

Monterey College of Law - Hybrid

EVIDENCE- SEC. 1

Final Examination

Spring 2024

Prof. S. Chronister

General Instructions:

Answer All Three Essay Questions.

Total Time Allotted: Three (3) Hours

Recommended Allocation of Time: Equal Time per Question

QUESTION 1

Damon is being charged with the murder of Vinnie in his home. Vinnie and Damon lived on the same street, and they would often spend time at each other's houses. The prosecution's theory is that Damon shot Vinnie because he was having an affair with Damon's wife, Winnie. The defense's theory is that Damon was startled and the gun misfired during a verbal confrontation between Vinnie and Damon.

Damon went to see Amber, his attorney. Paul, Amber's paralegal, sat in on the meeting and took notes. During the meeting Damon said "I shot Vinnie because he was having an affair with my wife, but it started as just a verbal arguments and I don't think I really meant to shoot him. My gun must have misfired, I don't really know how to use it that well."

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

Answer according to California law.

1. During the prosecution's case-in chief, Paul testified that Damon said: "I shot Vinnie." On cross-examination, Paul could not recall that Damon said Vinnie was having an affair with his wife, or that he said it started as a verbal argument and the gun misfired. The prosecution attempted to refresh Paul's memory with his notes from the client meeting. After reviewing his notes, Paul testified that Damon said he didn't mean to shoot Vinnie, and that his gun misfired. However, Paul was still not able to recall Damon saying Vinnie was having an affair. The prosecution then moved to enter Paul's notes into evidence.
2. Then the prosecution called Winnie, Damon's wife, to testify. She testified that on the day of the murder she was walking on the street in front of Vinnie's house when Damon walked out the front door. Damon walked up and told her "I have always hated Vinnie, so I shot him." Winnie did not think he was serious so she did not go inside Vinnie's house. Winnie then testified that she did not have an affair with Vinnie. At the time of the trial, Winnie and Damon had filed for divorce, but the divorce was not yet finalized.
3. Finally, the prosecution presented Nancy, Damon and Winnie's neighbor. Nancy stated that she is a recreational hunter and once a week she and Damon would go to the gun range and practice shoot. Nancy testified that in her opinion Damon was a good shot, knew how to handle his gun, and would not have misfired.

QUESTION 2

Pam was hit by a car driven by Daniel and broke both of her legs. Pam claims that she was walking in the cross walk while the walk sign was on, when Daniel ran a red light and struck her. Daniel claims that he was driving slowly through a green light when Pam darted into the road in front of Daniel's car. Pam sued Daniel in a negligence action to recover damages from her hospital expenses.

Assume the following occurred in Federal 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.

1. During the prosecution's case in chief, Pam testifies that 20 minutes after the crash a woman named Betty approached her on the street and said, "That car came flying out of nowhere. I was right behind you and jumped out of the way; I thought I was going to be hit and killed!"
2. Pam seeks to admit testimony of a police officer who responded to the accident. If permitted, the police officer will testify that she analyzed the indent on Daniel's car from the impact, in her opinion, the indent indicated that Daniel had been driving above the speed limit. The officer went on to testify that in her opinion Daniel was at fault for the accident.
3. Daniel calls Mary, Daniel's friend, who was in Daniel's vehicle at the time the accident occurred. Mary testified that Pam "jumped in front of Daniel's car and Daniel swerved but could not have avoided hitting her." On cross-examination, Pam says to Mary: "Isn't it true that you have been convicted of perjury in a case about insurance fraud?" Mary denies being convicted. Pam then seeks to introduce evidence of Mary's prior certified perjury conviction.
4. To show that Pam walked in front of Daniel's car while the crosswalk light was not on, Daniel seeks to introduce testimony that Pam has been hit by cars while crossing the street on two prior occasions during the last year.

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QUESTION 3

Paul was a passenger on a train owned by Desert Railways (DR), and was injured when the train crashed because of a track malfunction. Paul sued DR in federal court for negligent maintenance of the railway track.

At trial, Plaintiff's counsel called Wesley, a delivery driver, who testified that he was in the depot when the train was being inspected for maintenance. Wesley testified that he heard an employee of DR, Ethan, say, "The train looks fine but I am worried about the railway track, there was a derailment last week."

The Plaintiff's counsel then called an employee of DR who testified that after the accident, DR installed a new track on the line where Paul's train crashed. The employee testified that this installation was routine and not in reaction to the accident.

DR then called Charles, the train inspector and custodian of records, who testified regarding the train's maintenance record that detailed the pre-trip inspection. Charles testified that all of DR's maintenance records are stored in his office. After asking Charles about the function of the maintenance records, DR offered into evidence the following excerpt: "Pre-trip completed; train passes inspection and is ready for use." Charles is not responsible for the track maintenance, which is handled by a different inspector. Both inspections happen simultaneously, but are written up in separate reports. When asked on cross-examination regarding the track maintenance report, Charles testified that he did not review that report before finalizing his inspection.

Assuming all appropriate objections and motions were timely made, did the court properly:

1. Admit Wesley's testimony Ethan's statements? Discuss.
2. Admit the testimony of the DR employee? Discuss.
3. Admit the excerpt from the maintenance record? Discuss.

Answer according to the Federal Rules of Evidence.

ANSWER OUTLINE
EVIDENCE- HYBRID SECTION 1
SPRING 2024
FINAL EXAMINATION
PROF. S. CHRONISTER

QUESTION 1 ANSWER OUTLINE

1. Paul's testimony

Relevance – CEC 210 Evidence having any tendency to make the existence of any *disputed* fact of consequence to the determination of the action more or less probably than it would be without the evidence.

Balancing / Legal relevance – CEC 352 Court must balance the probative value of the evidence against the danger of unfair prejudice, confusion of the issues, misleading the jury, or undue consumption of time. If prejudice is substantially greater than the probative value of the evidence the court will exclude the evidence.

Witness comp / personal knowledge - A person is deemed competent unless facts say otherwise. (FRE) A witness is competent if they are capable of expressing themselves and able to communicate with the jury, and if they are capable of understanding their duty to tell the truth (CEC). A witness must have personal knowledge of the facts they are testifying to, meaning they experienced it with one of their five senses.

Prop 8: In CA, Prop 8 applies to criminal cases. Prop 8 says that all relevant evidence is admissible even if objectionable. However, evidence under Prop 8 is still subject to being excluded under CEC 352's balancing test, if the unfair prejudice outweighs the probative value. Prop 8 has many exemptions, including hearsay, character evidence, and privilege.

Hearsay - Hearsay is an out of court statement offered for the truth of the matter asserted. Hearsay evidence is inadmissible unless it falls under a hearsay exception.

Refreshed Recollection - If a witness uses a writing to refresh his memory while testifying, the writing must be produced at the hearing if requested by the adverse party. If the writing is produced the adverse party can inspect it and cross-examine the witness about it, and introduce any relevant portion of it into evidence. The writing does not need to be produced if the witness can show they no longer possess or control it, and it was not reasonably procurable.

Past recollection recorded – 1) The witness at one time had personal knowledge of the facts in the writing, 2) the writing was made by the witness or under his direction, 3) the writing was made while the matter was fresh in the mind of the witness, 4) the writing is accurate, and 5) the witness has insufficient recollection to testify fully and accurately. Even if these factors are met, the document itself can only be admissible into evidence if offered by the adverse party. If not offered by the adverse party it can only be read into evidence.

Opposing Party Admission (“I shot Damon”) - A statement by one party, offered against them at trial by the opposing party.

Attorney Client Privilege - If there is an attorney client relationship, the client has a right to stop confidential communications from being disclosed, either to a third party or at trial. The client holds the privilege, and can waive that privilege. A common waiver is by disclosing the communication to a third party. Here, a paralegal is typically considered an authorized third party. D could object to Paul's testimony.

Work Product (the notes): Materials gathered and conversations conducted in anticipation of litigation by anyone on the party's litigation team (including the party personally) are not discoverable or able to be presented as evidence at trial. However, if the need by the opposing party is great they can still request the documents. Here, likely the need for the notes does not outweigh the attorney's right to keep work product privileged.

2. Winnie's testimony

Relevance – CEC 210 Evidence having any tendency to make the existence of any *disputed* fact of consequence to the determination of the action more or less probably than it would be without the evidence.

Balancing / Legal relevance – CEC 352 Court must balance the probative value of the evidence against the danger of unfair prejudice, confusion of the issues, misleading the jury, or undue consumption of time. If prejudice is substantially greater than the probative value of the evidence the court will exclude the evidence.

Witness comp / personal knowledge - A person is deemed competent unless facts say otherwise. (FRE) A witness is competent if they are capable of expressing themselves and able to communicate with the jury, and if they are capable of understanding their duty to tell the truth (CEC). A witness must have personal knowledge of the facts they are testifying to, meaning they experienced it with one of their five senses.

Hearsay - Hearsay is an out of court statement offered for the truth of the matter asserted. Hearsay evidence is inadmissible unless it falls under a hearsay exception.

Opposing Party Admissions: - A statement by one party, offered against them at trial by the opposing party.

Spontaneous Statement (Excited Utterance)– CEC 1240 Evidence of a statement is not inadmissible by hearsay if the statement 1) purports to narrate, describe, or explain an act, condition, or event perceived by the declarant, and 2) was made spontaneously while the declarant was under the stress of excitement caused by such perception.

Present Sense Impression – CEC 1241 Evidence of a statement is not made inadmissible by hearsay if the statement 1) is offered to explain, qualify, or make understandable conduct of the declarant, and 2) was made while the declarant was engaged in such conduct. *Note, CEC exception is narrower than the FRE, only applies to statements made while engaging in the conduct.

State of mind – Declarant's then existing physical or mental condition is admissible to show that condition.

Spousal testimony privilege - In general, a married person has the privilege not to testify against their spouse in any proceeding. This privilege is held by the witness spouse. There are exceptions to this privilege, like if a spouse chooses to testify against their partner, if the lawsuit is between the spouses (ex: custody suits). Here, the parties are still technically married so the privilege may apply (could argue otherwise). However, wife is the witness spouse and she is choosing to testify, so D cannot stop her.

Martial Communications privilege: - A spouse has a privilege during and after a marriage, to refuse to disclose and to prevent others from disclosing a confidential communication made during the marriage. Like the spousal testimony privilege there are exceptions like waiver by the privilege holder (either spouse), and the crime fraud exception where communications made in furtherance of enabling or aiding anyone commit a crime or fraud are not privileged. Here, the parties are still technically married so the privilege may apply (could argue otherwise). Both spouses hold the privilege. However, D spoke to W on the street, arguably not

in confidence if anyone could have overheard. Might depend on if there were others on the street, if it is typically crowded, how loud D was speaking etc.

3. Neighbor Nancy's testimony

Relevance – CEC 210 Evidence having any tendency to make the existence of any *disputed* fact of consequence to the determination of the action more or less probably than it would be without the evidence.

Balancing / Legal relevance – CEC 352 Court must balance the probative value of the evidence against the danger of unfair prejudice, confusion of the issues, misleading the jury, or undue consumption of time. If prejudice is substantially greater than the probative value of the evidence the court will exclude the evidence.

Witness comp / personal knowledge - A person is deemed competent unless facts say otherwise. (FRE) A witness is competent if they are capable of expressing themselves and able to communicate with the jury, and if they are capable of understanding their duty to tell the truth (CEC). A witness must have personal knowledge of the facts they are testifying to, meaning they experienced it with one of their five senses.

Lay opinion testimony - A witness may testify to their lay opinion if it is 1) rationally based on their perception, and 2) helpful to understanding the witness's testimony. Here, N could give her opinion on D's ability to use a gun based on her common knowledge opinion. However, N starts to testify about her opinion based on being a hunter, which is arguably specialized knowledge, and she would need to be qualified as an expert witness.

Expert opinion testimony - 1) Must be qualified by skill, knowledge, or experience, and 2) must assist the trier of fact (the jury). Expert witnesses do not need to have personal knowledge of the facts to which they are testifying. The expert's knowledge / skill can come from education or experience. Here...

QUESTION 2 ANSWER OUTLINE

1. Pam's testimony

Relevance – Evidence having any tendency to make the existence of a fact of consequence to the determination of the action more or less probably than it would be without the evidence.

Balancing / Legal relevance – Court must balance the probative value of the evidence against the danger of unfair prejudice, confusion of the issues, misleading the jury, or undue consumption of time. If prejudice is substantially greater than the probative value of the evidence the court will exclude the evidence.

Witness comp / personal knowledge - A person is deemed competent unless facts say otherwise. A witness must have personal knowledge of the facts they are testifying to, meaning they experienced it with one of their five senses.

Hearsay - An out of court statement offered for the truth of the matter asserted. Hearsay evidence is inadmissible unless it falls under a hearsay exception.

Present Sense Impression - A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

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

Dying Declaration – In a criminal homicide or civil case, a statement can be admissible as a hearsay exception if the declarant made the statement while believing their death to be imminent, and the statement is made about its cause or circumstances. The witness must be unavailable at trial. Here, no facts to show that the woman was unavailable at trial. Additionally the statement was made 20 minutes after the accident. Exception likely does not apply.

2. Police Officer's testimony

Relevance – Evidence having any tendency to make the existence of a fact of consequence to the determination of the action more or less probably than it would be without the evidence.

Balancing / Legal relevance – Court must balance the probative value of the evidence against the danger of unfair prejudice, confusion of the issues, misleading the jury, or undue consumption of time. If prejudice is substantially greater than the probative value of the evidence the court will exclude the evidence.

Witness comp / personal knowledge - A person is deemed competent unless facts say otherwise. A witness must have personal knowledge of the facts they are testifying to, meaning they experienced it with one of their five senses. Here, if qualified as an expert witness, the police officer does not need personal knowledge of the facts to which she is testifying. However, the officer did respond to the accident so she does have personal knowledge.

Expert opinion testimony - 1) Must be qualified by skill, knowledge, or experience, and 2) must assist the trier of fact (the jury). Expert witnesses do not need to have personal knowledge of the facts to which they are testifying. The expert's knowledge / skill can come from education or experience. Here...

Ultimate issue opinion testimony – It is not automatically objectionable for an expert to testify to the ultimate issue. However, in a criminal case an expert cannot testify to their opinion on whether or not the D had the mental state or condition that constitutes an element of the crime charged or of the defense. Here, this is a civil case, so the ultimate issue opinion would not be automatically objectionable, though the defense will argue it is highly prejudicial.

3. Mary's Certified Perjury Conviction

Relevance – Evidence having any tendency to make the existence of a fact of consequence to the determination of the action more or less probably than it would be without the evidence.

Balancing / Legal relevance – Court must balance the probative value of the evidence against the danger of unfair prejudice, confusion of the issues, misleading the jury, or undue consumption of time. If prejudice is substantially greater than the probative value of the evidence the court will exclude the evidence.

Authentication: Demonstrative or tangible evidence must be authenticated before it can be introduced at trial. Certified convictions are self-authenticating.

Impeachment with Prior Conviction - A witness's credibility for truthfulness can be attacked with evidence of a criminal conviction. If the crime is a felony, the evidence must be admitted subject to a balancing test, if the witness is not the defendant. If the witness is a criminal defendant then the evidence is subject to a stricter balancing test. Evidence of any crime, regardless of punishment, must be admitted if an element of the crime involves dishonesty. Here, perjury is a crime that involves dishonesty and can be admissible for the purpose of impeachment. There is not a limit on extrinsic evidence for impeachment by prior convictions, so the conviction can be introduced even though M denied it.

4. Evidence of Prior Car Accidents

Relevance – Evidence having any tendency to make the existence of a fact of consequence to the determination of the action more or less probably than it would be without the evidence.

Balancing / Legal relevance – Court must balance the probative value of the evidence against the danger of unfair prejudice, confusion of the issues, misleading the jury, or undue consumption of time. If prejudice is substantially greater than the probative value of the evidence the court will exclude the evidence.

Witness comp / personal knowledge - A person is deemed competent unless facts say otherwise. A witness must have personal knowledge of the facts they are testifying to, meaning they experienced it with one of their five senses.

Character Evidence – Evidence is inadmissible if offered to show someone acted in conformity with a character trait on a particular occasion. Character evidence can be in the form of opinion, reputation, or specific instances. There are exceptions to the character evidence ban, like if the character trait is at issue at trial, or in criminal cases a defendant can “open the door,” or puts his character at issue first or offers evidence of the V's character for violence. Here, this is a civil case, and so there are less exceptions. The evidence would likely not be admissible to prove conduct in conformity.

Habit / Prior Bad Act - Evidence of a habit or custom is admissible to prove conduct in conformity with the habit or custom on a specific occasion. Here, the defense will argue that P shows a habit of being hit with cars under similar circumstances. The plaintiff will argue that two other accidents is not frequent enough to show habit. Because of the unique circumstances, and unlikely events, the judge would likely find the

evidence could show habit, of possibly be admissible to show P intentionally caused the accident (evidence of lack of mistake, common plan).

QUESTION 3 ANSWER OUTLINE

1. Wayne's testimony about Ethan

Relevance – Evidence having any tendency to make the existence of a fact of consequence to the determination of the action more or less probably than it would be without the evidence.

Balancing / Legal relevance – Court must balance the probative value of the evidence against the danger of unfair prejudice, confusion of the issues, misleading the jury, or undue consumption of time. If prejudice is substantially greater than the probative value of the evidence the court will exclude the evidence.

Witness comp / personal knowledge - A person is deemed competent unless facts say otherwise. A witness must have personal knowledge of the facts they are testifying to, meaning they experienced it with one of their five senses.

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

Opposing Party Admissions: - A statement by one party, offered against them at trial by the opposing party.

Present Sense Impression - A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

Effect on the Listener - Out of court statement can be offered to show the effect on the listener – their emotions, how they were feeling in the moment, their plans / thoughts.

2. DR employee testimony

Relevance – Evidence having any tendency to make the existence of a fact of consequence to the determination of the action more or less probably than it would be without the evidence.

Balancing / Legal relevance – Court must balance the probative value of the evidence against the danger of unfair prejudice, confusion of the issues, misleading the jury, or undue consumption of time. If prejudice is substantially greater than the probative value of the evidence the court will exclude the evidence.

Witness comp / personal knowledge - A person is deemed competent unless facts say otherwise. A witness must have personal knowledge of the facts they are testifying to, meaning they experienced it with one of their five senses.

Subsequent Remedial Measures - Excludes evidence of remedial measures when offered to prove negligence or culpable conduct. This rule only applies to actions taken after an accident, evidence of measures taken before an accident are admissible. Subsequent remedial measures can be admissible to prove something other than negligence or culpability, like knowledge or ownership. Here, cannot be admissible to prove negligence, but *could* be admissible to show knowledge of an issue.

3. Maintenance record

Relevance – Evidence having any tendency to make the existence of a fact of consequence to the determination of the action more or less probably than it would be without the evidence. Here, it is arguably not relevant to introduce the report for the train, when the issue is the track maintenance and DR is not trying to introduce the track inspection report.

Balancing / Legal relevance – Court must balance the probative value of the evidence against the danger of unfair prejudice, confusion of the issues, misleading the jury, or undue consumption of time. If prejudice is substantially greater than the probative value of the evidence the court will exclude the evidence. Here, there is a strong argument that the prejudice (only showing the inspection report that is favorable to DR) outweighs the probative value because the issue here seems to be the track, not the train.

Authentication: Demonstrative or tangible evidence must be authenticated before it can be introduced at trial. Certified convictions are self-authenticating.

Best Evidence Rule - Best evidence rule applies when inferior evidence is offered instead of the original writing, recording, or photograph. An original writing, recording, or photograph is not required if: The originals are lost or destroyed, or not obtainable, and the writing, recording, or photograph is relating to a collateral issue.

Double Hearsay: An out of court statement offered for the truth of the matter asserted. When a hearsay statement contains another hearsay statement within it (like a hospital record and the statements written in the hospital record), both layers of hearsay must fall within an exception to be admissible.

Outer layer:

Business Record Exception - 1) recording of an act or event, 2) made by a person with personal knowledge, 3) made at or near the time of the event or act, 4) by a person under a duty to keep the records in the ordinary course of business.

Inner Layer:

Opposing Party Admissions: - A statement by one party, offered against them at trial by the opposing party.

1)

1. Paul's Testimony

◦ Relevance ✓

- In order for evidence to be admitted into a trial it must be both logically and legally relevant.

◦ Logical Relevance

- A piece of evidence is logically relevant when it has the tendency to prove or disprove a disputed fact of consequence.
- Here, the prosecution is trying to bring in Paul's testimony to prove that Damon admitted to shooting Vinnie. This fact would help the trier in fact come to a conclusion about what happened.
- Thus, Paul's testimony is legally relevant and a judge would allow him to testify if all the other factors are met. A fact can be logically relevant to a case but it will not be admitted if it is not also legally relevant.

◦ Legal Relevance

- A piece of evidence is legally relevant if its probative value substantially outweighs the danger of unfair prejudice. A piece of evidence can be too prejudicial if it tends to confuse the jury, confuse the issues, cause undue delay, or if it is too cumulative.
- Here, the prosecution will argue that Paul's testimony has a lot of probative value because it would prove their case if the jury would believe Paul's testimony. However, the defense would argue that Paul's testimony is highly prejudicial and would be impossible to overcome for Damon.

good

- Thus, a court would likely find that the probative value outweighs the danger of unfair prejudice and allow the testimony.
- Personal Knowledge/Competency
 - In order to testify in a trial a witness must be competent. A witness is competent if they can understand the oath and the need to tell the truth, communicate clearly, and they have no mental or physical defect. A witness must also have personal knowledge as to the facts they are testifying to (i.e. have experienced something with one of their five senses).
 - Here, there were no facts presented regarding Paul's competence so it is fair to infer that he is competent to testify. Paul meets the personal knowledge requirement to provide his testimony because he was present during Amber's interview with Damon, meaning he heard Damon admit to killing Vinnie.
 - Therefore, Paul is competent and has personal knowledge and would be allowed to testify if he meets all other requirements.
- Hearsay
 - Hearsay is an out of court statement being offered to prove the truth of the matter asserted.
 - Here, the prosecution wants Paul to testify that he heard Damon say, "I shot Vinnie because he was having an affair with my wife..." This statement was made out of court. The prosecution is trying to prove Damon shot Vinnie purposefully meaning they are trying to use Damon's statement to prove the truth of the matter asserted, that he intentionally killed Vinnie.
 - Therefore, this statement is hearsay and it is inadmissible unless it can come in through an exception.

Good analysis!

◦

- **Opposing Party Statement**

- A common hearsay exception is opposing party statement. This exception states that if the opposing party made a statement outside of the court and it is being proffered by the other side, the statement is admissible.
- Here, Damon made the statement and it is being proffered by the prosecution.
- Thus, the hearsay exception is met and the statement would be allowed in by a court if it passes all of the other tests.

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- **A/C Privilege**

- **Attorney-Client Privilege** is a principle that states that any ^{confidential} communication between an attorney and their client regarding legal advice or representation is privileged, confidential, and can not be used against the client in a court of law. Unless, the communication was pertaining to future crimes or fraud or if the client is suing the attorney. The privilege extends to people who work for the attorney but not to random people.
- Here, Amber is Damon's attorney. Paul is Amber's paralegal. When Damon went to see Amber, Amber had Paul sit in the meeting and take notes. The prosecution would likely argue that the conversation is not privileged and confidential because someone other than Damon and Amber overheard the communication. The defense would likely argue that Paul was working for Amber at the time and he was subject to confidentiality. The defense would also argue that Damon was seeking legal advice for an incident that happened in the past not

→
Structurally,
move on to Privilege
issue after analyzing
all hearsay exceptions
(Refreshed rec +
past rec. recorded)

anything in the future that could be prevented by breaking privilege/confidentiality.

- Thus, a court would likely not allow Paul's testimony as Damon's statements were protected by the attorney/client privilege.

- *could also discuss issue of work product, since P. wants to introduce the notes
- Refreshed Recollection/Past Recollection Recorded

→
these are two
separate exceptions.

You can refresh a
witness's recollection
with something they
didn't write themselves.

- If a witness can not testify to a fact because their memory is failing them, a party can refresh the witness's recollection with anything that would help the witness regain their memory (i.e. a writing). A writing that was made by the witness, close in time to the occurrence, that was factually accurate, can be used to refresh the witness's recollection on the stand. However, it can only be read into the record. The opposing party, not the party offering the writing, can admit the writing into evidence if they wish.

→ factors for
past
recollection
recorded

- Here, if a judge would consider allowing Paul's testimony even though it was privileged and confidential, the prosecution properly refreshed Paul's recollection and he could testify as to the contents of the writing. Paul was a qualified witness because he could authenticate the writing. He knows he wrote his notes, close in time to hearing the confession, and the notes were accurate. However, the prosecution would not have been allowed to enter Paul's notes into evidence.

2. Winnie's Testimony

- Logical Relevance

- See rule above.
- Here, Winnie's testimony is logically relevant to the case because it can prove or disprove the disputed fact about whether or not Damon shot Vinnie by accident or on purpose.

-
- Thus, Winnie's statements are logically relevant and a judge would allow them in if all other tests are met.
 -
 - Legal Relevance
 - See rule above.
 - Here, the prosecution would say that Winnie's testimony holds a lot of probative value because it proves an element in their case (like motive or intent). The defense would say that this statement is highly prejudicial and in some way protected.
 - A judge would likely allow Winnie to testify.
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 - Prop 8
 - Prop 8 is known as the Victim's Bill of Rights in California and applies to criminal cases. It states that all relevant evidence shall be admitted subject to balancing tests.
 - Here, a judge would likely consider that Winnie's testimony is prejudicial to Damon's case but the probative value outweighs the danger of unfair prejudice.
 - Thus, the statements would be allowed in.
 -
 - Personal Knowledge/Competency
 - See rule above.
 - Here, there are no facts stating that Winnie is not competent and it is fair to assume that she is competent. Winnie has personal knowledge of what the prosecution is asking her to testify to because Damon told her that he shot Vinnie.
 - Thus, a court would likely find that Winnie has personal knowledge and is competent to testify.
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- - Hearsay
 - See rule above.
 - Here, the statement that the prosecution is attempting to offer to the jury was made by Damon to Winnie, "I have always hated Vinnie, so I shot him." This statement was made out of court and it is being used to prove the truth of the matter asserted which is that Damon shot Vinnie because he hated him.
 - Therefore, this statement is hearsay and inadmissible unless it falls under an exception.
- - Opposing Party Statement
 - See rule above.
 - Here, the statement that the prosecution wants to come in was made by Damon to Winnie. Damon is the opposing party/defendant and he allegedly made the statement.
 - Thus, this exception is met and a court would allow this statement in.
- Confidential Marital Communication
 - The law states that communication between spouses is protected and confidential. This confidentiality survives the marriage and can be invoked by either party.
 - Here, the prosecution would likely argue that this communication was not confidential and can be admitted because Damon, "walked out the front door...and told her, '...I shot him.'" Damon did not tell Winnie this information in the privacy of their own home. The defense would argue that there are no facts stating that

good analysis

Other exceptions: Spontaneous statements
Contemporaneous statements
State of mind

anyone else heard this statement and it should be kept confidential and between the spouses.

- Therefore, a court would likely find the prosecution's argument was stronger and allow this communication to be presented to the jury.

◦

- Adverse Spousal Testimony

- In CA, a spouse can not be compelled to offer adverse testimony regarding their spouse in a criminal case. The witness spouse can invoke the privilege while they are married to the accused spouse for communications before and during the marriage.
- Here, it appears that Winnie is willingly waiving the privilege and testifying against Damon by her own freewill.
- Thus, a court will not allow Damon or his defense team to bar Winnie from testifying.

◦

3. Nancy's Testimony

- Logical Relevance

- See rule above.
- Here, nancy's testimony is being offered to show Damon went to the gun range and could not have misfired the good.
- Thus, a judge would find that it meets the low bar of being logically relevant to the case.

- Legal Relevance

- See rule above.
- Here, Nancy's testimony is legally relevant because it could prove that Damon's actions were not an accident. The defense might say that Nancy's testimony would confuse the jury.

- Thus, a judge would find that this is prejudicial and likely would not allow it in.. if that were true the analysis would end here because irrelevant evidence is inadmissible. likely would be relevant, but maybe inadmissible for issues you identify below.
 - **Personal Knowledge/Competency**
 - See rule above.
 - Here, there are no facts to show that Nancy is not competent. She has personal knowledge because she knew Damon well and they went out to shoot together.
 - Thus, a court would find she is competent and has personal knowledge about what the prosecution wants her to testify to and she would be allowed to testify if she passed all other tests.
 - **Lay Opinion**
 - Rule: 1) Rationally based on perception 2) Assist the jury
 - Lay opinion can be based on an average person's perception.
 - Here, Nancy would likely be able to testify that she and Damon went out shooting once a week with Damon but anything else would not be considered lay opinion. → could expand on this analysis - is it based on her perception?
 - Thus, a judge would say that Nancy could only testify to things she knows as a lay person. would it assist the jury?
 - **Expert Opinion**
 - Expert testimony is based on knowledge, training, and education. It can be offered in a case if it would help the trier of fact and can be based on personal knowledge or training and experience.
 - Here, There are no facts to state that Nancy is a qualified expert. The defense would argue that Nancy is not qualified to opine about whether Damon is a good shot and about whether he misfired the gun. Prosecution would argue that Nancy is qualified due to her experience.
-

- **A court could likely not allow Nancy to testify as an expert witness.** - She may be qualified to testify as an expert, but the issue here is as you noted, the facts do not say she was qualified before testifying.

2)

1 Pam's Testimony

Relevance

✓
In order for evidence to be admitted into evidence it must be both logically and legally relevant. Evidence is logically relevant if it has any tendency to either prove or disprove a fact. Evidence is considered legally relevant if its probative value outweighs its ability to unduly prejudice, or confuse the jury, or cause an undue delay or add excessive evidence.

✓
Here the claim is D ran a red light and struck P. The primary issue is if D ran a red light in the process of striking P. Here P offers hearsay evidence from Betty stating the car came flying out of nowhere, I thought I was going to be hit and killed. The evidence is relevant because it provides further evidence which can have a tendency to prove D's car was the automobile involved in P being struck, no evidence is presented proving the evidence is overly prejudiced.

good analysis

Competency

✓
All witnesses are considered competent unless a statute or law deems otherwise. All witnesses must have the ability to understand the questions and attest to the ability to testify truthfully through an oath or affirmation.

✓
Here Pam had first hand knowledge of the accident as she was a conscious victim, no evidence has been presented proving her an incompetent witness.

Hearsay

✓
Hearsay is an out of court statement used to prove the fact of the matter asserted. Hearsay is generally not admissible unless an exemption or exception applies.

✓
Here P attempts to utilize a statement made by Betty at the scene of the accident, which is clearly out of court. Here P is offering the statement to prove that D sped through a red light striking P. This statement is hearsay.

Hearsay Exception

✓
Excited utterance is a statement made by a party while they are still under the stress of the situation. Here, 20 minutes^{✓ good} have passed, however there is no hard and fast rule for the amount of time that is equal to a cooling off period to an excited utterance. Here Pam expressed the testimony and there is an exclamation^{good} mark at the end which generally signifies excitement or emotion. That being said, 20 minutes regarding an serious emotional event that potentially could have lead to a near death experience will impact people in very different manners depending on their ability to modulate the stressors of the world around them. In this situation regarding not only a serious accident to the P, but also a near death experience by the Betty, it is reasonable to believe she may have still been under the stress of the situation. Here it is likely this hearsay exception would apply.

great analysis

Present Sense Impression

✓
A present sense impression is when a statement is made describing events that have recently unfolded. Here Betty describes her perspective about the incident to P, 20 minutes after the incident occurred. It is likely a court would allow this evidence in on this hearsay exception.

Personal Knowledge Objection

good issue spotting!
Here Betty's statement is being offered to prove D ran the red light. However, Betty's statement clearly states the car came flying out of nowhere which indicates it is unlikely she saw if the street light was red or green.

2 Police Officer Testimony

Relevancy the police officer's testimony is both logically and legally relevant, defenied supra, as the question of speeding has a tendancy to prove D may have ran a red light at high speed, no evidence proves the evidence is unfair.

Expand on analysis. is it prejudicial, if no, why not?

Competence

Defined supra, no evidence suggests police offcicer is not a competent witness, thus she is a competnent witness. **missing personal knowledge*

must be qualified by skill, knowledge or experience

Expert Testimony is (1) [✓]helpful to the jury (2) is based on sufficient facts and (3) is reliable utilizing the Daubert method and lastly (4) has a [✓]reliable applicability. Here P seeks to utilize the Police officer has an expert witness. Here P would like to utilize the indent from impat on D's car to prove he was speeding. This evidence is clearly would have a tendancy to help the jury decide if D was speeding by way of analysis of the impact indentation, this would be a complicated and technical issue. The jury would benefit from an explanation from an expert witness. If the science regarding impat indentation is sound and the data has been properly collected then the police officer's testimony would be based on sufficient facts provided from the impact. [✓]The Daubert method relies on (1) testability meaning is there a process or procedure that was utilized and that can be repeated to make an assertion. (2) the evidence is peer reviewed, no evidence in the facts support the police officer's analysis of the impact indication utilized a scientifc method which was peer reviwed. (3) There is a evidence of an low error rate from regarding testibility and standard deviation acuracy of data, again no evidence is prsented in the facts to prove error rate. (4) There is a professional standard, here the facts support the police officer arrived on the scene an "analyzed" the accident, no evidence suggest the police officer is unprofessional in her duty, therefore it may be inferred she performed her analysis of the accident with a standard of professional analysis within her scope of practice as a law officer. Lastly (5) the metodology is widly accepted in the community, an arguement can be made the police officers nation wide are generally one of the first on scene to most automobil accidents and over time, they have developed a standard for

investigation and analysis. Here Daubert standard is a guide, and discretion on the expertise of a witness depends on the court. As a duly sworn officer of the law acting in her capacity it is more than likely the court would accept this witness's testimony as expert.

Experts Witnesses Opinion Testimony

Expert Witnesses may offer opinion testimony and may speak to issues without divulging the underlying facts. Here the defense examines the officer on the process and workings of the facts that lead to her opinion testimony that D was driving above the speed limit. An expert may also testify to the ultimate issue, which is the issues being adjudicated by the jury, however an expert witness may not testify that D was at fault, as that is the issue for the jury to decide and that testimony would be overly prejudicial.

3.

Relevance

Defined Supra, ✓ Mary testimony directly contradicts the party at fault, which has tendency to prove D's claim, which is relevant, no evidence is presented to prove this evidence is prejudicial.

need to expand on the balancing test analysis

Competence

Here no evidence is presented to disprove Mary competence, she also has first hand knowledge of the events.

Mary Testified that P "jumped in front of D's car and D swerved but could not avoid hitting P. On cross examination Pam asks "isn't it true that you that you have been convicted of perjury in a case about insurance fraud." Here D is likely to object based on a leading question. However the objection will be overruled because an attorney is allowed to ask leading question on cross examination. D might also object to utilization of

character evidence. That objection will also likely be overruled because in a civil case character evidence dealing with prior bad acts, in particular dishonest prior acts in order to impeach a witness's credibility are allowed as long as the court does not deem the evidence to be overly prejudicial. Here Mary denies the conviction. P must accept Mary's answer and move on, she will not be allowed to enter the evidence of Mary's prior perjury conviction, however the question of authentication would arise from a document such as this, a publicly stamped or judicial procedural document would self authenticate or authenticate by virtue of being held in possession by the public entity. P should have filed to enter this evidence in a motion limine before trial if at all.

← impeachment with a prior conviction is the issue to analyze here. need a rule statement, analysis & conclusion.

X - impeachment w/ prior conviction (being in error)

→ another issue that needs IRAC structure.

4 Pam prior incidents

Relevance defined supra, here D seeks to enter prior acts to prove the propensity of another act which meets the minimal threshold of relevance as it potentially could have tendency to prove a fact, no evidence shows the evidence is presented to show the evidence is unfair. Expand on analysis

Competence

✓ Here it says D seeks to introduce testimony that P was hit by cars on two prior occasions during the last years, the facts are silent on where the testimony come from however competency is low bar, evidence is not offered to disprove competency so the assumption is the evidence will come from competent witnesses

* missing personal knowledge

Character evidence v Habbitt

✓ Generally character evidence to show a propensity for doing another act is inadmissible, however character evidence may be utilized to show something other than propensity such as motive, intent, plan, etc. Here D is clearly seeking to introduce the evidence for

propensity purposes which would not be allowed, however if this were a [✓]habit, something that person does so often you can reliably depend on the person performing the habit, then it would be admissible. Two incidents can not be assumed to be habit forming. Therefore unless D is seeking to introduce P's previous incidents for something other than propensity, it will not be allowed into evidence as it would be overly prejudicial.

↳ what else could it be admitted for?

Analysis should include this argument. Ex: could show P intentionally caused the accident (evidence of lack of mistake or common plan).

3)

1. Wesley's Testimony

◦ Logical Relevance

- A piece of evidence is logically relevant when it has the tendency to prove or disprove a disputed fact of consequence.
- Here, Wesley's testimony can prove or disprove several key points of the Plaintiff's claim including knowledge.
- Thus, a court would likely find that this testimony is logically relevant to the case.

◦ Legal Relevance

- A piece of evidence is legally relevant if its probative value substantially outweighs the danger of unfair prejudice. A piece of evidence can be too prejudicial if it tends to confuse the jury, confuse the issues, cause undue delay, or if it is too cumulative.
- The information Wesley would testify too is highly probative and would not confuse the issues or the jury. why?
- Therefore, a court would find this information legally relevant.
-

◦ Personal Knowledge/Competency

- In order to testify in a trial a witness must be competent. A witness is competent if they can understand the oath and the need to tell the truth, communicate clearly, and they have no mental or physical defect. A witness must also have personal knowledge as to the facts they are testifying to (i.e. have experienced something with one of their five senses).

- Here, there are no facts regarding Wesley's competence and we can assume that Wesley is competent. Wesley has personal knowledge of what he will testify to because he was in depot when he heard the statements regarding the train and the track.
- Therefore, a court would find that Wesley has sufficient personal knowledge and is competent to testify.

◦ Hearsay

- Hearsay is an out of court statement being offered to prove the truth of the matter asserted.
- Here, the Plaintiff wants Wesley to testify that Ethan said, "The train looks fine but I am worried about the railway track, there was a derailment last week." This was an out of court statement and it is being offered to prove that there were concerns about the railway track and there was a derailment.
- Therefore, this is a hearsay statement and a court would find that is inadmissible unless it falls under a hearsay exception or exemption.

good

◦ Present Sense Impression Hearsay Exception

- Present sense impression is a hearsay exception that allows the admissibility of statements made by a declarant during an occurrence. *or shortly after*
- Here, the Plaintiff would argue that Wesley heard Ethan make those statements while he was observing the train. However, the Defense would argue that Ethan's statements were not made as he was examining the track.
- A court would likely not find this hearsay exception applies.

explaining or describing the event

◦

- if it doesn't meet the exception, try to find exception that does apply

◦ Similar Happenings

Not a hearsay exception

* could also be opposing party admission

• Non-hearsay: Effect on the Listener

- The law allows for similar happenings to be admitted to prove knowledge. Even if the statements are hearsay, this is an exemption.
- Here, the statement that Wesley would testify that Ethan made is that, "...there was a derailment last week." This would be used to prove an essential element to the case that DR had knowledge of the potential derailment and did not correct the problem.
- A court would allow this statement in to prove DR was aware of the issue.

○

2. Testimony of DR Employee

○ Logical Relevance

- ✓ See rule above.
- ✓ DR's repairs to the track are logically relevant to this case because it would help prove or disprove a fact of consequence. *-what fact? Expand on analysis*
- ✓ Thus, this testimony is logically relevant.
-

○ Legal Relevance

- ✓ See rule above.
- ✓ Here, Plaintiff's Counsel is trying to use this information to show that DR was liable because they made the repairs. Although this is probative, the defense would argue that this fact is highly prejudicial and could confuse the jury.

- A court would likely know allow this piece of evidence in because it is too prejudicial. → if this is the conclusion the evidence does not come in + there would be no more issues to analyze.
- Best to conclude it would come in but might need a

○ Person Knowledge/Competence

- See rule above

limiting instruction due to prejudicial nature

- There are no facts relating to personal knowledge about the DR employee.
- *conclusion?*
- Public Policy Exclusions
 - It is good public policy to have manufacturers and business owners repair things to avoid future accidents. Subsequent remedial measures, liability insurance, etc. can not be used against a defendant in court to prove liability.
- Subsequent Remedial Measures
 - Subsequent remedial measures can not be proffered to prove liability. ✓
 - Here, Plaintiff's counsel is trying to introduce information about the actions DR took after the accident. DR replaced the track where the accident occurred and Plaintiff's counsel wants to introduce this to show liability. The defense would argue this was a subsequent remedial measure and should not be allowed in.
 - It is highly likely that a court would side with the defense and not ^Xallow testimony regarding subsequent remedial measures. If the court for some reason chooses to admit the testimony then they might issue a limiting instruction to the jury and explain that the jury can not use these facts alone to find DR liable. → correct. CAN be admissible to show something else (like knowledge of an issue) which is very relevant here.

3. Excerpt from Charles' Maintenance Record

- Logical Relevance
 - ✓ See rule above.
 - ✓ Here, Charles maintenance record would tend to prove that the train was in good working condition,.
-

- A court would likely find that these facts are logically relevant to the case.

-

- Legal Relevance

- See rule above.
- Here, Charles maintenance record could be used to prove that DR is not liable because they took good care of their trains. There is ~~no~~ danger of unfair prejudice. The Plaintiff would argue that these facts could confuse the jury. ^{always some?}
- A court would likely find that these facts are legally relevant to the case.

- Authentication

- In order for a tangible piece of evidence to be admitted, it must be authenticated. Evidence can be authenticated through witness testimony (not a requirement in federal court) or if it is a document it can be certified and be self authenticating.
- Here, it appears Charles is the Custodian of Records and he is able to authenticate the maintenance record.
- Thus, a court would find that the record has been authenticated.

- Business Records Exception (outer layer)

- Business records can be allowed in if the proffering party can prove that the records were made by someone who had knowledge of the information, that the record was kept in the normal course of business, the custodian of records testifies, and the record is trustworthy.
- Here, the maintenance record was kept in the normal course of business and all the facts indicate it was trustworthy. Charles is the custodian of records, he made the record close in time to his inspection.
- Therefore, the court would allow this business record to be admitted.

* Inner layer: opposing party admission