produced. The Best evidence rule only applies when dealing with legally operative words or a contract or if the person's knowledge is based solely on the item in dispute.

In this case, Wendy's knowledge is based solely on the note located in Franks pants. The note is the original and has been lost but no other reason is provided. The court would likely not entertain the idea that important evidence was lost or misplaced but the officer has written the number down correctly.

This evidence would not likely be allowed to come in.

Rog 3

The prosecutor is seeking to introduce evidence that Frank has been investigated for selling drugs in the past.

Prior Bad Act / Impeachment

Prior bad acts cannot be used to imply that a person has done bad acts in the past or has the propensity to commit crimes therefore they are more likely to have committed this crime. Prior bad acts can sometimes be used to show Motive, Intent, Absence of Mistake, Identification or Common Scheme or Plan.

This appears to still be the prosecution's Case-in-Chief and the facts do not indicate that Frank has provided any testimony or provided any defense that would allow the prosecution to bring in Character evidence or impeach Frank with Prior bad Acts.

Good!

Character Evidence

Character Evidence cannot be used for propensity purposes and can never be introduced by the prosecution unless in a civil case where character is the ultimate issue, like child custody, Negligent entrustment, Negligent Hiring, defamation, or deceit/ misrepresentation. In a criminal case, Character can only be introduced after the defendant "opens" the door to character by putting his character in question.

The prosecutor would not be allowed to introduce any bad acts or character evidence at this time against Frank.

Rog 4

It appears that it is now the defenses case in chief and Frank is seeking to introduce Bob's tape-recorded statement as proof that it was Bob, not Frank, who was selling drugs.

Relevance

See above

This evidence would be very relevant as it tends to show Frank's innocence.

Prior Inconsistent Statement - Hearsay Exclusion - Not Hearsay under Federal Rules

Bob has given testimony against Frank in Frank's criminal trial. Bob has placed his credibility at issue. Under the Federal rules a prior inconsistent statement is not hearsay and can be used as substantive evidence. Frank can also use this information to impeach Bob, if the court would not let it in under Prior inconsistent Statement - Hearsay Exclusion. The facts indicate that Bob was properly questioned by police and during the tape recorded interview (confession) he stated that he was selling heroin, and that Frank just happened to be in the apartment at the time the search warrant was conducted.

At Frank's trial, Bob testified that it was Frank, not Bob, who was selling heroin and that Bob was simply a user of heroin. This tape-recorded interview would be allowed in.

Writing.

A tape-recorded interview could be considered a writing and for a writing, four things need to be evaluated; relevance, Authentication, Secondary/Best Evidence and Hearsay.

This recording would be relevant based on the above analysis, It could be easily authenticated by bringing in the police evidence tech or the officer who conducted the interview to testify to the chain of custody ect.

Secondary Best Evidence

See above for rule

This recording would not meet the Best evidence standards as there were people present who could testify to what was said and the officer would have a detailed report of bobs confession as well.

Hearsay

This would not be considered Hearsay, therefore the tape would likely come into evidence.

END OF EXAM

It would be hearsay under the Fed. rules because the statement was not made under oath at a prior proceeding.

Great job overall!

3)

Q3

ROG 1:

Relevant (see below) to show that E was not able to take care of his own finances, and Tommy (T) took advantage of E. Also relevant to show why Sally (S) had access to E's accounts and discovered the embezzlement.

Balancing Test (see below): Not unfair, as more probative than unfairly prejudicial.

Judicial Notice (JN): A substitute for evidence whereby a court finds as true certain facts without formal proof. IN a civil case, the judge must instruct the jury that the fact judicially noted is conclusive, and in a criminal case (as here) that the jury MAY find the fact as conclusive.

JN may be made for facts commonly known in the judicial territory in which the court sits, or by resort to sources whose accuracy cannot be reasonably questioned.

Here, a court document may be judicially noted, since the fact that a document exists can be ascertained from the court, which is an authority on court documents that cannot reasonably be questioned. The CONTENTS of the document, however, must get in another way.

Here, Prosecutor (S) may provide the court with evidence that a court order granting conservatorship exists, and the court MUST make JN of that fact - the fact that E no longer had mental capacity is not able to be judicially noted, however.

ROG 2:

Relevance:

Evidence is relevant if it makes a material fact more likely that it would be without the evidence. Here, the testimony of the Accountant (A) is relevant to help the jury understand complicated evidence, such as shell corporations, multiple bank accounts, how a person can embezzle money.

Balancing Test under FRE 403 (see Q's 1&2 for definition - SORRY!!):

Here, the evidence is highly probative as it will help the jury understand complicated accounting and/or embezzlement schemes. There is no indication that it will UNFAIRLY prejudice the jury b/c the testimony will help (hopefully!), not hinder the jury to understand, and it is doubtful that hearing about boring accounting methods will inflame the passion of the jury.

Expert Testimony:

An opinion in the form of expert testimony may be given when the person testifying has special knowledge gained through education, experience, and/or training and testimony based on his expertise helps the jury to understand evidence or a fact at issue that is beyond an ordinary person's understanding.

Is it needed? Here, expert testimony is needed because detailed, large amounts of money, accounting methods, banking, embezzlement, trying to (most likely) cover the tracks of the crime through fake accounts, etc. is beyond common knowledge of the ordinary person. A's testimony is needed to help the jury make a decision as to the elements of the charge.

Is A an expert? A may be confirmed/found as an expert after Voir Dire. Since A has not testified before, the defense (D) will try to have him NOT found to be an expert. However,

and expert may gain the requisite knowledge through education. There is always a first time. It is likely that A will be found to be an expert, and D can try to cast doubt on A's credibility to the jury by highlighting the fact that this is A's first time to testify as an expert and by having his own, more seasoned expert testify.

Basis of Opinion? A must reasonably rely on the same information that other experts in the field rely on. He is allowed to rely on hearsay (such as the records). A can rely on Ed's (E) financial records, as it is obvious that other expert accountants rely on financial records to form their opinions and ply their craft.

Good! HOWEVER, A may NOT rely on E's diary. An expert witness may not make any opinion as to a witness or a party's credibility. It is highly doubtful that other experts rely on diaries to determine the state of mind of the person being swindled.

The P should try to get the diary in another way, not through the basis of expert testimony.

Method:

If A reliably applies the facts of the case to a reliable method relied upon by other experts, then the method is acceptable. The Daubert factors look to whether the method is Testable, Accepted by the relevant expert community, what the Rate of Error is, and whether it is subject to Peer Review and whether the method has been Published. This test is applied to scientific evidence, however. While accounting may be a big Mystery to some of us, it is not scientific, and therefore the Daubert test does not apply.

Conclusion:

A may give his expert opinion as to an ultimate issue, that Tommy (T), in his opinion, embezzled money. He may not, however, testify as to Ed's state of mind concerning Tommy and may not testify to that part of his opinion that relies on reading the diary.

Great job

Rog 3:

Relevance:

To show that b/c in her opinion E would never have given T the money, T had to have embezzled it.

403:

P will argue that it is Highly prejudicial, but not unfair since it is simply an opinion, not a salacious or disturbing image or information that would inflame the passions of the jury, not confusing, not cumulative. D will argue that it is unfairly prejudicial, since it is showing that T is taking advantage of an old man, and not just an old man, his father, which is likely to inflame the passions of the jury, rather than focusing them on the rather technical aspect of whether or not T moved money from E's accounts to his without permission.

It is likely that this lay opinion testimony will be found to be relevant and probative, and not outweighed by unfair prejudice.

Lay Opinion Testimony:

A lay witness (not testifying to technical, scientific, or specialized knowledge) may give an opinion if they have personal knowledge of the matter testified to, and if it is helpful to the jury. A lay witness may make opinions about a person's mental state (rational/irrational behavior), emotional state.

Here, P will need to lay a foundation: that Sally (S) is E's daughter, how much time they spent together, the nature and depth of their relationship, and how she would know how he felt about giving large sums of money to T.

If the proper foundation is laid, P will ask S about her opinion.

Speculation Objection: Defense (D) will object that S is speculating as to what E thought or would do before he died, not what he actually said or indicated.

Dead Man Statute Objection: A person may not testify about conversation regarding an estate made by a the estate decedent. Here, S would not be allowed ot refer to conversations with her father about the estate - such as not leaving large sums of money to T.

Impeachment (casting adversely on Witnesses credibility) by Bias/Interest:

Here, D will attempt to cast doubt on S's credibility by stating that she as Interest in the money as the conservator over her father, and that she wants all the money for herself. D will have to ask S on cross examination about the underlying facts that a jury could use to infer Bias/INterest. If S admits to those facts, D can ask the court for permission to introduce extrinsic evidence (anything that is not coming out of the Witnesses mouth in court). If S denies the fact that underly Bias/Interest, D may introduce extrinsic evidence, a 2nd witness.

Conclusion:

It is likely that S may NOT give her opinion since she is not giving an opinion as to something she has observed, but rather speculating about something E may do or not do.

ROG 4:

a juror may not testify before other jurors in the case. However, after the case is over, a juror may testify as a mistake on the verdict form, outside influences. IN this case, the juror may testify that he was threatened, but not about what was deliberated. This is allowed for requests for new trial, or motions for new trial based on improper jury

ID:

Exam Name: EvidenceB-MCL-Spr17

END OF EXAM