Kern County College of Law

Evidence Examination

Spring 2024

Profs. N. Roth & E. Schlaerth

Instructions:
Answer Three (3) Essay Questions
Time Allotted: Three (3) Hours.

KCL
Evidence II
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Question 1

In April of 1985, Leslie Johnson (a 15-year-old girl) never came home from school, and her parents reported her missing. After two months of exhaustive searching by the authorities, her body was tragically located in a wooded area approximately five miles south of her house. She had been strangled to death and the perpetrator had attempted to bury her body. The police took various swabs of her body and seized fingernail clippings to preserve evidence, but they were unable to identify the murderer.

In 2015, however, there was a breakthrough in the case. Utilizing a never-before-used type of DNA testing and analysis, forensic scientists with the local lab determined that the male DNA present on the swab of Leslie's strangulation marks corresponded with a suspect that was five foot eight with brown eyes, black hair, and a uniquely shaped birthmark on the suspect's left thigh. One of Leslie's neighbors (Frank McDaniels) perfectly matched the description, and he was arrested and brought to trial.

At trial (in 2024), the prosecution seeks to call Dr. Green, who invented the method for determining unique traits from a DNA sample that led to Mr. McDaniels' arrest. There are no articles or publications in existence that criticize or cast doubt on Dr. Green's method. Dr. Green himself is an extremely experienced and educated forensic scientist and researcher, but at the time of trial, his method had not been published and only one other scientist (who had worked with Dr. Green) could testify to the method's legitimacy.

In addition to the above, the prosecution seeks to have the court take judicial notice of the fact that the forest where Leslie was found is five miles away from Mr. McDaniels' old address, that it is easily accessible by road to the public, and that the soil of the forest is very dense and difficult to dig into.

Assume the case is prosecuted in a court under the jurisdiction of the state of California.

1. Can the prosecution properly have Dr. Green testify about his novel method for determining unique traits from a DNA sample? Why or why not?
2. Can Dr. Green properly testify to the that he reviewed the police reports in this case? Why or why not?
3. Can Dr. Green testify to the contents of an article he reviewed in the journal "Forensic Science Monthly" that discusses the possibility of predicting birthmarks on individuals through DNA analysis? Why or why not?

4. Can Dr. Green testify to the contents of a transcript that he reviewed from Mr. McDaniels' father's interview with police, in which he confirmed that both he and his son (the defendant) have birthmarks on their left thighs? Why or why not?
5. Can the court grant the prosecution's motion to take judicial notice of the matters requested? Why or why not?

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Question 2

Colin is being prosecuted for possessing a stolen vehicle. Colin was arrested after two police officers did a records check on a car that Colin was driving, and the records check revealed that the vehicle had been reported stolen. When the officers pulled Colin over and arrested him, Colin claimed that he did not know the car was stolen. He told the police that he bought the car off of Craigslist from an unknown person, but that he and the seller memorialized the deal by writing and signing a "bill of sale" document. Colin stated that he had the document with him and that it was in the car, but police arrested him before Colin could grab it. The police eventually conducted an incredibly thorough search of the vehicle and did not find any such document.

At trial, Colin seeks to testify in his defense, and claims that he entered a contract and signed a bill of sale to purchase the car. The prosecution objects, on grounds of hearsay and best evidence rule.

The prosecution also seeks to call Bill Bradley as a witness. Mr. Bradley is an individual who was in court for his own case, on the same day that Colin's case was on calendar before trial. He overheard Colin and his attorney speaking in the hallway outside of the courtroom, when Colin said, "just get me the best deal you can, I never really bought the car off Craigslist."

Assume the trial occurs in a court within the federal jurisdiction of the United States of America.

1. Should the court sustain or overrule the prosecution's hearsay and best evidence rule objections to Colin's testimony about signing a bill of sale? Why or why not?
2. Should the court allow the prosecution to call Bill Bradley as a witness? Why or why not? Would your answer change if the court had already allowed Collin to testify that he had purchase the car off of Craigslist?
3. During his testimony, Collin also volunteers that he had never used Craigslist before buying the car in this case, but the prosecution subpoenaed Craigslist and obtained Collin's account history, which showed that he had made numerous other purchases off of Craigslist in the five years before his arrest in this case. The prosecution seeks to introduce the records into evidence. If you were the defense attorney, what objections should you make? What result? Assume that the court already found the records properly authenticated, because they included a properly-signed custodian of records affidavit.
4. During Collin's testimony and on cross-examination, the prosecution seeks to ask Collin about his 2015 felony conviction for grand theft. What objections, if any, should you make if you are the defense attorney? What responses should the prosecution give? What result?

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caused the plug to fail. He will also testify that the defect could not have been observed during an inspection. Mr. Daniele has been in the field of aviation for over 20 years and regularly consults with the Federal Aviation Administration in airplane crash investigations.

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Question 1 Answer Key

1. Dr. Green's testimony about a novel scientific method will require a hearing to determine if his method and testimony are sufficiently scientifically reliable to be admissible. California is a *Kelly-Frye* jurisdiction, and so the court will have to determine if, under *Kelly-Frye*, the novel method has obtained sufficient general acceptance in the pertinent scientific field. Here, even though there is no evidence that the method is unreliable, it also does not seem to have gained general acceptance in the forensic DNA community either. Thus, there is a reasonable likelihood that the testimony will be excluded.
2. Dr. Green can testify that he reviewed police reports. California follows *Sanchez*, which states that while experts cannot relate hearsay statements to the jury, they can still testify that they relied on hearsay reports in general terms.
3. Dr. Green can likely testify to this. Under *Sanchez*, this type of information would be general background information, and experts can testify to the contents of hearsay statements if they are not case-specific. Here, the contents of that article would not be case-specific.
4. No, this would be hearsay and it does not appear that any exception applies. Under *Sanchez*, the expert could not testify to this unless the statement had already been admitted or the information had been testified to by Mr. McDaniels' father.
5. In California, courts shall take judicial notice of universally known facts that cannot be reasonably disputed, and they may take judicial notice of locally known and easily verifiable facts. The distance of the forest compared to Mr. McDaniels' old address is something that the court can probably take judicial notice of, but the other two items are probably not sufficiently obvious (even in the local community) for the court to take judicial notice. This is especially true since there has been a massive passage of time between the incident (1985) and the date of the trial (2024).

Question 2 Answer Key

1. The testimony probably does not run afoul of the hearsay rule, since Collin is not relaying an out-of-court statement – he is simply testifying that he signed a bill of sale to purchase the car, and he has personal knowledge of that fact. But the best evidence rule would probably be at play, since the document is effectively a contract and thus a legally dispositive instrument. Other evidence of the writing (i.e. Collin's testimony) would be admissible under FRE 1004 if all the originals are lost or destroyed, and not by the proponent acting in bad faith. Here, the court would have to determine if the original was either lost by Collin (not in bad faith) or lost/destroyed by the police, and if the court so finds, then Collin could testify to the contents of the writing.
2. This statement may very well be protected by attorney-client privilege since it concerns the subject matter of the case, and if so, it would inadmissible. It depends if Mr. Bradley was an "eavesdropper," or if, on the other hand, Collin and his attorney were talking so loudly that they lost any reasonable expectation that their conversation would remain private. It would not matter if the statement was impeaching; if the privilege applies, it is absolute.
3. You could make a hearsay objection, and the prosecution would have to lay the foundation that the records qualified as "business records" for the hearsay exception applied. The defense should also object that this evidence constitutes extrinsic evidence for impeachment on a collateral matter. The fact that Collin did use Craigslist in the past doesn't really seem to have much to do with the facts of the instant case.
4. Since Collin testified, his credibility is at issue. The federal rules allow a criminal defendant to be impeached by a felony conviction if the probative value of the evidence outweighs the prejudicial effect, under FRE 609. Here, there is prejudice to Collin if the jury ends up using the evidence improperly to infer that Collin has a general criminal disposition. Given the similarity between the evidence to the current charge and the age of the conviction, there is a decent chance that the conviction (and any questioning about it) will be excluded and inadmissible.

Question 3 Answer Key

Evidence 1: Witness Charlie (25 points)

- Relevance that there was something observed to be wrong with the door before takeoff that should have been noticed by the airline staff if it was noticed by a 7 year old.
- Competency:
    - Observe/Personal Knowledge
        - A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge about the matter.
        - Witness's own testimony is sufficient to prove personal knowledge (FRE 602)
        - Testimony should not be excluded for lack of personal knowledge unless no reasonable juror could believe that the witness had the ability and opportunity to perceive the event that he testified about (US v. Franklin)
        - Personal knowledge may include reasonable inferences but those inferences must be grounded in observation or other first-hand personal experience. (Payne v. Pauley)
        - Absolute certainty is not required (Kemp v. Balboa)
    - Recollect
    - Communicate
    - Appreciation of obligation to speak truthfully
        - Does Damon understand the difference between a truth and a lie? Can he communicate that as well?
        - The witness must have sufficient intelligence and character to know and desire to tell the truth.
        - The witness must declare he will testify truthfully (FRE 603)
- Admissible because Damon has a special knowledge and although his communication skills are limited, he can still make himself understood with simple phrases.

Evidence 2: Witness Dr. Wickham (25 points)

- Relevance: to Impeach Damon's testimony that when he said "weird", it meant something was wrong
- Impeachment: Prior Inconsistent Statement
    - Statement is offered to show that the witness has, on another occasion, made statements that are inconsistent with some material part of his testimony.
    - Initial statement could be made out of court to anyone, including a doctor
    - If the statement was not made under oath at a prior hearing or in a deposition, the statement is hearsay.
    - A prior inconsistent statement that is hearsay is only admissible as impeachment and not for its truth.
- Doctor Patient Privilege
    - There is no doctor patient privilege in FRE.

- Admissible only as impeachment because it's a prior inconsistent statement made to his doctor and there is no doctor patient privilege.

Evidence 3: Maintenance Records (25 points)

- Relevance: to show that the door had not been inspected and Eclipse failed their duty to maintain the airplane properly
- Hearsay – records are out of court statements
- Business Records Exception – A report is created within the regular course of business, recorded contemporaneously or near after the action of the business and indications of reliability. Also, records can show a lack of something as well as the existence of something.

Evidence 4: Witness Mechanic Michael Daniele (25 Points)

- Subject matter must be appropriate for expert testimony, expert must be qualified, testimony is supported by proper factual basis, and opinion may embrace the ultimate factual issue
- Subject matter is beyond the common knowledge and experience and it is offered to assist the trier of fact in understanding the evidence
- Case specific information can be related but not for the truth of the matter asserted as the basis for the expert's opinion

1)

1. The *Kelly-Frye* test is used to determine the admissibility of novel scientific techniques in California.

Scientific evidence is admissible if it is relevant, and can assist the trier of fact in determining a fact in issue. Evidence derived from scientific experimentation and analysis is subject to additional scrutiny. In California, the *Kelly-Frye* test is used to determine whether evidence derived from a novel scientific technique is admissible. The *Kelly-Frye* standard is a bright-line rule: if the novel scientific technique has not been generally accepted in the scientific community prior to its being offered, the evidence is not admissible.

Other jurisdictions, including the federal system, use the *Daubert* test. Under *Daubert*, novel scientific evidence is admissible if it is helpful to the trier of fact to determine a fact in issue, if the methods used to obtain the scientific evidence are a product of the scientific method (the formulation of and testing of a hypothesis to come to a conclusion), whether the technique is scientifically reliable, if the evidence was obtained through proper application of the scientific technique, and if the technique is rooted in proper scientific basis.

The evidence produced by Dr. Green would be helpful to the trier of fact in determining the identity of the killer.

Irrelevant evidence is not admissible, and scientific evidence is no exception. Identity is always at issue in a criminal prosecution. To prove their case beyond a reasonable doubt, the prosecution must prove the identity of the defendant. If the scientific evidence proffered by the prosecution would be helpful to the jury in determining this fact, then the evidence is relevant and passes the first hurdle of admissibility. The evidence proffered by the prosecution is relevant to prove the identity of the killer, since the evidence would provide a physical description of the defendant. Therefore, the evidence is relevant.

To admit the scientific evidence offered here, the court must evaluate it for general acceptance in the scientific community.

Under *Kelly-Frye*, scientific evidence will not be admitted unless the technique has *already* gained general acceptance within the scientific community. The result is that other scientists, and not the court, assume the gate-keeping function of the judge. Under *Kelly-Frye*, each method for producing

scientific evidence is tested by a court only once - the first time it is introduced and withstands the proper scrutiny on appeal. Each subsequent time the scientific evidence is then put before the court, the court would simply rely on previous decisions to admit or deny the evidence without conducting any inquiry into the methodology of the experiment - because it is no longer novel.

Under *Daubert* this analysis is done ad-hoc each time the evidence is presented. Under *Daubert*, novel scientific evidence is not admissible unless the methodology used to produce the evidence is scientifically reliable. To determine whether the evidence is reliable, the court will look to several factors: whether the test has general acceptance in the scientific community, whether the test is capable of being repeated, whether an error rate is known or can be known, whether the process has been reviewed by peers, and whether the expert conducting the test is disinterested in the litigation. Failure to satisfy one or more of these factors is not dispositive of the issue. The court assumes a gate-keeping role to determine, essentially, whether the technique is "good science" or "bad science." If the court finds that the technique is "good science" after weighing all of the facts listed above, the court will find that the experiment is scientifically reliable and admit the results, even if the test has not gained general acceptance within the scientific community.

Dr. Green's method does not have general acceptance in the scientific community.

Here, the court will need to analyze the evidence under each of the factors above. Because there are no articles or publications in existence that criticize or cast doubt on Dr. Green's method (or, for that matter, any in existence that affirm the legitimacy of his results) then the court will not find that the technique has general scientific acceptance. There is no evidence before the court to satisfy the standard under *Kelly-Frye.* As such, under the California rule, the evidence will be excluded.

Under a *Daubert* analysis, this will weigh against its admission, but as noted above, under *Daubert* this is not a bright line rule. The evidence can still be admitted if the court is satisfied that the evidence is scientifically reliable.

Dr. Green's technique is capable of being repeated and tested for accuracy.

The kind of test Dr. Green has run is easily repeated: scientists can take random samples of known contributors, run Dr. Green's analysis, and compare the results of Dr. Green's analysis with the actual physical traits of the contributors. This manner of repeatability and testability would provide clear evidence about whether Dr. Green's method is reliable. It is suspicious that Dr. Green's analysis has not been repeated in other cases or other experiments, but again, this is not dispositive

of the issue. The fact that it could easily be tested if anyone cared to do so weighs heavily in favor of its admissibility under *Daubert.*

Repeat testing could determine an error rate for Dr. Green's test.

The testing discussed above could be repeated a sufficient number of times to develop a statistitcally significant error rate. After the error rate of the test is determined, the evidentiary value of Dr. Green's method would be enhanced. If it had a low error rate, then Dr. Green's analysis could be highly reliable. The opposite is also true - a high error rate would demonstrate some fault in Dr. Green's methodology. As it stands now, though, there is no known error rate for Dr. Green's analysis, and because the error rate is not known, this weighs against its admissibility under both tests.

Dr. Green's method has not been reviewed by peers, which casts doubt on its reliability.

The lack of studies, articles, and publications that relate to Dr. Green's research suggests strongly that it has not been peer reviewed at all. Peer review is a critical step in determining whether scientific evidence is reliable. Peer review would insight and critiques of the methodology used by Dr. Green. If Dr. Green and one other scientist (who works for Dr. Green) are the only two people in the scientific community who have ever performed this type of experiment, then any critical flaws in his methodology or technique would remain hidden. The fact that Dr. Green's research has not been peer reviewed weighs heavily against its admissibility under both tests.

Dr. Green is interested in the outcome of this case.

Finally, Dr. Green is an interested party: the test being used in this case is his own invention. He is not a disinterested third party - if his research is accepted by the court, Dr. Green could reap a substantial financial benefit or boost to his professional credibility. This shows a clear potential bias in his testimony, since he is interested in the outcome of the case. This fact also weighs heavily against its admissibility under both tess.

Because Dr. Green's methods cannot be found to be scientifically reliable, the results of his DNA analysis should be excluded.

Because the analysis is not generally accepted in the scientific community, Dr. Green's novel analytical method would not be admissible in a California court. Even under the more permissive *Daubert* standard, after weighing each of the factors above, the court would still find find that Dr.

Green's novel method for determining unique traits from a DNA sample is unreliable and will be excluded.

2. The police reports in this case are hearsay, and the contents cannot be disclosed to the jury absent a hearsay exception.

Hearsay is an out of court statement offered to prove the truth of the matter asserted. The police reports in this case undoubtedly contain numerous hearsay statements, probably from multiple declarants. There are no specific statements being offered by Dr. Green, so there are no statements to evaluate for any exceptions to the hearsay rule. Dr. Green would be precluded from testifying to specific things he read in the police report unless they were hearsay that fell within a proper exception.

Dr. Green may state the basis for his opinion and the matters upon which he relied.

An expert witness may properly rely on hearsay to offer an opinion in a case, even if the hearsay is not specifically admissible under a hearsay exception. But the expert may only rely on the type of hearsay typically relied on by an expert in that field in forming their opinion.

A DNA analyst may properly rely on a police report as part of the basis of their opinion. The police report undoubtedly contains information about the specific conditions under which the DNA samples were obtained, the identity of the persons who collected them, their manner of storage, and the identities of other individuals in the chain of custody of the samples or analysis. This type of information would reasonably be relied on by an expert in DNA analysis and this information could properly form part of the basis of Dr. Green's opinion.

He should be cautioned, though, not to relate any of the statements contained in the police report, because those statements may be inadmissible hearsay. It is better practice for the prosecution not to have the expert rely on the police report and instead observe the testimony of the relevant witnesses in court, or if he is unable to do so, relay the facts that were properly developed during the trial to the expert in the form of a hypothetical question.

For each of these reasons, Dr. Green will be allowed to testify that he reviewed the police report in forming his opinion - so long as he actually did so, and so long as the police report forms part of the basis for his opinion.

3. Contents of scientific articles are admissible hearsay when offered by an expert.

Scientific articles and journals may be testified to by experts in that field, so long as their contents are relevant. The statements in a scientific journal or article are hearsay - described above - but the statements therein can be properly brought before the jury under a hearsay exception. It is extremely common to do so: experts are routinely cross-examined based on the contents of scientific journals which may contradict their testimony. Further, an expert may testify to the contents of a scientific article to lay a proper foundation for their opinion or methods. But the scientific article must be relevant to the issues about which the expert testified. A journal about horticulture would not be proper material on which to examine Dr. Green, but an article about birthmarks and DNA analysis is certainly fair game. Dr. Green will therefore be allowed to testify to the contents of the article proffered.

4. An expert may not relate case-specific hearsay to a jury under People vs. Sanchez.

Experts may, under certain circumstances, relate non-case-specific hearsay to a jury if that hearsay evidence was part of the basis for their opinion. Non-case-specific hearsay would be hearsay evidence - like the results of scientific studies, theories, or general statistical trends in a community - but would be admissible under a hearsay exception for expert witness testimony. However, an expert may not relate case-specific hearsay to a jury, if that hearsay evidence does not fall within a proper exception to the hearsay rule, or if the evidence has not been brought before the jury by other witnesses.

Here, the prosecution wants Dr. Green to testify to the contents of a transcript that he reviewed. The declarant was Mr. McDaniels's father - not Mr. McDaniels. There is no hearsay exception which would allow his statement to the police to be admitted. He was not making an excited utterance: he was being interviewed by the police about birthmarks. He is not a party opponent, he was not dying, and there were no inconsistent statements made on the stand by Mr. Mcdaniels that would make the contents of his interview with the police admissible.

Dr. Green cannot testify to the contents of the conversation between Mr. McDaniels's father and the police. He can use the contents of that conversation to form his opinion, but cannot testify to those facts in front of the jury absent other proof during the trial. If Mr. McDaniels's father was called as a witness in the case, and testified that both he and Mr. McDaniels both had birthmarks, then Dr. Green could explain to the jury that the *in court* (non-hearsay) statement was the basis for his opinion, and could describe the statement fully because it was already in evidence.

5. The court may take judicial notice of matters that are within the common knowledge of the jurisdiction, and matters that are not reasonably in dispute.

A court may take "judicial notice" of certain facts - and no further proof is necessary of such judicially-noticed facts at trial. The jury will be instructed that they can (but are not obligated to) consider those facts as proven without additional proof, documents, or testimony about them. The court *must* take judicial notice of certain facts: the contents of laws, treaties, statutes, regulations, and decisions of court. The court *may* take judicial notice of other facts, if they are within the general knowledge of the jurisdiction or if they are facts not reasonably subject to dispute and can be quickly and easily verified.

The request for judicial notice is not sufficiently specific, and places facts in reasonable dispute.

The prosecution has asked the court to take judicial notice of the fact that the forest where Leslie Johnson was found is five miles from Mr. McDaniel's old address. This is a fact that is subject to reasonable dispute and the court should deny the request. The request for judicial notice does not have sufficient specificity - the request does not state a particular location within the forest (whether it be the parking lot, the forest boundary, the center of the forest) and does not state how the five miles were measured. The forest could be five miles away in a straight line - or a five mile drive away. The judicially noticed fact is not specific enough and the court should decline to take judicial notice of that fact.

The prosecution also asks the court to take judicial notice of the fact that the forest is "easily accessible by road to the public." This is a slightly more specific fact, but there is a subjective tone to it that is not properly judicially noticeable. Whether a location is "easily accessed" is subject to dispute - if the road requires 4 wheel drive when it is cold or snowing, there is a strong argument to be made that it is not "easily accessible." The court should therefore decline to take judicial notice of this fact as well.

Finally, the prosecution asked the court to take judicial notice of the fact that the soil of the forest is "very dense" and "difficult to dig into." Again, there is a subjective quality to this request that is not properly judicially noticeable. Someone with access to a backhoe or a trencher would have a very easy time trying to dig into soil, whereas someone who was using a hand spade would have a difficult time.

A more proper request for judicial notice would read "The People ask the Court to take judicial notice of the following facts: The distance to drive from Mr. McDaniels's old address to the boundary of the forest on Main St. is five miles, The front gate of the forest is located on Main St., a public road, and the soil in the forest cannot be penetrated by a shovel using ordinary effort."

As phrased, the entire request for judicial notice should be denied.

2)

Question 1:

Hearsay:

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

Colin is being prosecuted for possessing a stolen vehicle. He was arrested after two police officers did a records check on a car that Colin was driving and the records check revealed that the vehicle had been reported stolen. When the officers pulled Colin over, Colin claimed that he did not know the car was stolen and that he had bought the car of Craiglist and memorialized the deal by writing and signing a bill of sale. At trial, Colin seeks to testify in his defense. Prosecution objects. Prosecution's hearsay objection should be overruled because he has the right to testify at trial if he so desires. It is not hearsay if he is testifying to his own facts and experiences.

Thus, the prosecution's hearsay objection should be overruled.

Best Evidence Rule:

The best evidence rule has a preference for original documents.

Colin is being prosecuted for possessing a stolen vehicle. He was arrested after two police officers did a records check on a car that Colin was driving and the records check revealed that the vehicle had been reported stolen. When the officers pulled Colin over, Colin claimed that he did not know the car was stolen and that he had bought the car of Craiglist and memorialized the deal by writing and signing a bill of sale. At trial, Colin seeks to testify in his defense. Prosecution objects. Prosecution's objection should be sustained because the police searched the car and the contract was not where Colin claimed it was. Colin should be able to introduce the original bill of sale into evidence as proof that the car was not stolen.

Thus, prosecution's best evience rule objection should be sustained.

Question 2:

Lay Witness:

Lay witnesses are people who testify based on their personal knowledge or life experiences.

Prosecution seeks to call Bill Bradley as a witness. Mr. Bradley is an individual who was in the court for his own case, on the same day that Colin's case was on the calendar before trial. Bill Bradley overheard Colin and his attorney speaking in the hallway outside of the courtroom, when Colin said, "just get me the best deal you can, I never really bought the car off Craiglist." Lay witnesses are allowed to testify about their personal knowledge and Mr. Bradley had personal knowledge about Colin's purchase of the car.

Thus, the court should allow prosecution to call Bill Bradley as a witness.

Attorney-Client Privilege:

Attorney-client privilege protects confidential communicatios of attorneys and their clients. The communication is no longer confidential if a third person hears the conversation between the attorney and the client.

Colin and his attorney were speaking in the hallway outside of the courtroom, when Colin said, "just get me the best deal you can, I never really bought the car off Craiglist." Bill Bradley overheard them speaking about Colin's case and the privileged communication is not longer confidential.

Thus, the attorney-client privilege does not apply to the communication between Colin and his attorney.

Hearsay:

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

Mr. Bradley is an individual who was in the court for his own case, on the same day that Colin's case was on the calendar before trial. Bill Bradley overheard Colin and his attorney speaking in the hallway outside of the courtroom, when Colin said, "just get me the best deal you can, I never really bought the car off Craiglist." This statement is hearsay because it offered for the truth of the matter asserted which is that: Colin did not purchase the car, it was stolen.

Thus, Bill Bradley would be allowed to testify but not to hearsay statements.

If the court had already allowed Collin to testify that he had purchased the car of Craiglist, Bill Bradley would be allowed to testify for the impeachment of Colins statements.

Confrontation Clause:

The confrontation clause applies to criminal cases only. The accused has the right to be confronted with the witnesses against him.

Collin has the right to be faced with the witness who is against him. The court must give him the right to cross-examine the witness against him.

Thus, the court should allow Bill Bradley to testify against him.

Question 3:

401 Relevance:

Relevant evidence is evidence that can make a fact more or less probable than it would be without the evidence and the fact is of consequence to the issues presented.

Collin volunteers that he had never used Craiglist before buying the car in this case, but the prosecution subpoenaed Craiglist and obtained Collin's account history, which showed that he had made numerous other purchases off of Craiglist in the five years before his arrest in this case. The prosecution seeks to introduce the records into evidence. The numerous other purchases the

prosecution wants to bring in are not relevant in this case to prove that the car Collin was driving is stolen.

Thus, the evidence of other purchases is not relevant.

403 Balancing Test:

Evidence is relevant if is has a tendancy to prove or disprove a material fact when its probative value substantially outweighs its prejudicial effect.

Collin volunteers that he had never used Craiglist before buying the car in this case, but the prosecution subpoenaed Craiglist and obtained Collin's account history, which showed that he had made numerous other purchases off of Craiglist in the five years before his arrest in this case. The prosecution seeks to introduce the records into evidence. The records to not prove or disprove the alleged fact that Collins stole the car.

Thus, the records are not relevant.

Impeachment by a Collateral Matter:

Impeachment by a collateral matter is when a person can be impeached when it give irrelevant fact to the case at issue.

Collin volunteers that he had never used Craiglist before buying the car in this case, but the prosecution subpoenaed Craiglist and obtained Collin's account history, which showed that he had made numerous other purchases off of Craiglist in the five years before his arrest in this case. The prosecution seeks to introduce the records into evidence. Defense attorney can impeach the records on a collateral matter because the other purchases are irrelevant when the issue in this case is to prove that the car Collins was driving was stolen property.

Thus, the records are irrelevant and can be impeached.

Question 4:

Impeachment by a Collateral Matter:

Impeachment by a collateral matter is when a person can be impeached when it give irrelevant fact to the case at issue.

The prosecution seeks to ask Collin about his 2015 felony conviction for grand theft. The defense can impeach the 2015 felony conviction for grand theft because it is irrelevant in this case where Collin is being prosecuted for possession of stolen goods.

Thus, the 2015 felony conviction can be impeached.

Impeachment by Prior Conviction:

Impeachment by prior conviction allows two types of crimes to come in under the federal rules: crimes involving dishonesty and false statement and felony convictions not involving dishonesty. For crimes involving dishonesty, the court applies the 403 balancing test and favors exclusion if its probative value substantially outweighs its prejudicial effect. For felony convictions not involving dishonesty, the court has discretion to exclude the evidence. If the accused is the witness and testifies at his own trial, the discretionary standard favors exclusion. If the witness is other than the accused, the balancing test (403) favors admission of the evidence.

During Collin's testimony and on cross-examination, the prosecution seeks to ask Collin about his 2015 felony conviction for grand theft. The defense can show that Collin testified at his own trial and the court has discrestion to exclude this evidence. The discresionary standard favors exclusion if the accused is the witness and testifies at his trial.

Thus, the 2015 felony conviction can be impeached.

3)

1. A witness is competent if they are capable of understanding the witness's oath, and are capable of perception, recollection, and communication.

A witness may testify if they are able to perceive the matters about which they will testify, recall those matters about which they will testify, communicate their testimony, and understand the importance of telling the truth in their testimony. There is no rule that disqualifies a child witness based on age, or any witness based on disability, so long as they meet each of the requirements of competence above.

Here, Damon is an autistic 7 year old with issues communicating. The defendant may object based on his age and his inability to communicate in a "normal" fashion. The objections should be overruled. There is nothing in the facts to suggest that Damon is unable to perceive the things about which his testimony is offered. Nothing is mentioned about Damon's sight or hearing being abnormal. There are no facts to suggest that Damon cannot recall the details - and in fact, the facts state that he is "intelligent" and "mature" for his age. These suggest that Damon will have no difficulty whatsoever recalling what he saw and heard on the date in question. Finally, there are no facts to suggest that Damon would be dishonest or lie. He is a 7 year old child, described as mature and intelligent. It is reasonable to believe that Damon understands the difference between a truth and a lie, and can testify truthfully. The court should, of course, specifically inquire with the witness because of his age.

The only forseeable issue is that Damon has difficiulty communicating. He uses simple, short sentences and phrases. But nothing about this particular pattern of communication is disqualifying - he is not testifying through any unusual means (like a psychic medium or a lip reader) and his testimony - although it will probably be slow - should be able to be understood by the jury. So long as Damon can understand the questions asked and the trier of fact can understand the answers given, the difficulties in communication will not rise to the level of making Damon incompetent to testify. The court may assist the parties by allowing the use of leading questions upon direct examination to speed things up, but this would not be required.

The objections to Damon's testimony based on competence will therefore be overruled and Damon can testify.

2. The therapist/patient and physician/patient privilege applies in federal proceedings.

The facts do not state what kind of doctor Dr. Wickham is, nor why he is treating Damon, apart from the fact that Damon is autistic. Therefore, there may be two privileges at issue here: therapist/patient and doctor/patient privilege. Because this is a civil suit in federal court, the federal court will adopt whatever evidentiary privileges exist in the state whose laws apply to the dispute. Both types of privilege exist in California and Texas, so they will be addressed simultaneously and no distinction will be drawn between them.

The therapist/patient and phyisician/patient privileges make privileged any statements made by the patient to their doctor during the course of or in relation to their treatment, so long as the statements are made in a private setting. Here, Damon told Dr. Wickham that "weird" means "good" at an appointment. The statement was therefore clearly made during the treatment of Damon, and the privilege applies.

The privilege is held by Damon. The doctor cannot waive the privilege on Damon's behalf nor volunteer any information from their sessions without Damon's permission. Dr. Wickham was not appointed to evaluate Damon, nor is Damon's physical condition at issue in the case (because it is not Damon's lawsuit - it is Thomas's.) Damon can therefore assert the privilege and prevent Dr. Wickham from testifying.

An objection made by Thomas or Damon to Dr. Wickham's testimony as calling for privileged information should be sustained.

3. The best evidence rule applies to the contents of the maintenance records.

The best evidence rule applies whenver the contents of a writing are material to a dispute and are at issue. The best evidence rule states that the original records must be provided unless the original records cannot be produced for good cause. Good cause would include that the original records were lost or destroyed (without bad faith) or the original records are held by an opposing party, who has refused to produce them despite proper notice to do so. Upon good cause being shown, the court may allow secondary evidence in the form of testimony about the contents of the records.

Because the maintenance records go to the issue of negligence on the part of the airline, and the contents of the records are material to that determination, the best evidence rule applies. The airline must produce the original maintenance records. The custodian of records may (and should) testify to authenticate them, but should not testify to their contents or their interpretation. The custodian of records has only one job: to prove that the records really are the records they purport to be. Any other testimony from the custodian of records would be irrelevant and violative of the best evidence rule.

If the airline objects to the custodian's testimony based on the best evidence rule, then their objection will be sustained unless the airline cannot produce (or refuses to produce) the original documents, which are in their possession. If the original records are in the possession of the airline, and the airline has refused to produce them, then the custodian's testimony may be properly offered by Thomas (but not the airline) and the objection will be overruled.

Finally, if the records are exceptionally voluminous, then either party may offer their contents in the form of a chart, graph, summary, or calculation - but the original records must be available for inspection by any party.

4. The expert testimony is relevant and has the proper foundation.

Experts may testify when they have specific knowledge, training, or experience which would be helpful to the trier of fact in determining a fact in issue. The expert must be qualified to testify as an expert and to give an expert opinion. The expert may qualify based on any combination of background, training, experience, education, and research in the field relevant to the expert's testimony. No formalized education or degrees are required to qualify as an expert - there have been cases in the past where a long-time drug user has testified about the effects of narcotics and their use, despite (obviously) having no formal education or training in using narcotics. The whole of the expert's experience and training will be considered when the court makes a determination about their qualifications to testify.

Here, Michael Daniele is a mechanical engineer. It can be assumed that he underwent vigorous education and training to get a mechanical engineering degree. He has 20 years experience in the field of aviation and consults with the FAA regarding crash investigations. It appears, then, that Mr. Daniele is qualified as an expert in the field of airplanes and airplane parts.

His opinion must have the proper foundation. To form a proper opinion about the issues in this case, he must rely on some information - both his background, training, and experience, as well as

information specific to this case. If he had personally examined the plug he states is defective, then he can testify to his own observations about the plug and the reasons he believes it was defective. This would be a proper expert opinion. He could also testify based on the observations made by others. If others examined the plug, documented their findings, and he read their findings in a report, he could testify as to the contents of those reports and his opinion about them. Case-specific hearsay offered by an expert is not prohibited in federal civil litigation - no Sanchez issues exist here. Finally, he may be asked a hypothetical question. The offering party could ask him, hypothetically, what his opinion would be if certain facts were assumed to be true.

As long as he had the proper foundation for his opinion, it owuld be proper for him to opine both that the manufacturing defect caused the plug to fail, and that it could not have been uncovered during an inspection. Even though these two opinions go to the ultimate issues in the case - whether the airline was negligent - they are properly admitted into evidence. Although his opinion touches those facts, his opinion is *helpful* to the jury in reaching its own conclusion. Any opinion that simply stated "The airline was not negligent" would be *unhelpful* to the jury and would be improper opinion.

Any objections to the testimony of Mr. Daniele would be overruled.

END OF EXAM