

EVIDENCE
Final Examination
Spring 2021
Professors Davenport, Lizardo & Starr

INSTRUCTIONS:

There are three (3) questions in this examination.

You will be given four (4) hours to complete the examination.

QUESTION 1

Burns is being charged with arson. He is being represented by Attorney Hyde.

The prosecution's theory was that Burns burned down his failing business to get the insurance proceeds. The fire was started with gasoline and Burns owns a red Ferrari that was seen leaving the area right before the fire started.

Before the arson, Burns was in the garage with his wife, Wilma. Burns popped open the Ferrari trunk and showed Wilma several gasoline cans and said, "I figured out a way to solve our financial problems." Wilma did not want to have anything to do with his plans.

Nosey, a neighbor, overheard the Burns' conversation because the garage door was wide open. Nosey has known Burns and Wilma for eleven years.

While at his business, Burns called Hyde and told him, "I really messed up! Some gasoline spilled on my clothes and I am nauseated from inhaling the gas fumes!" Hyde tells Burns to go to the emergency room and tell the doctor that he inhaled fumes from barbecuing. Hyde was using his office speaker phone while talking to Burns. Dexter, Hyde's driver was in the lunchroom and overheard the conversation.

At the emergency room, Dr. Pyro diagnosed the injury as gasoline fume inhalation. Oxygen therapy was given.

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

Answer according to California law.

1. The prosecution calls, Wilma who voluntarily testified about her husband's statement and him showing her gasoline cans located in the Ferrari trunk. At the time of trial, Wilma had filed for divorce.
2. Next, the prosecution presents Nosey, a neighbor, who testified that he saw the red Ferrari and overheard Burns tell Wilma, "I figured out a way to solve our financial problems."
3. Next, the prosecution calls Dexter, the driver for Attorney Hyde, who testified regarding Hyde's conversation with Burns.
4. Finally, the prosecution presents Dr. Pyro who testified he treated Burns for gasoline fumes inhalation.

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QUESTION 2

Darlene is prosecuted for battery with serious bodily injury in the criminal case of People of the State of X vs. Darlene.

On February 1, 2020, Darlene was working as a waitress at Pizza Palace. She waited on Victor, a patron of the Pizza Palace and the alleged victim in the case. The prosecution's theory of the case is that Darlene pushed Victor off his barstool after he complained about her poor service, causing him to fall and suffer serious bodily injury, a concussion, as a result of the fall. The Defense theory of the case is that Victor became intoxicated while waiting for his food. Darlene asked him to leave, Victor became belligerent and fell off his barstool sustaining injuries.

Assume the following occurred in the jury trial of Darlene. Discuss all the evidentiary issues and arguments that would likely arise in each section below, including objections, if any, and the likely trial court ruling on the admissibility of the evidence. **The State of X has adopted the Federal Rules of Evidence.**

1. Victor testifies that he was waiting for his food for over an hour. When he complained, Darlene yelled, "I'll show you good service!" and forcefully pushed him off his barstool. Victor was taken to the hospital and the treating physician told him he sustained a concussion.
2. On cross-examination of Victor, defense counsel asks Victor the following, whether Victor filed a \$5 million lawsuit against Pizza Palace after the incident?
3. Next, the prosecution calls Dr. Vallum to the stand. Dr. Vallum will testify that he has been a licensed medical doctor for 20 years. He is Victor's primary care physician. Dr. Vallum testifies to Victor's injuries. Dr. Vallum is asked by the prosecution to state an opinion as to the cause of Victor's injuries. Dr. Vallum states that the injury Victor sustained could only have resulted from being pushed off a barstool. His opinion is based on an experiment that Dr. Vallum conducted with grapefruits where he rolled some grapefruits off a barstool and forcefully pushed other grapefruits off the same barstool. Dr. Vallum testifies that there was significantly more trauma to the grapefruits he forcefully pushed off the stool than those that rolled off the stool, which is consistent with the injuries Victor sustained. The defense objects.
4. After the prosecution rests, the defense calls Pizza Palace's head security officer, Wendy. Wendy is required to investigate incidents and write reports regarding those incidents by Pizza Palace. Wendy testifies that she reviewed the video surveillance inside of the Pizza Parlor on the night of the incident. She saw Victor fall off his bar stool. She didn't know how to save the surveillance video and by the time she was able to contact the manufacture of the surveillance system, the surveillance video was erased because it records over itself every 24 hours.

Question 3

The following facts gave rise to two trials: a federal criminal trial and a federal civil trial.

When Victoria Vinik turned 15 years old, her parents gifted her an iPhone. She soon met a man on the SnapChat social media network. His name was Donny. Donny, who was 25, told Victoria he was a software engineer in Hollywood and worked on major movies. Soon, the messages became sexual in nature, despite her age, and Victoria agreed to meet with Donny. They planned for Donny to drive to Bakersfield and pick her up and take her to Los Angeles to meet movie stars and “party.” She planned to tell her parents, Paul and Sue Vinik, she was at a sleepover with her friend, Freda. The plan initially worked. Victoria got permission to stay at Freda’s house and Donny picked her up on Friday night. On Saturday morning, however, the Viniks realized something was wrong when Victoria’s Find My Friends application showed her traveling south on Interstate 5 out of town. The Viniks could not get a hold of Victoria or Freda, so they logged onto her computer and found messages between Donny and Victoria and realized what had happened. The Viniks immediately called police.

Two days later, police located Victoria’s body in a ditch on the side of the road on Interstate 5. A medical examiner determined that Victoria had been forcibly raped and then strangled to death. Police found Donny later the same day and arrested him, later linking the rape to Donny through DNA. The United States Attorney’s office prosecuted Donny for sex with a minor, rape, and for Victoria’s murder. The Viniks sued in Federal court for torts, including sexual assault and a statutory wrongful death claim that requires intent to kill.

The following proffers were made during the federal criminal trial with appropriate notice:

- 1) SGT William of the Las Vegas Police Department testified that Donny had been arrested six years earlier for sexual assault of a girl, age 13, in a Barnes and Noble bathroom in Las Vegas, for which Donny was later charged and convicted for sexual assault and child molestation.
- 2) Detective Smith of the Los Angeles Police Department testified that, upon a valid search of Donny’s cell phone, he located hundreds of depictions of child pornography with the victims depicted ranging from apparent ages of 12 to 16.

The following proffer was made at the civil trial with appropriate notice:

- 3) In order to prove the killing was accidental, Donny’s attorney called Detective Bart of the Bakersfield Police Department. Bart testified from memory that Victoria’s diary bragged of numerous sexual encounters with teenage boys in which she asked them to “choke her.” The diary itself had been destroyed when a typographical error by police administrative staff caused it to be shredded as duplicate paperwork.

Discuss potential objections and responses to objections to the above proffers under the **Federal Rules of Evidence**. Do not address hearsay.

1)

Question 1

*Excellent Job on
this Question!!!*

1. Wilma's Testimony

The issue here is whether or not Wilma may testify about the statement her then husband, Burns, made about figuring out how to solve their financial problems while showing her several gasoline cans in the trunk of car. This is an issue because the communication may be covered by a privilege related to marriage.

Privileged Information

Great! Information is privileged when it is a confidential communication between properly related parties and incident to the relation. For communication to be confidential, it must take place in physical privacy, and with the intent on the holder's part to maintain secrecy.

Privileges Related to Marriage

The privilege for confidential marital communications and the spousal testimony privilege can both apply to parties who are or have been married.

Spousal Testimonial Privilege

Great! The spousal testimonial privilege only applies in criminal cases. For a spousal testimonial privilege to apply, the privilege requires that the proceeding be against the spouse and that a valid marriage exists at the time. The privilege is held by the witness spouse, and immunity may only be asserted during the marriage.

Here, Wilma had filed for divorce at the time of trial, so this privilege will not apply because immunity may only be asserted during a valid marriage.

* Divorce is only Final After a Decree so the Privilege still stands

Confidential Marital Communications Privilege

The confidential marital communications privilege can apply to both civil or criminal cases. Both spouses hold the privilege, and it protects the confidential communication made between spouses while they were married. For the privilege to apply, the communication must have taken place during a valid marriage, and there must have been a reliance on intimacy between the spouses.

Here, Wilma and Burns were in a valid marriage at the time the communications Wilma would like to testify about took place. Since both spouses hold the privilege, Burns will likely be able to claim the privilege and keep Wilma from testifying.

Good
Burns would waive the confidential marital communication privilege by failing to claim it when the testimony is offered, voluntarily disclosing it to another, or by a contractual provision waiving the right to claim the privilege in advance. None of these appear to apply in Burn's case.

Good
The prosecution may argue that the communication did not meet the second required element of there being a reliance on intimacy because the conversation took place with the garage door wide open. However, Burns will likely be successful in arguing that there was an expectation of privacy in their conversation, and that this is affirmed by the fact that they were alone together at their private residence.

The court will likely uphold Burns claim to the confidential marital communications privilege.

2. Nosey Neighbor's Testimony

Good! The issue here is whether or not Burn's neighbor, who happened to overhear the conversation Burns had with his wife in the garage, can testify. It is an issue because the neighbor was eavesdropping on a conversation that was protected by testimonial privilege.

Privileged Information

Information is privileged when it is a confidential communication between properly related parties and incident to the relation. For communication to be confidential, it must take place in physical privacy, and with the intent on the holder's part to maintain secrecy.

When Burns was talking to his wife in their garage, the conversation took place under the privilege of confidential marital communications because there was a valid marriage at the time of the communication, and the facts tend to support the argument that both Burns and his wife were relying on intimacy while talking. They did not know the neighbor was present, and intended their conversation to be private.

Eavesdropping on a Privileged Communication

Good Typically, if a third party is present during a privileged conversation, it is not longer privileged. However, the parties need to know the third party exists. Here, Burns and his wife did not know of the neighbor's presence.

Great! The prosecution may argue that an eavesdropper to a conversation is allowed to testify to what they heard if the parties to the conversation were negligent in their privacy. Here, Burns and his wife spoke with the garage door wide open, and it can be argued that they could have foreseen that a neighbor could easily hear them in this circumstance.

However, it is likely that Burns will be able to successfully dismiss this argument by asserting that a reasonable person could not foresee that a neighbor would listen in on their conversation, because they were alone in their private residence and the facts do not indicate that Burns used a raised voice. It would be different if Burns had spoken to his wife out on the street, or in a public location, but one has a reasonable expectation of privacy when discussing a matter in their own home at normal volume level.

The court will likely find that the neighbor is barred from testifying due to the confidential marital communications privilege.

3. Dexter's Testimony

The issue here is whether or not Dexter's testimony about the comment he overheard between Burns and his attorney, Hyde, would violate the attorney-client privilege.

Privileged Information

Information is privileged when it is a confidential communication between properly related parties and incident to the relation. For communication to be confidential, it must take place in physical privacy, and with the intent on the holder's part to maintain secrecy.

Attorney-Client Privilege

Grant
Communications between an attorney and client, made during the course of their professional relationship related to case in issue, are privileged from disclosure. A client has a privilege to refuse to disclose and to prevent others from disclosing confidential communications between the client (or his representative) and his attorney (or his attorney's representative).

For the attorney client privilege to apply, the communication must be confidential, and for the purpose of obtaining legal advice about past lawful or unlawful conduct, or about future conduct the client wants to carry out lawfully.

Here, Burns was seeking the legal advice of his attorney in a conversation he most likely thought was confidential.

The prosecution may argue that the conversation between Burns and his attorney, Hyde, did not take place in physical privacy, and therefore wasn't confidential, because Burns was on speakerphone, and at a volume loud enough that Dexter could hear what was being said from the lunchroom.

However, the intent to maintain secrecy only needs to be present with the holder of the privilege, and it can reasonably be assumed that Burns did not know he was on speakerphone, or that Dexter could hear him, because if he had been aware of these facts he likely would not have revealed information that was incriminating towards him. The facts indicate that he exclaimed his statement: "I really messed up! Some gasoline spilled on my clothes and I am nauseated from inhaling the gas fumes!" It is highly unlikely that Burns would knowingly say this in the presence of a third party.

Burns would waive the attorney-client privilege by failing to claim it when the testimony is offered, voluntarily disclosing it to another, or by a contractual provision waiving the right to claim the privilege in advance. None of these appear to apply in Burn's case.

It is likely that the court will uphold a claim from Burn for the attorney-client privilege.

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4. Dr. Pyro's Testimony

The issue here is whether or not Dr. Pyro's testimony about his treatment of Burns would violate a physician-patient privilege.

Privileged Information

Information is privileged when it is a confidential communication between properly related parties and incident to the relation. For communication to be confidential, it must take place in physical privacy, and with the intent on the holder's part to maintain secrecy.

Physician-Patient Privilege

The physician-patient privilege applies when the doctor is present, information is acquired while attending the patient in course of treatment, and the information was necessary for treatment.

Here, Dr. Pyro was present, and the personal knowledge he gained about Burn's injuries was acquired while treating him in the course of necessary treatment.

The privilege does not apply where the holder of the privilege puts his or her own physical condition in dispute, in aid of wrongdoing, where there is a dispute between the physician and the patient, there is an agreement to waive the privilege, there is a federal case applying the the federal law of privilege, or in some criminal cases, depending on the state.

All but the last of these examples do not apply to Burns. While California does recognize the physician-patient privilege for civil proceedings, it does not recognize the privilege in criminal proceedings.

Because Burns is being charged in a criminal proceeding, the trial court will not allow him to claim the physician-patient privilege.

Excellent

END OF EXAM

2)

1. Victor's testimony that Darlene pushed him off his barstool.

RELEVANCE.

EV is logically relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be w/o the EV. EV is legally relevant if it does not violate FRE 403; that is if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading a jury (or undue delay, waste of time, or needless presentation of repetitive EV).

Good! Here, Victor's testimony that he was forcefully pushed off his barstool by Darlene would be highly relevant to determine the cause for Victor's fall and injury. It's unlikely that a court would find this testimony outweighed by the danger of unfair prejudice, confusion, waste of time etc., and of good probative value to determine what caused the fall.

The court is likely to find this evidence relevant.

HEARSAY.

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

Here, Victor's testimony - *Didn't finish answer*

2. Whether Victor filed a \$5 million lawsuit against Pizza Palace after the incident?

RELEVANCE. See definition above.

Here, such a lawsuit could prove very relevant to support either a motive for Victor's claim about Darlene pushing him off the barstool and also as support of his possible significant damages due to his injury. It is likely that this cross-examination does not violate FRE 403.

The court is likely to find this evidence relevant.

IMPEACHMENT.

Impeachment is the casting of doubt on the veracity of a witness. Statements may be proved by cross examination and extrinsic evidence. Impeachment can be supported by contradiction, prior inconsistent statements, EV of bias, Interest or motive, crime conviction involving dishonesty.

Good!

Here, a 5 million dollar lawsuit against Pizza Palace can be used to support a theory of bias, interest and motive for Victor to potentially claim or fabricate that he was forcefully pushed by Darlene causing his injuries.

It is likely that the court would allow this question in cross-examination.

3. Dr. Vallum's expert testimony as a 20 year licensed medical doctor.

RELEVANT. See definition above.

Here, a licensed doctor's testimony regarding Victor's injuries could prove relevant in determining the force with which Victor fell from the barstool.

It is likely that the doctor's testimony is considered relevant in this regard. However, even if it is considered relevant, a judge would have to make a FRE 403 determination of the possible danger of unfair prejudice, confusion of the issues or misleading a jury due to the doctor's experiment conducted with grapefruits.

EXPERT OPINION TESTIMONY.

An expert may state an opinion or conclusion provided that: his specialized knowledge will help trier of fact; that he is a qualified expert; believes in his opinion to a reasonable degree of certainty; his opinion must be supported by a proper factual basis and his opinion must be based on reliable principles that were reliably applied (the Daubert/Kumho tests). Daubert standard for judging reliability of scientific EV: Peer reviewed and published, tested and subject to retesting, low error rate and reasonable level of acceptance. Kumho: Reliability is determined for this specific purpose by looking at facts and circumstances of the case.

Here, the objection of the defense likely depends on the "grapefruit test". If Dr. Vallum can show that his comparison testing of rolling and pushing grapefruits off the same barstool meets reasonable levels of acceptance and reliability, then his testimony is likely allowed and the defense objection overruled. However, if the "grapefruit test" is not supported against tests such as Daubert and Kumho, then the defense objection is likely to be granted.

4. Security officer Wendy's testimony regarding the video where she saw Victor fall off his barstool.

RELEVANCE. See definition above.

If the video included footage of Victor falling off by himself, Wendy's testimony is highly relevant to this case as well as any civil case potentially filed against Pizza Palace.

BEST EVIDENCE RULE.

The best EV 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 present a greater risk of error than oral testimony in other situations. A writing includes "any tangible collection of data", and can also be videos, photos, x-rays, computer disks, audio recordings. The best EV rule requires an original but several exceptions exist such as when the original has been lost or destroyed, and was not lost or destroyed in bad faith.

Here, the facts show that the video surveillance was on an automatic 24 hours delete and record mode, therefore the original writing was destroyed. Nothing in our facts show that it was lost or destroyed in bad faith and especially considering that Wendy worked as Pizza Palace's head of security. It is likely that the court allows Wendy's testimony of the video showing Victor falling off the barstool.

Good job

END OF EXAM

3)

1) **Logical Relevance:** Evidence is logically relevant if it has some tendency to make a fact more or less probable.

Legal Relevance: Evidence is legally relevant if the probative value is not so substantially outweighed by its prejudicial effect to be admissible.

Here, the defendant's prior acts are extremely relevant and show to the propensity of his character to have committed this crime before and is now carrying out the same crime again. The defense will argue that it is extremely prejudicial to Donny, but the FRE still allows propensity within the sexual assault exception.

Character Evidence FRE 413: Defendant's Prior Acts of Sexual Assault or Child Molestation

Evidence of the defendant's prior acts if sexual assault or child molestation is admissible in a civil or criminal case where the defendant is accused of committing an act of sexual assault or child molestation.

The prosecution does not have to wait for Donny to open the door to character evidence and the propensity ban on prior bad acts is lifted under FRE413. While the prosecution needs to give 15 days notice prior to trial of the use of this information, there are not rules stopping the prosecution from using Donny's past sexual assault and molestation conviction against him. This evidence shows that Donny has committed this egregious act before and has the propensity to have committed it again but has now escalated to murdering his victim as well. The prosecution does not have to wait for Donny to open the door to character evidence in the form of reputation, opinion, or specific acts due to this exception. SGT Williams' testimony is being offered by the prosecution as a specific

Great!

act to show Donny's character and propensity for sexual violence against children, specifically young girls. The defense will argue that allowing this testimony will be extremely prejudicial to Donny, but the Federal Rules specifically allow past convictions of sexual assault or child molestation to come in without the defendant opening the door to character evidence.

The Court will allow the testimony of SGT William over defenses objection.

2) Relevance: (Supra)

The prosecution will argue this is relevant due to the ages of the victims and the subject matter of the testimony it is essential to the states case that Donny is a sexual predator. The defense will argue that Donny has not been committed of this crime and its admissibility is extremely prejudicial to Donny in the eyes of the jury.

Character Evidence: FRE 413: (Supra)

While the accusation of sexual assault and molestation open for the door for the prosecution to bring forward opinion, specific acts, and reputation of the defendant. The defendant does not need to be convicted or charged with a prior sexual offense for it to be admissible, but if the probative value of the evidence outweighs its prejudicial effect, the court may use its discretion to exclude it from court.

Allowing Detective Smith's testimony regarding the child porn from Donny's phone, will be argued by the defense as extremely prejudicial because it is highly damning and is not a material fact or an issue in the case. The prosecution may argue that it is essential to proving Donny is a violent child sexual assault offender and is prone to having sexual desires for young girls between the ages of 12 and 16.

The Court will find that it is unfairly prejudicial to Donny to bring forward evidence of a crime he is not being accused of to show his propensity multiple violent crimes he is being tried for.

3) Relevance: (supra)

The defense will argue the testimony and diary is relevant to prove that Victoria had a pre-disposition to sexual escapades and there was no sexual assault. The plaintiff will argue that this is not relevant and will not lead to any fact more or less probable and the prejudicial effect of allowing this testimony in will unfairly harm the decedent's character which was not made an issue.

Detective Barts Testimony- Victoria's Diary

FRE 412: Past behavior of the victim in a civil or criminal trial involving an alleged sexual misconduct, evidence offered to prove the sexual behavior or sexual disposition of the alleged victim is typically inadmissible. Specifically excluded evidence offered to prove any alleged victim engaged in other sexual behavior and evidence offered to prove an alleged victim's sexual predisposition.

- **Civil exception:** Evidence offered to prove the sexual disposition or behavior of the alleged victim is admissible if it is otherwise admissible under the federal rules and its probative value substantially outweighs the danger of harm to the victim and of unfair prejudice to any party.

Here Donny is trying to implicate 15 year old Victoria as a sexual deviant who is into taboo sexual escapades. Donny is attempting to defend his strangulation and the requirement of wrongful death claims intent to kill requirement with the excuse that he was fulfilling her sexual fantasy. This does not line up with the evidence that Victoria was forcibly raped by Donny and it was not consensual between the two, it does not stand

reason that a rapist would try to engage in an act the victim allegedly enjoyed during sexual intercourse while he is sexually assaulting her and then eventually killing her. This is extremely prejudicial against Victoria and her family. Its prejudicial harm drastically outweighs any probative value it may have into Victoria's consensual sex life with boys of her own age. Victoria is dead and is not able to defend her own character that is being slandered by Donny, and the testimony by Detective Bart should be excluded. Victoria nor her parents, the victim has not placed her reputation or purity at issue and following Federal Rules of Evidence should be excluded.

The Court should NOT allow Donny to bring forth this testimony from Detective Bart, since there is no probative value of material fact to be made from allowing the jury to hear this testimony, but Victoria's reputation which has not been made at issue by the Victim, will be unfairly harmed.

END OF EXAM

QUESTION 1 -ANSWER OUTLINE FOR BURNS – S.Lizardo

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

1. **WILMA'S TESTIMONY- HUSBAND'S STATEMENTS AND SHOWING HER GAS CANS**

PROP 8

Prop 8 applies to criminal cases, in California and provides that all relevant evidence is admissible even if it is objectionable. However, Prop 8 evidence is subject to the being excluded under CEC 352, if the unfair prejudice outweighs the probative value. Furthermore, Prop 8 has several exemptions.

RELEVANCY DISCUSSED IN OTHER SECTIONS

SPOUSAL TESTIMONIAL PRIVILEGE

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

- Here, Wilma is volunteering to testify against her spouse. The testifying spouse may testify against a spouse in **any proceeding**. Wilma is the holder of the privilege. The privilege to claim is only during marriage but can cover confidential communications before marriage.

-Waiver of the privilege by Wilma, the holder spouse

-Exception- crime (arson)

MARITAL COMMUNICATIONS PRIVILEGE

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

-Burns and Wilma are legally married at the time of Burns' statement. However, Wilma has filed for divorce when she testified.

-Effect of pending divorce- the privilege would survive divorce, however, parties still married at time of the testimony.

-Presumption of confidential communication in certain relationships. Wilma's observation of the gasoline cans in the trunk of the red Ferrari would not be protected since it is not a communication but an observation.

- Nosey's testimony (possible eavesdropper) will be discussed below-

2. **NOSEY'S TESTIMONY – the Neighbor (Eavesdropper)**

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

Logical Relevance- Tendency Test

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 Nosey's testimony to establish that the red Ferrari belongs to Burns and that Burns statement to Wilma, "I figured out a way to solve our financial

problems,” may show motive or consciousness of guilt. Since Nosey did not see the gasoline cans in the car trunk, he cannot testify to that.

PERSONAL KNOWLEDGE /WITNESS COMPETENCY

Since Nosey has known Burns and Wilma for eleven years, he is familiar with their voices and what they look like. He can authenticate the voices.

Legal Relevance -Balancing Test

The trial judge has the discretion to exclude evidence if the probative value is substantially outweighed by the danger of unfair prejudice. The jury most likely will not be confused not will the testimony be a waste of time.

Hearsay- Overhearing of Burns’ statement to Wife

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted and is inadmissible unless an exception applies. Here, the original declarant is Burns who told his wife “I figured out a way to solve our financial problems.” The one repeating the statement is Nosey.

Hearsay Exceptions:

Admission by Party Opponent-

-A statement is no inadmissible when offered against the declarant (Burns) in a case where the original declarant is a party.

-Burns is the defendant in a criminal case.

-Party who is offering the testimony of the arsonist is the prosecution.

State of Mind

-Declarant’s (Burns) then existing physical or mental condition or state of mind.

-Discussion of Burns statement to Wilma about financial solution.

Declaration Against Interest

– Burns will be deemed unavailable if he takes the Fifth Amendment. The statement is against his interests since he is talking about solving financial problems.

NOSEY AS EAVESDROPER- PRIVILEGE

(Refer to spousal privilege and martial confidential privilege definitions stated above.)

-Voluntary disclosure to third parties waives the privilege. At common law, an eavesdropper could testify, however, the modern trend is contra.

-Burns and Wilma were in their garage with the door standing wide-open. Nosey who has known the couple for eleven years was not known to be listening.

Trial court may allow Nosey’s testimony since crime/fraud may defeat privilege.

Motive

Prosecution may argue that Burns overheard statement may intend to establish that Burns financial troubles was the purpose behind the arson. As Motive, this is not hearsay, as it is not for the truth of the matter asserted. Under Motive, the court is likely to allow the statement in however, there may be a limiting instruction given.

3. DEXTER’S TESTIMONY, THE DRIVER

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 Dexter's testimony to establish consciousness of guilt and an admission of guilt because Burns said, "I really messed up."

Legal Relevance

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

HEARSAY

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

-What Dexter overheard Burns and Hyde say were an out- of- court statements offered to prove arson elements because fire can be started by gasoline.

SPONTANEOUS STATEMENT EXCEPTION—Dexter repeating the Burns-Hyde conversation

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

- "I really messed up! Some gasoline spilled on my clothes and I am nauseated from inhaling the gas fumes!" may be a spontaneous statement exception since it may be argued that Burns may still be under the stress of crime. However, this exception is not likely to prevail if the event, the arson has had a significant lapse of time.

Exception does not apply.

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

ADMISSION BY PARTY

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

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

-Party who is offering the arsonist's testimony is the prosecution. The parties are on separate sides.

-Since Burns made the statements by calling Hyde, they are Admissions by a Party Opponent and will be admitted into evidence unless privilege applies.

STATE OF MIND

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

-Discussion of statements by Burns to Hyde and Hyde's statement about barbecuing.

CONTEMPORANEOUS STATEMENTS

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

- Dexter is repeating Burns and Hyde's statements concerning the messed -up remark. He is not explaining his own conduct.

- Exception does **not** apply.

PRIVILEGE

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

ATTORNEY – CLIENT PRIVILEGE – DRIVER DEXTER

-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.

-Hyde is Burns' attorney and is having a confidential client communication with Burns. The driver, Dexter, is overhearing the conversation.

Third Party's Presence - Eavesdropper or Reasonably Necessary

-Burns' admission about "I really messed up. Some gasoline spilled on my clothes and I am nauseated", may qualify for the crime or fraud exception. However, the exception is generally limited to future crimes.

-Then, Hyde advised Burns to seek medical help but tell the doctor he was barbecuing. Furthermore, the statements Burns to Hyde may be considered "consciousness of guilt."

-The third-party presence of driver Dexter would defeat the privilege and his overhearing the Hyde-Burns' statements are admissible unless Dexter as Hyde's driver is deemed a reasonably necessary party to the attorney-client privilege.

4. DR. PYRO'S TESTIMONY

RELEVANCY- see rules above.

Dr. Pyro's testimony is logically relevant because the crime is arson and the doctor treated Burns for gasoline fume inhalation. There can be a reasonable inference that the gas fume inhalation occurred during the preparation for the arson.

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

PHYSICIAN – PATIENT PRIVILEGE

A physician-patient relationship is protected from disclosure if the patient's confidential communication was for the purpose of diagnosis or treatment. The holder of the privilege is the patient, Burns, since he was treated for gasoline fume inhalation.

Is the doctor now covered under the umbrella of the attorney-client privilege? If the physician was contacted for the purpose of a pending litigation, there may be an extension of the attorney-client privilege. Although Attorney Hyde told Burns what to say to the doctor (the barbecuing lie) there are no facts supporting that the doctor knew of the ruse or believed the patient was lying on the advice of his attorney.

EXCEPTION: CRIME OR FRAUD

Recognized exception to disclosure if crime or fraud (arson).

HEARSAY- EXCEPTION- STATEMENTS FOR MEDICAL TREATMENT

Hearsay defined above. Statements for medical diagnosis or treatment may be admissible if made for the purpose of medical treatment.

Here, the diagnosis was made based upon a lie, the barbecuing. However, a trial court may exclude based on the gas fume inhalation diagnosis being too prejudicial since the crime is arson.

2021 Spring Semester Evidence Final Exam
Professor Davenport

Darlene is Prosecuted for battery with serious bodily injury in the criminal case of People of the State of X vs. Darlene.

On February 1, 2020, Darlene was working as a waitress at Pizza Palace. She waited on Victor, a patron of the Pizza Palace and the alleged victim in the case. The Prosecution's theory of the case is that Darlene pushed Victor off of his barstool after he complained about her poor service, causing him to fall and suffer serious bodily injury (a concussion), as a result of the fall. The Defense theory of the case is that Victor became intoxicated while waiting for his food. Darlene asked him to leave, Victor became belligerent and fell off his barstool sustaining injuries.

Assume the following occurred in the jury trial of Darlene. Discuss all the evidentiary issues and arguments that would likely arise in each section below, including objections, if any, and the likely trial court ruling on the admissibility of the evidence. **The State of X has adopted the Federal Rules of Evidence.**

1. Victor testifies that he was waiting for his food for over an hour. When he complained, Darlene yelled, "I'll show you good service!" and forcefully pushed him off of his barstool. Victor was taken to the hospital and the treating physician told him he sustained a concussion.

Relevance. Evidence is relevant if it has some tendency to prove or disprove a fact of consequence in the case. Victor's testimony is relevant because it establishes the elements of the crime of which Darlene is charged – that there was an unlawful touching which resulted in serious bodily injury.

Personal Knowledge. Victor can testify to what he personally observed during his testimony.

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

Victor testifying to Darlene's out of court statement.

There is no hearsay issue here because the statement is not being offered for the truth of the matter asserted – that Darlene provided Victor with good service. Even if the evidence was offered for its truth, under the federal rules it would still be considered non-hearsay as a statement of a party opponent.

Victor testifying that the doctor told him he had a concussion.

This is hearsay – it is an out of court statement being offered for the truth of the matter asserted – that Victor had a concussion. There is no hearsay exception that applies.

Lay Witness Opinion Testimony.

Federal Rule 701. Opinion Testimony by Lay Witnesses. If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness's perception;
- (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

David's statement that he received a concussion would also be impermissible lay witness opinion testimony because whether he suffered a concussion is based on specialized knowledge.

2. On cross-examination of Victor, defense counsel asks Victor the following:
 - a. Whether he was convicted of a felony offense for perjury 22 years ago?

Relevance – The defense attorney's questions are relevant to case an adverse reflection on the credibility of Victor as a witness.

Impeachment – Impeachment is the casting of an adverse reflection on the veracity of a witness.

Impeachment with Conviction of a Crime. Under certain circumstances a witness may be impeached by proof of conviction of a crime. Under the Federal Rules, the crime must be a crime involving dishonesty or false statement (misdemeanor or felony) or a felony conviction. If the crime is one of dishonesty or false statement, the court has no discretion to exclude it, even under FRE 403. If the crime is a felony not involving dishonesty, then the court may exercise its discretion to exclude it. Where the witness is someone other than the accused in a criminal case, the court will determine if the probative value is substantially outweighed by its prejudicial effect.

There is one caveat, there is a presumption against admitting convictions occurring more than 10 years after the date of conviction or release on the crime, whichever is later. However, under Rule 609(b) the judge may admit such evidence for impeachment if the proponent of the evidence gave the other party advance notice that he intended to use the conviction and if the judge decides that the probative value of the conviction substantially outweighs its prejudicial effect.

Possibly admissible. The conviction is for a crime that goes to truthfulness 609(a)(2), but the conviction is more than 10 years old.

b. Victor filed a \$5 million lawsuit against Pizza Palace after the incident?

Relevance – The defense attorney’s questions are relevant to case an adverse reflection on the credibility of Victor as a witness.

Impeachment – Impeachment is the casting of an adverse reflection on the veracity of a witness.

Bias or Interest. 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.

3. Next, the prosecution calls Dr. Vallum to the stand. Dr. Vallum will testify that he has been a licensed medical doctor for 20 years. He is Victor’s primary care physician. Dr. Vallum testifies to Victor’s injuries. Dr. Vallum is asked by the prosecution to state an opinion as to the cause of Victor’s injuries. Dr. Vallum states that the injury Victor sustained could only have resulted from being pushed off a barstool. His opinion is based on an experiment that Dr. Vallum conducted with grapefruits where he rolled some grapefruits off a barstool and forcefully pushed other grapefruits off of the same barstool. Dr. Vallum testifies that there was significantly more trauma to the grapefruits he forcefully pushed off the stool than those that rolled off the stool, which is consistent with the injuries Victor sustained. The defense objects.

Relevance. Evidence is relevant if it has some tendency to prove or disprove a fact of consequence in the case. Here the doctor’s testimony goes to the element of whether Victor sustained serious bodily injury and the cause of that injury.

Expert Opinion Testimony

The federal rules allow expert opinion testimony where jurors lack the knowledge or skill to draw the proper inferences from the underlying data. FRE 702 authorizes such testimony.

Rule 702. Testimony by Expert Witnesses

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:

- (a) 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;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Qualifications as an Expert.

The expert appears qualified to testify as a witness. He has been a medical doctor for 20 years.

Statement on Ultimate Issue

An expert is permitted to state an opinion on an ultimate issue in a case with the exception of issues of mental state in criminal cases. Here, if otherwise permissible, the expert could opine as to the existence of serious bodily injury and the cause of that injury.

Reliability of the Expert Opinion:

Even if a person is qualified as an expert, his or her testimony must satisfy another requirement in order to be admissible. The testimony must have a certain degree of reliability. When scientific testimony is offered, the court must first make an assessment of whether the testimony is based on scientifically valid reasoning or methodology, and whether the testimony can be applied properly to the issue at hand. The court provided guidance as to various considerations the trial court may review in determining admissibility, including:

1. Whether a theory or technique can be and has been tested
2. Whether the theory or technique has been subject to both peer review and publication
3. The known or potential error rate of the method
4. The existence and maintenance of standards controlling its operation
5. Whether it has attracted widespread acceptance within the relevant scientific community

The students should state these factors and conclude why this evidence would not pass the Daubert test.

4. After the Prosecution rests, the defense calls Pizza Palace's head security officer, Wendy. Wendy is required to investigate incidents and write reports regarding those incidents by Pizza Palace. Wendy testifies that she reviewed the video surveillance inside of the Pizza Parlor on the night of the incident. She saw Victor fall off his bar stool. She didn't know how to save the surveillance video and by the time she was able to contact the manufacture of the surveillance system, the surveillance video was erased because it records over itself every 24 hours.

Relevance. Evidence is relevant if it proves or disproves a fact of consequence in the case. Wendy's testimony is relevant because it supports the defense theory of the case that Victor fell, thus negating the elements of unlawful touching of which Darlene was charged.

Best evidence rule - 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

The best evidence rule applies where the writing is a legally operative or dispositive instrument or where the knowledge of a witness concerning a fact results from having read or seen it in the document. When the best evidence rule applies, the rule expresses a preference for an original or a duplicate (an exact copy of the original) unless there is a genuine question raised about the original's authenticity. If the proponent cannot produce the original, he may offer secondary evidence of its contents if there is a satisfactory excuse provided justifying the admissibility of secondary evidence. such as loss or destruction.

Admissibility of Secondary Evidence. Here, Wendy's knowledge of the incident comes from watching it on the surveillance video, so the best evidence rule would apply. 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 Wendy's testimony would not violate the best evidence rule as long as the court found that the evidence was destroyed accidentally and not in bad faith.

Lay witness opinion testimony - Opinions by lay witnesses are generally inadmissible. However, there are many cases where, from the nature of the subject matter, no better evidence can be obtained. Lay witness opinion testimony is permissible when:

1. It is 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; and
3. Not based on scientific, technical or other specialized knowledge.

Here, mom's opinion that Dan was not sane at the time of the commission of this offense is based on her personal observation. She states that she observed him speaking to himself as if he was responding to voices that were not present. He told her he was a special agent fighting aliens. It is helpful to a clear understanding of her testimony and a fact in issue. Dan's mother is in a unique position to assess his mental state based on her knowledge of Dan.

1. Next, Dan's attorney calls Dr. X, a licensed psychologist who has practiced in the field for 20 years. Dr. X testifies that Dan was suffering from schizophrenia at the time of the incident. She further testifies that schizophrenia can result in delusional thinking and that Dan experienced delusions about being a secret government agent at the time of the offense. On cross examination by the Prosecution, Dr. X testifies that she has never personally treated Dan. She states that her opinion is based on her review of Dan's medical records, an interview with Dan's mother, and an astrological reading she conducted.

Expert Testimony – Expert testimony is admissible if the subject matter is scientific, technical or other specialized knowledge would help the trier of fact understand the evidence or determine a fact in issue. The evidence must be relevant and the methodology must be reliable.

The opinion must be supported by a proper factual basis. The factual basis must consist of facts that are of a kind that are reasonably relied upon by experts in the field.

The astrological reading is not of a type that would be reasonably relied upon by psychologists and should be excluded as a basis of Dr. X's opinion. If Dr. X could not come to the same conclusion without the astrological reading as a basis for her opinion, her opinion should be stricken.

The interview with Dan's mother and medical records are the types of information that are relied upon by other psychologists. Under the California case, *People v. Sanchez*, if an expert testifies to case-specific out of court statements to explain the basis of his or her opinion, those statements are considered by the jury for their truth, thus rendering them hearsay. Thus, the expert's reliance on those statements must be admitted through an applicable hearsay exception or witness. Dan's mother testified, so any case-specific facts Dr. X testified to based on the interview with Dan's mother would be permissible if those statements were testified to by Dan's mother.

The medical records would need to fall within a hearsay exception or the author of those records would need to be called as a witness for Dr. X to relate case-specific facts contained within the records. If Dr. X states that she generally relied upon the records, but did not relate case-specific information, such reliance would be reasonable.

QUESTION 3 – H.STARR

Proffer 1:

- Donny Should Object to Relevance (logical relevance):
 - o The proffer tends to show that Donny had a motive to befriend and lure Victoria. Students may also point out that propensity is another basis for relevance due to the application of 413
- Donny should object as improper character evidence
 - o Under a simple character analysis, the proffer is a prior act apparently being used to prove an act in conformity therewith
 - o Prior to discussing applicable statutes or exceptions, the objection would be sustained, however...
 - MIAMI COP exceptions
 - Prosecution should argue that the prior assault falls under an exception, such as:
 - o Intent – Likely permissible
 - o Common scheme or plan – Harder argument
 - o Absence of mistake – Likely permissible
 - o Motive – Likely permissible
 - o Identity – Not likely permissible
 - Conclusion: Based on the number of potential applicable exceptions, the evidence would likely come in under a standard exception, however, there are also specific statutory provisions
- Prosecution should respond that evidence is permissible under FRE 413

- Because the instant prosecution is a criminal case involving sexual assault, the prior sexual assault is admissible under 413. Appropriate notice is assumed by the facts, and the indication that the crime is rape/sexual assault is enough to determine that it is applicable.
 - Conclusion: Likely admissible under FRE 413
- Prosecution could also respond that evidence is permissible under FRE 414
 - While the victim in the instant case is a minor, she does not fall under the definition of a “child” within FRE 414. So FRE 414 would not apply to the instant case, despite the fact that the prior case likely does fall under the definition because the prior victim was 13
 - Conclusion: Likely inadmissible under 414
- Donny should object under 403 (legal relevance)
 - The typical argument of unfair prejudice is not really applicable because rule 413 allows consideration of such offenses. Moreover, passions and prejudices won’t carry much weight either, since the underlying accusation is already of the same variety and still worse. However, waste of time and confusion of the issues are still viable arguments.
 - Conclusion: 403 objection will fail

Proffer 2:

- Donny Should Object to Relevance (logical relevance):
 - The proffer tends to show that Donny had a motive to befriend and lure Victoria.
- Donny should object as improper character evidence
 - Under a simple character analysis, the proffer is a prior act apparently being used to prove an act in conformity therewith
 - Prior to discussing applicable exceptions, the objection would be sustained, however...
 - MIAMI COP exceptions
 - Prosecution should argue that the prior assault falls under an exception, such as:
 - Intent – Likely permissible
 - Common scheme or plan – Harder argument
 - Absence of mistake – Harder argument
 - Motive – Likely permissible
 - Identity – Not likely permissible
 - Conclusion: Based on the number of potential applicable exceptions, the evidence would likely come in under a standard exception, however, there are also specific statutory provisions subject to 403
- Prosecution could attempt to respond under 413

- Because child possession of pornography is not a situation involving a prior sexual assault, that statute would not likely apply.
 - Conclusion: Section 413 does not apply
- Prosecution could attempt to respond under 414
 - As noted above, the victim in the instant case is not a child based on the definition supplied by the rule. Nor does the behavior cited fit the statute.
 - Conclusion: Section 414 does not apply
- Donny should object under 403
 - Unlike the prior proffer, where there were specific statutory provisions applicable, this one relied pretty much entirely on MIAMI COP bases and is a different types of behavior. The number of victims in a large number of depictions combined with the lack of any apparent personal involvement ups the prejudicial effect while lowering the probative value. Moreover, the jury would likely be subjected to the depictions, causing consumption of time and confusing the issues.
 - Conclusion: It would vary by judge, so any conclusion stemming from a reasonable analysis will do.

Proffer 3

- Viniks could object to Relevance
 - According to the proffer, the defense is seeking to use the proffer to demonstrate that the killing was accidental. It also suggests the rape was perhaps not forcible, but consensual in manner consistent with the victim's writings.
 - Conclusion: relevant
- Viniks could object to character
 - Under a typical character objection, the People would argue that this suggests that the victim had a propensity to act in a certain way.
 - Conclusion: Under standard analysis, sustained
- Donny should respond;
 - MIAMI COP Exceptions:
 - Intent (or lack thereof)
 - Motive
 - Accident
 - Conclusion: character objection overruled
- Viniks should object under 412
 - Rule 412 prohibits use of sexual predisposition or past sexual behavior in both civil and criminal cases, with exceptions in both. The only exceptions that matter here are those in civil cases.
 - Without discussing exceptions, this objection should be sustained since this is evidence of the victim's prior sexual conduct.
- Donny should respond

- The prior sexual behavior of the victim may be admitted if the probative value substantially outweighs the danger of harm to the victim and of unfair prejudice to any party. Reputation may only be brought up if the victim places it in controversy
 - Students would be within reason to conclude that the defense enunciated use of the evidence is of sufficient probative value since the victim can suffer no actual harm due to her death and because the party is not unfairly prejudiced, since the evidence goes directly to an elements of the claim (intent to kill).
- Viniks should object under Best Evidence Rule
 - Since the defense is seeking to admit secondary evidence of the diary, the best evidence rule, without exceptions, would bar the testimony.
 - Conclusion: Without exceptions, sustained.
- Donny should respond that an exception applies:
 - All originals are destroyed without bad faith by Donny
 - The original cannot be obtained by legal process
 - The party that had control had control of the original and was put on notice
 - Conclusion: Overruled