

QUESTION 7

Pat sued Dan for assault and battery in the U.S. District Court for the State of Broncomania. Dan claimed that he acted in self-defense. The following testimony was offered at trial.

John testified that he is personally acquainted with Pat, and has known him on both a business and a social level for the last eight years. John also testified that he lives in the same neighborhood and works for the same company as Pat. Pat's lawyer asked John, "In your opinion and based on your personal observation, is Pat a violent or peaceful person?" Dan's lawyer objected, but the judge nevertheless required John to answer the question.

On cross-examination, Dan's lawyer asked John: "Have you heard that Pat has a prior arrest for assault and battery?" Pat's lawyer objected, but the judge compelled John to answer the question.

Later, Dan's lawyer called Wayne to the stand. Wayne testified that he arrived at the scene of the fight just as it started. Wayne then testified that a bystander exclaimed to him: "I was talking to Dan when Pat jumped Dan from behind." Pat's lawyer objected to Wayne's testimony and moved to strike.

QUESTIONS:

1. Explain whether the judge's ruling on Pat's lawyer's question was proper.
2. Explain whether the judge's ruling on Dan's lawyer's question was proper.
3. Explain how the judge should rule on Pat's lawyer's motion to strike.

DISCUSSION FOR QUESTION 7

Opinion as to Pat's Character Traits

Overruled. John may answer under FRE 405 and 701. Since Dan is claiming that he acted in self-defense, evidence of Pat's character as a peaceful or violent person is relevant. Evidence of Pat's character trait for violence/peacefulness may be in the form of opinion testimony under FRE 405. John's opinion is admissible under FRE 701 if it is based on his own perception (which it should be given that John has known Dan for eight years), and if it will be helpful to the determination of a fact at issue. John's opinion should be helpful to the jury's determination whether Pat or Dan was the aggressor.

Cross-Examination on Knowledge of Arrest.

Overruled. John must answer provided that Dan's lawyer has evidence that the arrest actually occurred. Dan's lawyer must have a good faith belief that Pat was arrested for assault and battery. Under FRE 405(a) after a witness has testified as to a person's character, opposing counsel may inquire into relevant specific instances of conduct on cross-examination. Not only does this go to Pat's violent or peaceful character trait, but it may also impeach the credibility of John's opinion.

Bystander's Statement

Overruled. Motion to strike is denied. The testimony is hearsay, but it is admissible under either the present sense impression exception (FRE 803(1)) or the excited utterance exception (FRE 803(2)). It is admissible as a present sense impression because it describes the fight and was made immediately after the fight started, It is admissible as an excited utterance because it relates to a startling event (the fight) and was made while the declarant was still subject to the excitement caused by the fight.

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SCORESHEET FOR QUESTION 7

ASSIGN ONE POINT FOR EACH STATEMENT BELOW

1. Evidence of Pat's character trait for violence or peacefulness is admissible because Dan is claiming self-defense. 1. _____
2. John's opinion testimony of Pat's peaceful/violent character is admissible. 2. _____
3. John may give his lay opinion of Pat's peaceful/violent character if: 3. _____
 - 3a. it is rationally based on his personal observation and 3a. _____
 - 3b. it would be helpful to the determination of a fact in issue. 3b. _____
4. Dan's lawyer must have good faith belief that Pat was actually arrested for assault and battery. 4. _____
5. Dan's lawyer may inquire into specific instances of past conduct on cross-examination. 5. _____
6. Prior arrest is relevant as to Pat's violent/peaceful character. 6. _____
7. John's knowledge (or lack of knowledge) of the prior arrest goes to the credibility of his opinion.. 7. _____
8. Bystander's statement is hearsay. 8. _____
 - 8a. Hearsay is out of court statement made for proving truth of matter asserted.. 8a. _____
9. Statement may be admissible as present sense impression if: 9. _____
 - 9a. statement describes the fight, and 9a. _____
 - 9b. it was made immediately after the start of the fight. 9b. _____
10. Statement may also be admissible as excited utterance if: 10. _____
 - 10a. statement relates to the fight, and 10a. _____
 - 10b. it was made while the declarant was still under the excitement caused by the fight. 10b. _____

QUESTION 7

Paul Pedestrian was crossing Main Street in Capital City. Dan Driver was driving with his wife, Wendy, and struck Pedestrian as he crossed the street. Pedestrian heard Wendy say to her husband: "You fool, couldn't you see him in the crosswalk?" Pedestrian also heard Driver say, "Some people think they are invulnerable just because they're in a crosswalk." Pedestrian sued Driver to recover for his injuries.

At the beginning of the trial, Pedestrian's attorney moved to exclude Driver and Wendy from the courtroom because they might testify later. The court denied the motion.

In the plaintiff's case, Pedestrian testified that as he was crossing Main Street in the crosswalk, he was struck by Driver's car. Pedestrian tried to have Wendy's statement admitted, but the court sustained Driver's attorney's objection. Pedestrian then tried to testify to Driver's statement, but the court sustained an objection to that statement as well.

In the defendant's case, Driver's attorney called Driver to the stand. Driver testified that he hit Pedestrian when Pedestrian jumped into the street from between two parked cars. Driver also testified that Pedestrian was not in the crosswalk when he was hit. Driver further added that he was a good Christian person who would not bear false witness against another.

Pedestrian's attorney then cross-examined Driver and asked Driver if he was covered by an automobile liability insurance policy. He also asked him whether he offered to pay Pedestrian's medical bills that resulted from the collision. The court sustained objections to both questions.

Driver's attorney then called Wendy as a witness and asked her: (1) if she was in the car at the time of the accident, (2) whether she saw the accident, and (3) if she was positive that Pedestrian was not in the cross-walk at the time he was hit. Wendy answered "yes" to each question. The court overruled the objections of Pedestrian's lawyer to each question. On cross-examination, Pedestrian's attorney attempted to ask Wendy about her statement at the scene but the court again sustained an objection.

After deliberating, the jury found for Dan Driver.

QUESTION:

Discuss the objections that were made at trial, what other objections each party could have made, and on what basis the objections should have been sustained or overruled. The courts of this jurisdiction have adopted the Federal Rules of Evidence.

DISCUSSION FOR QUESTION 7

Exclusion from the courtroom

Rule 615 authorizes the court, at the request of a party, to order that witnesses be excluded so that they cannot hear the testimony of other witnesses. However, the rule does not authorize the court to exclude a party who is a natural person. Therefore, Pedestrian's motion was appropriate under Rule 615, and should have been denied by the trial court because the trial court is not authorized to exclude a party who is a natural person.

Statements at scene as hearsay

Pursuant to Rule 801(c), hearsay is a statement, other than one made by the declarant while testifying at trial, offered to prove the truth of the matter asserted. A "statement" includes an oral assertion, as was made in this case. Rule 801(a). Driver was the declarant because he was the person who made the statement. Rule 801(b). Rule 802 provides that hearsay is not admissible except as provided by other rules.

Wendy's statement at the scene was offered by Pedestrian in his testimony. At that point, it was hearsay and therefore inadmissible under 802 unless there is an applicable exception in Rule 803. In this case, Pedestrian's lawyer should have argued that the statement fit one of two exceptions: it was a spontaneous present sense impression under Rule 803(1) or it was an excited utterance under Rule 803(2).

In any event, once Wendy testified, the statement ceased to be hearsay under Rule 801(d)(1)(A) since it clearly was a prior inconsistent statement of a witness.

Driver's statement at the scene is not hearsay. Rule 801(d)(2)(A) provides that a statement is not hearsay if it is offered against a party and is the party's own statement. In this case, the statement is offered against Driver, the party who made the statement. As such, it is not hearsay and it is admissible for the truth of the matter asserted.

Religious beliefs

Rule 610 provides that evidence of the beliefs or opinions of a witness on matters of religion is not admissible for purposes of enhancing the credibility of the witness. Dan's religious beliefs were of no relevance to any issue in the case, and were offered solely for the purpose of bolstering his credibility. Therefore, Driver's attorney should not have been permitted to inquire into Driver's religious beliefs.

Inquiry into insurance

Rule 411 states that evidence that a person was insured against liability is not admissible upon the question of whether the person acted negligently. Pedestrian's attorney's reason for inquiring into liability insurance could only have been to demonstrate that Driver acted negligently because the other exceptions under the rule (proof of agency, ownership or control, or bias of a witness) are not applicable in this case. Therefore, the court was correct in prohibiting Pedestrian's attorney from inquiring as to Driver's liability insurance policy.

Inquiry into offer to pay medical bills

Pursuant to Rule 409, evidence of offering to pay medical expenses caused by an injury is not admissible to prove liability for the injury. Therefore, the court was correct in prohibiting Pedestrain's attorney from asking whether Driver offered to pay Pedestrain's medical expenses.

Leading questions

The three questions Defendant's lawyer posed to Wendy were clearly leading questions. Pursuant to Rule 611(c), leading questions should not be used on direct examination. The rule provides one exception: leading questions may be used if they are necessary to develop the witness' testimony. Arguably, the first question to Wendy was used to develop her testimony. However, that was clearly not the purpose of the final and critical question asked of Wendy concerning the cross-walk. Therefore, Driver's attorney should not have been permitted to use leading questions of Wendy during her direct examination.



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Essay 7 GradeSheet

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EXCLUSION

- 1. Driver, as a natural party, cannot be ordered excluded from the courtroom. 1. _____
- 2. Wendy, because she is witness, can be excluded from courtroom. 2. _____
- 2a. The exception is that if Wendy is shown to be essential to the presentation of case then she need not be excluded. 2a. _____

HEARSAY

- 3. Wendy's statement, when first offered by Pedestrian, is hearsay. 3. _____
- 3a. "Hearsay" is a statement other than one made by the declarant while testifying at the trial, offered to prove the truth of the matter asserted. 3a. _____
- 4. Wendy's statement may be admissible as an exception, because it was a spontaneous present sense impression, or 4. _____
- 5. It also may be admissible as an excited utterance. 5. _____
- 6. Once she testifies, Wendy's statement is not hearsay because it is a prior inconsistent statement. 6. _____
- 7. Driver's statement is not hearsay because it is an admission by party-opponent. 7. _____

RELIGIOUS BELIEFS

- 8. ~~Driver's testimony~~ Driver's testimony about his religious beliefs is irrelevant, and not allowed to bolster his credibility. 8. _____

INSURANCE

- 9. Inquiry about liability insurance is not admissible to establish negligence. 9. _____

SETTLEMENT

- 10. Inquiry into an offer to pay medical bills is not allowed to prove liability. 10. _____

LEADING QUESTIONS

- 11. The three questions posed to Wendy were leading and cannot be used in direct examination. 11. _____
- 11a. The first question may be found to be an exception: leading questions are allowed to develop a witness' testimony. 11a. _____

QUESTION 7

Paula Plaintiff and Dan Defendant have been friends for years and often exchanged correspondence. Unfortunately, last year they collided with each other in an auto accident. Paula sued Dan in federal district court, claiming that he ran a red light.

Paula wishes to testify at trial that approximately one week before the accident she received a letter from Dan, in which he wrote: "Boy! Did I have a near-miss on the way home. I wish I didn't drive so carelessly all the time." The letter was not signed by Dan, but Paula claims she can recognize Dan's handwriting because of their frequent correspondence. Paula, however, no longer has the letter. She simply threw it away after she read it, just as she did with all Dan's other letters.

QUESTION :

Discuss all issues reasonably raised by these facts as they relate to Paula's desire to testify about Dan's letter at trial.

DISCUSSION FOR QUESTION 7

Authenticity

Any exhibit must be authenticated before it is admissible. F.R.E. 901 (a) provides that the requirement of authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims. F.R.E. 901 (b)(2) further provides that a non-expert may give an opinion about the genuineness of handwriting, if based on familiarity with the handwriting that was not acquired for purposes of the litigation. Paula's testimony that she can recognize Dan's handwriting is sufficient to authenticate the letter.

Hearsay

Dan's letter is offered to prove the truth of the matter asserted (that he is a careless driver) and fits the general definition of hearsay in F.R.E. 801(c). As such, it would be excluded under F.R.E. 802 except as provided elsewhere in the Federal Rules of Evidence. F.R.E. 801 (d)(2)(A) expressly provides that a statement is not hearsay if it is offered against a party and it is the party's own statement. Since Paula is offering the statement against Dan and it is his own statement, and the letter is admissible as an admission by a party opponent.

Best Evidence Rule

Since Paula is trying to prove the contents of a writing, F.R.E. 1002, the Best Evidence Rule, would normally require that she produce the original of the writing. However, under F.R.E. 1004(l) the original is not required if all originals have been lost or destroyed, unless done in bad faith. Since Paula threw the original letter away just like she did with all Dan's other letters, she did not destroy it in bad faith, and can thus testify to the contents of the letter without producing the original.

Character/Habit

Dan would argue that the purpose of the introducing the letter is to prove that his character is that of a careless driver and that therefore he was careless at the time of the accident. F.R.E. 404(a) prohibits the introduction of evidence of a person's character to prove an act in conformity therewith on a particular occasion. Thus, even though the letter can be properly authenticated, contains an admission by a party opponent, and the original of the letter does not have to be produced, the letter is ultimately may be inadmissible because it contains improper character evidence.

Paula's response to the argument of Dan is that the letter is offered to show Dan's habit of driving carelessly, and therefore is admissible under F.R.E. 406. The admissibility of the document therefore depends on whether the court finds that it is offered to show Dan's conduct under 406 or his character under 404.



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1. The letter must be authenticated under F.R.E. 901 in order to be admissible. 1. _____
2. Paula's testimony that she recognized Dan's handwriting would be sufficient to authenticate the letter under F.R.E. 901(b)(2). 2. _____
3. Since Paula is trying to prove the contents of the writing she must comply with the Best Evidence Rule, F.R.E. 1002. 3. _____
4. Identify that since the original of the letter was not destroyed in bad faith, she can use other evidence (her own testimony) to prove the contents of the letter. 4. _____
5. Identify issue of hearsay. 5. _____
6. Define hearsay: a statement other than one made by the declarant while testifying at the trial, offered in evidence to prove the truth of the matter asserted. 6. _____
7. Dan's letter is admissible as an admission by a party opponent under F.R.E. 801 (d)(2)(A). 7. _____
8. Identify issue of relevance. 8. _____
9. F.R.E. 404(a) prohibits the use of character evidence to prove an act in conformity therewith on a particular occasion. 9. _____
10. F.R.E. 406 allows the use of evidence of habit to show that the conduct of a person on a particular occasion was in conformity with his habit. 10. _____

QUESTION 5

Dan Defendant is on trial for aggravated robbery. Two witnesses for Dan have testified that he has a reputation in the community for being a peaceful, honest person. Dan then took the stand and denied involvement in the crime.

On cross examination, the prosecutor asked Dan about his participation in a bar fight and a shoplifting incident, both of which had occurred within the past year. Dan's attorney objected to these questions claiming they called for improper character evidence. In response, the prosecutor stated that Dan's two witnesses should not have been allowed to testify as they did, but since they did, the defense had opened the door to Dan's character. Thus, the prosecutor argued, he was now allowed to rebut their evidence by inquiring into specific instances of conduct.

QUESTION:

Discuss the prosecutor's claims about the admissibility of character evidence.

DISCUSSION FOR QUESTION 5

The objection should be sustained because the prosecutor is trying to improperly rebut evidence of defendant's character with specific instances of conduct and any cross examination with respect to specific instances of conduct should have been directed to defendant's two character witnesses, not defendant. The prosecutor is wrong when he claims that defendant's two witnesses should not have been allowed to testify as they did. First of all, the prosecutor did not make a timely objection stating the specific ground of objection as contemplated by FRE 103(a)(1). Second, even if he had objected, the objection should have been overruled. Although FRE 404(a) excludes evidence of character for the purpose of proving an act in conformity therewith on a particular occasion, FRE 404(a)(1) provides an exception to that prohibition for evidence of a pertinent trait of character offered by the accused. Under FRE 405(a) such character evidence can be offered in the form of testimony as to reputation, or by testimony in the form of an opinion. Thus defendant's two witnesses properly testified as to the reputation of defendant regarding pertinent character traits.

The prosecutor is also wrong about his ability to rebut evidence of defendant's character by cross examining defendant about prior specific instances of conduct. Although it is correct that once defendant's character witnesses have testified, under FRE 404(a)(1), the prosecutor may offer rebuttal evidence, that evidence must be about reputation or in the form of an opinion under FRE 405(a). The prosecutor's cross examination was designed to elicit evidence about specific instances of conduct. Although FRE 405(a) does say that inquiry into specific instances of conduct may be inquired into on cross examination, that rule refers to the cross examination of the character witnesses themselves. The purpose of such cross examination is not to rebut defendant's character evidence but rather to test the credibility of the character witnesses themselves, in order to find out exactly how much they really know about the things that might have a bearing on defendant's character. *Michelson v. United States*, 335 U.S. 469 (1948); *Mullins v. United States*, 487 F. 2d 581 (8th Cir. 1973).



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Essay 5 GradeSheet

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1. Ordinarily, evidence of character or trait is not admissible to prove that a defendant acted in conformity with the trait or character on a particular occasion. 1. _____

2. Defendant must show the character trait is pertinent to meet the exception. 2. _____
 - 2a. Evidence regarding peacefulness or honesty is pertinent. 2a. _____

3. The method for offering admissible character evidence is through reputation or opinion testimony. 3. _____
 - 3a. Therefore, defendant's character witness's were properly allowed to testify. 3a. _____

4. The prosecutor can attack the character evidence presented by defendant's witness by cross-examining the witnesses regarding their knowledge of specific instances of conduct. 4. _____

5. The prosecutor can rebut evidence regarding the defendant's character with opinion or reputation evidence. 5. _____

6. Here, the prosecutor incorrectly sought to rebut the evidence of defendant's character traits by asking Defendant about specific instances of conduct. 6. _____

QUESTION 6

On December 1, 2000, Dan Defendant was walking around the Barex train station asking people for money. When he approached Vic Tem and asked him for money, Vic Tem summoned a nearby police officer. The officer arrested Defendant and charged him with panhandling in Capital City. The Capital City panhandling statute provides: "No person shall knowingly ask for money without a license."

At Defendant's trial, Vic Tem testified about his encounter with Defendant at the train station. He testified that Defendant asked: "Will you give me money so I can eat?" Defendant's attorney objected.

The City then called Ms. Keeper to testify about panhandling licenses. The parties stipulated that Keeper worked in, and was responsible for, the city records office, and that she alone processed panhandling licenses. Keeper testified that she searched all office records and found no evidence of a panhandling license issued to Defendant as of January 15, 2001. Defendant's attorney objected to Keeper's testimony and conclusion.

The trial court then took judicial notice that Defendant had submitted an application for a panhandling license on November 25, 2000. The City objected.

At the close of the City's case, Defendant's attorney moved to dismiss because the City failed to introduce evidence that Defendant's conduct took place in Capital City. The trial court took judicial notice that Barex Train Station is in Capital City, and denied the motion to dismiss. Defendant's attorney objected.

Defendant's attorney then called Peter Psych, a psychologist, to testify as a stipulated expert. Psych testified that Defendant, because he submitted an application and thought he was properly licensed, did not act knowingly when he asked for money in the train station. The City objected to Psych's testimony.

QUESTION:

Applying the Federal Rules of Evidence, rule on each objection and discuss the basis for each ruling.

DISCUSSION FOR QUESTION 6

Hearsay Issues

There are two major hearsay issues.

Admission of Party Opponent

Hearsay is an out of court statement offered for the truth of the matter asserted. Fed.R.Evid. 801(c). Certain statements are specifically not hearsay; an admission is one of those statements. An Admission by Party Opponent is not hearsay when the statement is offered against a party and is the party's own statement in his individual capacity. Fed.R.Evid. 801(d)(2). Vic Tem's testimony about what Dan said to him is not hearsay, it is an admissible admission. Therefore, Dan's objection should be overruled.

Absence of Public Record

Hearsay is an out of court statement offered for the truth of the matter asserted. Fed.R.Evid. 801(c). Hearsay is generally inadmissible. Fed.R.Evid. 802. However, if an exception applies, then the hearsay evidence is admissible. Fed.R.Evid. 802. Federal Rule of Evidence 803 provides a number of exceptions, one of which is applicable to Keeper's testimony.

Rule 803 provides hearsay exceptions where the availability of the declarant is immaterial; that is, it does not matter whether the declarant is available to testify. Fed.R.Evid. 803. One of these hearsay rule exceptions is the Absence of Public Record or Entry exception. Fed.R.Evid. 803(10). This exception provides that evidence to prove the absence of a record is admissible in the form of testimony that a diligent search failed to disclose the record where the record is one that was regularly made and preserved by a public office or agency.

The parties stipulated that Keeper worked in and was responsible for the state record office, and that she alone processed and granted state panhandling licenses. Therefore, Keeper had the proper foundation to testify about this issue, and that is not in dispute. Keeper's testimony that she searched all office records and found no evidence of a state panhandling license issued to Defendant as of January 15, 2001 was admissible under the Absence of Public Record or Entry hearsay exception. Fed.R.Evid. 803(10).

Judicial Notice Issues

A court may take judicial notice of adjudicative facts. Fed.R.Evid. 201(a). A judicially noticed fact must be one "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed.R.Evid 201(b). A court may take judicial notice of an adjudicative fact sua sponte. Fed.R.Evid. 201(c).

Judicial Notice of Application

The trial court took judicial notice that Dan had submitted an application on November 25, 2000. The fact that is the subject of this judicial notice question is an adjudicative fact. An "adjudicative fact"

DISCUSSION FOR QUESTION 6
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is one that is a fact to which the law of the case is applied in the process of adjudication. See, e.g., Davis, Judicial Notice, 55 Colum.L.Rev. 945, 952 (1955). These are the facts that normally go to the jury in a jury case. Id.

However, the fact is not one that is the proper subject of judicial notice. The fact is not one that is generally known within the territorial jurisdiction of the court. Fed.R.Evid. 201(b)(1). The fact is also not one that is capable of ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed.R.Evid. 201(b)(2). Examples of these types of facts include dates, information in census reports, or scientific facts. The information which the trial court attempted to notice does not fall within this category of facts. Therefore, the City's motion should be granted.

Judicial Notice of Location of Barex Train Station

As discussed above, the trial court may take judicial notice sua sponte. At the close of the State's case, Dan moved for dismissal because the State failed to introduce evidence that Dan's conduct took place in Capital City. The trial court took judicial notice that Barex Train Station was in Capital City, and denied the Motion.

The trial court properly took judicial notice of the location of the Barex Train Station. A court may take judicial notice of a fact that is generally known within the territorial jurisdiction of the trial court. Fed.R.Evid. 201(b)(1). Common examples of this type of facts include geographic facts, such as the location of a road or building. The location of the Barex Train Station is a fact that is generally known with the jurisdiction of the court. Therefore, the trial court did not err by taking judicial notice of this fact, and the Motion should be denied.

Opinion on Ultimate Issue

An expert witness may testify at trial, in conformity with Fed.R.Evid. 702 et seq. An expert, in most circumstances, may express his opinion even if it embraces the ultimate issue of fact to be decided by the trier of fact. Fed.R.Evid. 704(a). However, an expert witness may not testify that a criminal defendant did or did not have the mental state constituting an element of the crime charged. Fed.R.Evid. 704(b).

Defendant called Peter Psych, his psychologist, to testify. Psych testified that, because Defendant submitted an application and thought he was properly licensed, Defendant did not act knowingly when he asked for money in the Barex Train Station. This testimony is inadmissible because an expert witness may not testify that a criminal defendant did not have the mental state required to commit the offense. Fed.R.Evid. 704(b). Therefore, the objection should be sustained.



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1. Hearsay is an out of court statement offered for the truth of the matter asserted. 1. _____
2. An Admission by Party Opponent is not hearsay when the statement is offered against a party and is the party's own statement in his individual capacity. 2. _____
3. Vic Tem's testimony about what Dan said is admissible under the hearsay exception for admission by party opponent. 3. _____
4. Absence of Public Record or Entry exception provides that evidence to prove the absence of a record is admissible in the form of testimony that a diligent search failed to disclose the record where the record is one that was regularly made and preserved by a public office or agency. 4. _____
5. Keeper's testimony is admissible under the Absence of Public Record or Entry hearsay exception. 5. _____
6. A court may take judicial notice of adjudicative facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial unit or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. 6. _____
7. The trial court could not take judicial notice that Dan had submitted an application because this fact is not one that is generally known within the territorial jurisdiction of the court or capable of ready determination by resort to sources whose accuracy cannot reasonably be questioned. The objection should be sustained. 7. _____
8. The trial court could take judicial notice of the location of the Barex Train Station because it is a fact that is generally known within the territorial jurisdiction of the trial court or capable of ready determination by resort to sources whose accuracy cannot reasonably be questioned. The objection should be denied. 8. _____
9. An expert witness may not testify that a criminal defendant did or did not have the mental state constituting an element of the crime charged and the objection should be sustained. 9. _____

QUESTION 6

David drove Betsy home from a party at which they both had been drinking. David lost control of the car on a curve and ran into a tree. Betsy was killed. At the time of the accident it was dark and the road was unlit. The warning sign before the curve gave notice to drivers that the recommended speed limit was 45 miles per hour.

Shortly after the accident, the state highway department placed reflective devices (chevrons) at the curve to make the curve more visible.

Betsy's family filed a wrongful death action against David. The attorney for Betsy's family offered the following evidence at trial:

- (1) The testimony of the emergency medical technician who transported David to the hospital. The EMT stated that David told him that he, David, had consumed at least twelve beers during the two hours before the accident.
- (2) The testimony of a state trooper who responded to the scene of the accident. The trooper stated that, based on his seventeen years of experience as a state trooper and ten years experience as an accident investigator, he believed it was definitely unsafe to drive the curve at any speed greater than seventy miles per hour. The trooper also testified, based on the facts he observed, that David was driving more than one hundred miles per hour when he attempted to negotiate the curve.
- (3) The testimony of a witness who saw David's car speed by her in a "streak" moments before the accident. The witness stated that David's car was traveling between eighty and ninety miles per hour, a speed she considered unreasonable based on her experience of driving the road over one hundred times.
- (4) The testimony of a highway design engineer who testified that the road was not inherently dangerous, that warning signs had been posted sufficiently before the curve to give adequate warning to drivers, and that the curve could not be made safer.

QUESTION:

Discuss the admissibility of testimony of the EMT, the trooper, the witness, and the engineer. Discuss as well whether the defense may use the placement of the chevrons as evidence to counter the testimony of the engineer. Assume that the Federal Rules of Evidence apply and that the court in which this case was filed follows the majority of jurisdictions on all issues.

DISCUSSION FOR QUESTION 6

Testimony of the EMT

Most states have enacted statutes providing that a physician may not testify without the consent of his patient about any information acquired from the patient during the course of their professional relationship, provided the information was necessary to enable the physician to treat the patient. The statutes are generally adopted to achieve the purpose of placing a patient in a position in which he or she would be more inclined to make a full disclosure to the doctor, and to prevent the patient from being embarrassed by the doctor's disclosure of private medical information about the patient to third parties. See e.g., Middleton v. Beckett, 960 P.2d 1213 (Colo. App. 1998); State v. Fears, 715 N.E.2d 136 (Ohio 1999).

In this case, other than merely transporting David to the hospital, the facts do not suggest that the EMT provided any medical services, or that David's statement regarding how much alcohol he had consumed was necessary to enable the EMT to do his job. Moreover, an EMT is not a physician, and while many statutory physician-patient privileges also protect statements made by a patient to a registered nurse, statements made to an EMT may or may not be privileged. See State v. Viete, 973 P.2d 501 (Wash. App. 1999); LoCoco v. XS Disposal Corp., 1999WL557626 (Ill. App. 1999). Accordingly, it is not clear whether David's statement to the EMT is admissible.

Testimony of the state trooper

David could object to the testimony of the state trooper as improper opinion testimony, but his objection probably will not be successful. Under FRE 702, expert testimony is admissible if: (1) the subject matter of the testimony is appropriate for expert testimony (*i.e.*, it is scientific, technical or other specialized knowledge that would assist the jury); (2) the witness has sufficient special knowledge, skill, experience, training, or education to qualify him as an expert; (3) the expert possesses a reasonable certainty or probability regarding his opinion and the opinion is not based on mere guess or speculation; and (4) the expert's opinion is supported by a proper factual basis.

The trooper's testimony is arguably admissible as expert testimony. The subject matter of his testimony (the method for determining the speed at which an automobile was traveling immediately before an accident) is not within the common knowledge and experience of jurors (stated conversely, the jury could not resolve the factual issue of the speed at which David was traveling without technical assistance). His testimony is based on specialized knowledge he gained as an accident investigator and as a state trooper, thus qualifying him as an expert on the issue. He is reasonably certain about his conclusion (it would "definitely" be unsafe to travel at more than 70 miles per hour on the road, and David's car was traveling more than 100 miles per hour). Finally, his opinion is supported by a proper factual basis (his personal observations of the scene).

If the trooper is not qualified by the trial court as an expert witness, his testimony will nevertheless be admitted pursuant to FRE 701 as opinion testimony of a lay witness. FRE 701 allows for the admission of opinion testimony by a lay witness, provided the opinion is rationally based on the perception of the witness and is helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. Prior to eliciting the trooper's opinion, the attorney must first lay a foundation establishing his personal knowledge of the facts that form the basis of his opinion. FRE 602. The trooper's testimony is based on his observations of the scene of the accident and on his personal

knowledge and experience, and it could help the trier of fact to determine whether David was negligent.

Testimony of the witness

The witness's testimony should also be admitted as opinion testimony of a lay witness. Her testimony regarding the speed at which David was traveling immediately before the accident is based on her personal observation of the car and on her numerous experiences driving on the same road.

The examinee should recognize that the determination whether a person qualifies as an expert, and whether opinion testimony (whether of an expert or lay witness) is admissible is made by the trial court. FRE 104(a).

Testimony of the engineer

The same tests for expert witness's apply to the engineer as apply to the trooper.

Testimony regarding the reflective devices

Plaintiff will object to the introduction of the evidence regarding the placement of the reflective devices on the ground that it is evidence of subsequent remedial measures. Under FRE 407, evidence of subsequent remedial measures is not admissible to prove negligence or culpable conduct. However, such evidence is admissible when it is "offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment." See also White v. Caterpillar, Inc., 867 P.2d 100 (Colo. App. 1993).

Here, the evidence regarding the placement of the reflective devices is probably admissible under either the feasibility exception or to impeach the highway design engineer. The feasibility exception applies only if the opposing party contests the feasibility of precautionary measures at the time of the incident. FRE 407; see also Duggan v. Board of Commissioners, 747 P.2d 6 (Colo. App. 1987). Plaintiff's highway design engineer testified that the road was not inherently dangerous, and that the curve David attempted to negotiate could not be made safer. To the extent this testimony can be construed as a denial of the feasibility of precautionary measures, evidence regarding the subsequent placement of the reflective devices at the curve would be admissible under the feasibility exception.

The evidence may also be admitted to impeach the highway design engineer's testimony that the curve was not inherently dangerous, that a warning sign was posted on the road sufficiently far in advance of the curve to alert drivers to the upcoming curve, and that the road could not be made safer.



21610

Essay 6 GradeSheet

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and write numbers clearly

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|-----|--|-----------|
| 1. | Issue recognition: Physician - patient privilege. | 1. _____ |
| 2. | Physician - patient privilege excludes evidence. | 2. _____ |
| 3. | Physician - patient privilege may not apply to EMTs. | 3. _____ |
| 4. | Physician - patient privilege covers information necessary for treatment. | 4. _____ |
| 5. | Exception: lay opinion testimony admissible if helpful, based on the perception of the witness, and not specialized. | 5. _____ |
| 6. | Opinion re speed of moving object typically admissible. | 6. _____ |
| 7. | Prerequisite for expert opinion: testimony will assist trier of fact. | 7. _____ |
| 8. | Prerequisite for expert opinion: witness is "qualified." | 8. _____ |
| 9. | Prerequisite for expert evidence (a) based on sufficient facts; (b) reliable principles; (c) reliably applied. | 9. _____ |
| 10. | Evidence of placement of chevrons: subsequent remedial measures generally not admissible. | 10. _____ |
| 11. | Evidence of placement of chevrons may be admissible to show feasibility or for impeachment. | 11. _____ |
| 12. | Issue recognition – hearsay. | 12. _____ |
| 13. | Hearsay exception – statement by party opponent. | 13. _____ |
| 14. | Hearsay exception – statement for medical diagnosis. | 14. _____ |

QUESTION 2

In January 2003, Andy Agent, an undercover DEA agent, learned from William Witness, a paid government informant, that Don Defendant had a large supply of cocaine he was arranging to sell. At Agent's request, Witness set up a meeting between Agent and Defendant. At the meeting, Agent said that he was interested in purchasing a kilogram of cocaine, if it was of good quality. Defendant agreed to make the sale and gave Agent a small sample of cocaine. Agent immediately arrested Defendant. When Defendant was searched, only one-half an ounce of cocaine was found on his person. Later, in a search of Defendant's home, over a kilogram of cocaine was found.

Defendant has been charged with possession of cocaine with intent to distribute. Defendant claims that he was "just fooling around," and that he never intended to sell any of the cocaine to Agent.

At Defendant's trial, the prosecution intends to call Witness to testify. Witness will testify that, on three separate occasions in March of 2002, he personally found buyers for cocaine that Defendant wished to sell. Witness will further testify that, in each of those transactions, Defendant sold at least one-half of a kilogram of cocaine.

Witness has been working for the government as an informant since August 2002. Since that time, he has had no other source of income. None of the three purported buyers of the cocaine has been located.

QUESTION:

Discuss objections that Defendant's attorney should make if Witness testifies at trial. Assume that this case is being tried before a jury in a jurisdiction where the Federal Rules of Evidence have been adopted.

DISCUSSION FOR QUESTION 2

Defendant's attorney should object to the evidence on the ground that it involves improper use of character evidence. Evidence of other crimes is not admissible to prove the character of a person in order to show action in conformity therewith on a particular occasion. FED. R. EVID. 404(a) ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . ."). See also Michelson v. United States, 335 U.S. 469, 475-76 (1948) (Jackson, J.). Therefore, the prosecution may not offer Witness's testimony about Defendant's prior drug transactions to prove that Defendant is prone to sell cocaine, and therefore probably guilty of the crime charged in this case.

The prosecution may be able to offer the evidence of the prior cocaine sales for another purpose, besides propensity. Evidence of other crimes may be admissible for purposes besides proving action in conformity therewith (i.e., propensity). FED. R. EVID. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . .").

Here, the prosecution can argue that it is not offering the testimony to show that Defendant is prone to commit this type of crime, but rather to show that, because Defendant had actually sold cocaine in the past, he likely intended to sell cocaine on this occasion. Offering this evidence to prove intent may be permissible, under Rule 404(b). Other permissible purposes could arguably include proving a plan, scheme, or modus operandi.

If the prosecution offers the evidence for a permissible purpose, such as proof of intent, then the judge will have to determine whether the evidence is probative on that point, and whether intent is a material issue in the case. United States v. Huddleston, 485 U.S. 681 (1988).

Here, intent is clearly a material issue -- the prosecution must prove that Defendant intended to distribute the cocaine, and Defendant claims that he did not. In addition, the prior sales are probative on the issue because one who has intentionally sold drugs in the past is more likely to have intended to do so in these circumstances.

Next, the judge must decide whether the evidence of Defendant's prior cocaine sales is sufficient for a reasonable jury to find, by a preponderance of the evidence, that Defendant actually engaged in the prior cocaine deals. United States v. Huddleston, 485 U.S. 681 (1988). Here, the only evidence of those prior deals is Witness's testimony that they occurred. William Witness has serious credibility problems. He arguably has strong incentives to create helpful information for the government, since his income depends entirely on his ability to feed the government useful information. In addition, his account is uncorroborated; none of

the buyers can be located. On the other hand, Witness claims that he was personally involved in arranging the deals, and he offers direct evidence of their occurrence. Given that the standard is low and that credibility generally goes to weight rather than admissibility, it is likely that the judge would find that the standard has been satisfied.

Finally, the judge must balance the probative value against the risk of unfair prejudice. The judge may exclude evidence if its probative value is substantially outweighed by the risk of unfair prejudice. FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. ").

Here, the probativeness of the evidence is enhanced by the importance of the evidence: the issue of intent is critical, and it is difficult to prove. Further, the connecting generalization seems strong: someone who has frequently intentionally sold drugs in the past is more likely to have intended to do so in a situation like this one. On the other hand, the evidence itself is quite weak: there is only Witness's word that Defendant engaged in the prior deals, and Witness has credibility issues.

On the other side of the balance, the prejudice is substantial. The jury will likely not be able to avoid drawing an impermissible propensity inference, even with the help of a limiting instruction (especially since the propensity and intent inferences are so similar). In addition, there is a real risk that the jury will use the evidence as evidence that Defendant is a bad man who deserves punishment regardless of whether he committed this crime.

Because the test is heavily weighted in favor of admission, it is likely that the judge will admit the evidence. Although the risk of prejudice here is substantial, and the evidence itself is questionable, Witness' testimony nonetheless provides direct evidence that Defendant has intentionally sold drugs in the past. It is powerful and probative evidence of Defendant 's intent to sell the drugs to Agent, which is a critical issue in the case. United States v. Moore, 732 F.2d 983, 989 (D.C. Cir. 1984).



21321

Essay 2 GradeSheet

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1. Objection: improper use of character evidence (Rule 404). 1. _____
2. Rule 404 prohibits evidence of specific instances of conduct to prove action in conformity therewith. 2. _____
3. Rule 404(b), however, permits evidence of specific instances of prior conduct for other purposes, such as intent. 3. _____
4. Here, evidence of Defendant's past cocaine sales is probative of his intent to sell the cocaine, which is a material issue in the case. 4. _____
5. Before the judge can let the testimony into evidence, he must first decide whether the testimony is sufficient for a reasonable jury to find that Defendant actually engaged in the prior cocaine deals (*Huddleston*). 5. _____
 - 5a. Argument for: Witness was a participant in the transactions. 5a. _____
 - 5b. Argument against: Witness's story is uncorroborated; he is biased by his desire to please the government (his sole source of income). 5b. _____
6. If evidence is sufficient, then judge may still exclude it under Rule 403 if the probative value is substantially outweighed by the danger of unfair prejudice. 6. _____
 - 6a. Probative value: intent is a key issue and the prosecution greatly needs this proof, which makes probative value high, but the evidence itself is weak, given the lack of corroboration and William Witness's credibility problems, which lowers the probative value. 6a. _____
 - 6b. Prejudice: great risk that the jury will misuse the evidence of past sales as evidence of D's propensity, which is forbidden and creates great prejudice. 6b. _____

QUESTION 9

Dave Defendant is on trial for the murder of Vince Victim. Defendant's attorney plans to call Gail Girlfriend as a witness to testify to a phone call she received a few days after Victim was killed. Girlfriend plans to testify that Bob Boyfriend told her that he, not Defendant, killed Victim. Although Boyfriend did not identify himself during the telephone conversation, Girlfriend claims she recognized Boyfriend's voice because they had been dating for about a year and she had frequently talked with him on the phone. At the same time that she answered the call from Boyfriend, Girlfriend's answering machine activated and recorded the whole conversation.

Defendant's attorney has already called Boyfriend as a witness. Boyfriend refused to answer any questions, and the judge held him in contempt. There is no evidence linking Boyfriend to Victim's murder except for the phone call, and the tape of it which Girlfriend cannot find.

QUESTION:

Discuss the evidentiary issues presented by Girlfriend's potential testimony regarding the telephone call she received from Boyfriend.

DISCUSSION FOR QUESTION 9

If Girlfriend's statement is used to prove that Boyfriend, and not Defendant, killed Victim, the statement would be hearsay, because it would be an out of court statement used to prove the truth of the matter asserted. FRE 801(c). The hearsay statement must be excluded under FRE 802 unless it falls within a hearsay exception. The only exception that seems to apply in this instance is a "statement against interest" in FRE 804(b)(3). This exception requires that the declarant, Boyfriend, be unavailable, which he is because he has refused to testify even though ordered to do so by the Court. FRE 804(a)(2). This exception also requires that the statement so far tended to subject the declarant to criminal liability that a reasonable person would not have made the statement unless believing it to be true, which would certainly seem to be the case with a statement in which one confesses to a killing. FRE 804(b)(3) further requires, though, that when a statement tending to expose the declarant to criminal liability is offered to exculpate the accused (which it is here) it is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. Since the facts indicate that the only other evidence implicating Boyfriend in the murder is the misplaced tape, this corroboration requirement cannot be met. Thus, the statement does not meet the requirements of a statement against interest and should be excluded under FRE 802.

The facts also raise a "best evidence" issue under FRE 1002. Because there was a recording of the conversation, that recording is the best evidence of the conversation. Here, however, because the recording was lost, it is not possible to produce the best evidence. Therefore, an exception to the best evidence rule must be sought which allows testimony regarding the conversation. One exception allows Secondary Evidence of Content to be produced when the original is lost or destroyed in good faith. As long as Girlfriend only testifies about the conversation itself, and not what was on the tape, the best evidence rule would not require the production of the tape recording.

The final issue raised by the facts is the authentication of Boyfriend's voice during the phone call. FRE 901. FRE 901(b)(5) provides that the authentication requirement can be satisfied by the opinion of a witness based upon hearing the voice at any time under circumstances connecting it with the alleged speaker. Since Girlfriend had dated Boyfriend for a year she certainly was familiar with his voice and could, thus, authenticate the phone conversation.

ESSAY Q9

SEAT

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ISSUE

	YES	NO
1. Girlfriend's testimony as to Bob's statement is hearsay under the definition in FRE 801(c).	1. <input type="radio"/>	<input type="radio"/>
2. Hearsay is an out-of-court statement used to prove the truth of the matter asserted.	2. <input type="radio"/>	<input type="radio"/>
3. The statement might qualify as a "statement against interest" under FRE 804(b)(3).	3. <input type="radio"/>	<input type="radio"/>
4. Bob is "unavailable" for refusing to testify even though ordered to do so by the court.	4. <input type="radio"/>	<input type="radio"/>
5. The statement is against Bob's interest since it would subject him to criminal liability.	5. <input type="radio"/>	<input type="radio"/>
6. Since the statement is being offered to exculpate the accused, it is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.	6. <input type="radio"/>	<input type="radio"/>
7. The tape recording raises a potential "best evidence" problem under FRE 1002.	7. <input type="radio"/>	<input type="radio"/>
8. An exception exists for unavailable/lost originals.	8. <input type="radio"/>	<input type="radio"/>
9. The "best evidence" rule would only apply if the "content" of recording were being proven.	9. <input type="radio"/>	<input type="radio"/>
10. The requirement of authentication of Bob's voice on the phone could be met by Gail's opinion that it was Bob, since she was already familiar with his voice FRE 901(b)(5).	10. <input type="radio"/>	<input type="radio"/>

QUESTION 1

Paula Plaintiff and Dan Defendant were involved in an auto accident at the intersection of Oak and Maple streets. The intersection is controlled by a traffic signal. Officer Jones arrived on the scene about half-an-hour after the accident and interviewed Wanda Witness. Officer Jones' written report of the accident states that Witness said she saw Defendant run the red light.

Plaintiff sued Defendant in federal court; the key fact at issue in the lawsuit being who ran the red light. At trial, Plaintiff's attorney called Witness to testify. She testified that it was Plaintiff who ran the red light, not Defendant.

QUESTION:

Discuss whether Plaintiff's attorney can use Officer Jones' report and, if so, for what purpose(s). Assume that the report has been properly authenticated.

DISCUSSION FOR QUESTION 1

Officer Jones' out of court report, if used to prove the truth of the matter asserted in the report, that Wanda made the statement about Defendant running the red light, would fit the definition of hearsay in FRE 801(c) and be excluded under FRE 802, unless it falls within an exception. The report should fall within the exception for public records and reports in FRE 803(8)(B) because the report is a report of a public office or agency setting forth matters observed pursuant to a duty imposed by law as to which matters there was a duty to report. However, the report itself contains the out of court statement by Wanda, which, if offered to prove the truth of the matter asserted, that Defendant ran the red light, would also fit the definition of hearsay in FRE 801(c) and be excluded under FRE 802 unless it falls within an exception. Thus the report containing Wanda's statement is hearsay within hearsay but, under FRE 805, will not be excluded if each part of the combined statement conforms with an exception to the hearsay rule. Wanda's statement does not, however, fall within the same public records exception as the report itself, because Wanda, who does not work for the police department, was not under any duty imposed by law to report what she observed at the accident scene.

The report itself might also qualify as an exception under the business records exception in FRE 803(6), because it is a record kept in the course of a regularly conducted business activity and it is the regular practice of the police department to make such reports. Again, however, Wanda's statement does not fall within this exception, because, since she did not work for the police department, she did not make her statement in the course of the regularly conducted business activity of the police department.

Thus, although the police report falls within two exceptions, Wanda's statement does not fall within any exceptions, and cannot be admitted in evidence to prove the truth of the matter asserted, that Defendant ran the red light.

Wanda's statement can, however, be used to impeach her testimony at trial as a prior inconsistent statement. When used for impeachment, the statement is not being offered in evidence to prove the truth of the matter asserted and is, thus, not barred by FRE 802. Wanda's statement is a nonhearsay statement, contained within a hearsay statement (the police report) which falls within the exceptions for public and business records.

Under FRE 607 it is permissible for Plaintiff to impeach Wanda, even though Wanda was called as a witness by Plaintiff, because the credibility of a witness can be attacked by any party, including the party calling the witness.

ESSAY Q1

SEAT

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ISSUE

	YES	NO
1. Officer Jones' report is hearsay (FRE 801(c)).	1. <input type="radio"/>	<input type="radio"/>
2. Wanda's statement is hearsay (FRE 801(c)).	2. <input type="radio"/>	<input type="radio"/>
3. Hearsay is (a) an out of court statement (b) offered for the truth of the matter asserted.	3. <input type="radio"/>	<input type="radio"/>
4. Both statements must be excluded unless each part of the combined statements falls within an exception to the hearsay rule (FRE 805).	4. <input type="radio"/>	<input type="radio"/>
5. Officer Jones' report falls within the public record exception (FRE 803(8)(B)).	5. <input type="radio"/>	<input type="radio"/>
6. Officer Jones' report falls within the business records exception (FRE 803(6)).	6. <input type="radio"/>	<input type="radio"/>
7. Wanda's statement does not fall within the public records exception because she was not under a duty imposed by law to report what she observed at the accident scene (FRE 803(8)(B)).	7. <input type="radio"/>	<input type="radio"/>
8. Wanda's statement does not fall within the business records exception because she was not a part of the business organization (the police department) that produced the report (FRE 803(6)).	8. <input type="radio"/>	<input type="radio"/>
9. Thus, as hearsay, the report containing Wanda's statement cannot be admitted into evidence to prove the truth of that statement, namely, that Defendant ran the red light.	9. <input type="radio"/>	<input type="radio"/>
10. Wanda's statement can be used to impeach her trial testimony as a prior inconsistent statement (FRE 607).	10. <input type="radio"/>	<input type="radio"/>
11. Plaintiff can impeach her own witness (FRE 607).	11. <input type="radio"/>	<input type="radio"/>

QUESTION 1

Paul decided to take up golf and arranged a series of lessons from Dale, the veteran professional instructor at the local country club. Dale has a unique approach to the golf swing, which he calls the "Unnatural Golf Method." To begin instruction, Dale manipulated Paul's shoulders by pushing them hard from behind. As he did so, Paul cried out in pain. Paul claimed that Dale injured his back and that he incurred medical expenses for treatment. Paul sued Dale for professional negligence in an attempt to recover for his injuries.

QUESTIONS:

Applying the Federal Rules of Evidence, discuss the admissibility of each of the following items of evidence that were offered at trial. Assume proper objections were made.

Offered by Paul:

1. Testimony from two other novice golfers, also former students of Dale, that they too had injured their backs when Dale negligently pushed too hard on their shoulders while giving them a golf lesson.
2. Testimony from Dale's former wife, Martha, that when they were married Dale once privately told her that the "Unnatural Golf Method," although it produced long, accurate shots, was a "back killer."

Offered by Dale:

1. An article from "Today's Golfer," a well-known golf magazine, that contradicted the testimony of Elroy "Bear" Clubs, famous golf pro. Clubs had testified at trial that, in his opinion, the "Unnatural Golf Method" is absurd and ineffective. Clubs admitted, under oath, that "Today's Golfer" is a reliable authority.
2. Testimony from Sal Hutton, another famous golf pro, that in his opinion "Bear" Clubs is dishonest.

DISCUSSION FOR QUESTION 1

Testimony of Novice Golfers

To be admissible, evidence must be relevant. FRE 402. It is a close question whether this testimony is relevant. FRE 401 defines “relevant evidence” as evidence that tends to make the existence of any fact that is of consequence to the determination of the action more or less probable.

The contention that two other golf students were injured when Dale pushed on their shoulders does make it more probable that Dale’s teaching method does injury to the back. This probability, however, is not high. Prior acts of negligence are generally not relevant to the issue of whether a defendant was negligent during the incident in question. The reason for this general conclusion is that Dale might have, for instance, pushed against many students’ shoulders without any adverse consequences. The fact that Dale pushed these two golfers too hard lends little to the conclusion that he pushed Paul too hard. In addition, other causes, unique to each of the golfers, could better explain each golfer’s back injury; moreover, their injuries could differ in significant ways.

Paul might have argued that this evidence constitutes admissible habit. FRE 406 specifically allows the admission of evidence of the habit of a person to prove action in conformity therewith. Although, the answer is not obvious, the better answer is that two injured students drawn from the presumably high number of students from this “veteran” instructor is insufficient, alone, to provide an adequate basis to establish a habit of injuring students during golf lessons.

Finally, this evidence also appears to be inadmissible character evidence. FRE 404(a) prohibits evidence of a person’s character to show action in conformity therewith. To the extent that the novices’ testimony showed Dale to be a rough, careless golf instructor who was likely to be rough and careless in instructing Paul, it is character evidence and is inadmissible. None of the “non-character” purposes found in FRE 404(b) are pertinent.

Testimony of Dale’s Former Wife

Dale confessed his doubts about his teaching method to his wife while they were married. He spoke to her in confidence. As a result, Dale’s statement falls within the Marital Communications Privilege recognized at common law. Trammel v. United States, 445 U.S. 40 (1980). The Federal Rules of Evidence adopts the common law of privileges. FRE 501. At common law, the privileged status of Dale’s communication continues even after his marriage has ended. Both the testifying spouse (Dale’s former wife) and the non-testifying spouse (Dale) are “holders” of the privilege; in other words, both must consent to allow the privilege to be waived. Dale did not consent, as evidenced by his objection to its admissibility. As a result, the testimony of Dale’s former wife is inadmissible.

Note that the testimony would not be inadmissible on hearsay grounds. Hearsay is an extra-judicial statement offered for the truth of the matter asserted therein. FRE 801. Dale's statement meets this definition. However, Dale is a party, and hearsay statements of a party are admissible as "not hearsay" if offered by the party opponent. FRE 801(d)(2).

Article from Magazine

Clubs testified that Dale's method is absurd and ineffective. Dale offered an article from a golf magazine that contradicts Clubs' contention. The article constitutes impeachment evidence, as the article contradicts Clubs' assertion. As impeachment, the article is not being used as substantive evidence, to prove the truth of the contention that the Unnatural Golf Method is a sound and accepted system of golf. It is only used to show that the fact that a popular magazine would present the method belies Clubs' contention that the method is ineffective.

In addition, the article is also admissible as substantive evidence, not just as impeachment. Although it is hearsay, it meets the "Learned Treatise" exception described in FRE 803(18). This exception allows into evidence, among other items, articles in periodicals if established as a reliable authority by testimony of a witness. Clubs testified that the magazine was reliable. Pursuant to the provisions of FRE 803(18), this article could be read to the jury but not received as an exhibit; the article serves as a substitute for live testimony by its author.

Testimony of Sal Hutton

FRE 607 provides that the credibility of a witness may be attacked. Clubs is a witness, and Hutton attacked his credibility, testifying that Clubs is dishonest. Character evidence is generally inadmissible on the grounds of relevance. FRE 404. However, FRE 404(a)(3) creates an exception for evidence that attacks the character of a witness. Hutton's evidence is in the form of an opinion. Opinion evidence is allowed on the character of a witness, provided that the evidence refer only to the character trait of truthfulness or untruthfulness. FRE 608(a).

As a result, Hutton's testimony is admissible as he attacked Clubs' credibility. An opinion as to Clubs' character is an acceptable form, although Hutton's character testimony is limited to Clubs' character for untruthfulness.

ESSAY Q1

SEAT

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ISSUE

POINTS
AWARDED

Testimony of novice golfers

- | | | | |
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| 1. | To be admissible, evidence must be relevant (FRE 402). | 1. | ○ |
| 1a. | Relevant evidence tends to make the existence of any fact, that is of consequence to the determination of the action more or less probable. | 1a. | ○ |
| 1b. | Prior acts of negligence generally not relevant. | 1b. | ○ |
| 2. | FRE 406 authorizes admission of "habit" evidence: | 2. | ○ |
| 2a. | Evidence must tend to show a habit that a person would have acted in conformity therewith (injuring students). | 2a. | ○ |
| 2b. | Two students testimony probably not enough to constitute "habit." | 2b. | ○ |
| 3. | This evidence also is probably inadmissible character evidence. (FRE 404(a) (generally) prohibits admission of "character" evidence.) | 3. | ○ |

Testimony of Dale's former wife

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| 4. | Dale's statement to his wife falls under the "Marital Communications Privilege" ("Spousal Immunity") ("Husband-Wife Privilege")(FRE 501). | 4. | ○ |
| 4a. | The privilege continues even after the marriage ends. | 4a. | ○ |
| 4b. | To waive privilege, both Dale and his former wife must consent; Dale can (therefore) prohibit his former wife from testifying. | 4b. | ○ |
| 5. | Dale's statement meets definition of hearsay. | 5. | ○ |
| 5a. | Hearsay is an extra-judicial statement, offered for the truth of the matter asserted. | 5a. | ○ |
| 5b. | Hearsay statements are admissible if offered by party opponent (FRE 801(d)(2)). | 5b. | ○ |

Article from Today's Golfer

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| 6. | A witness' testimony (Club's) may be impeached with extrinsic evidence. | 6. | ○ |
| 7. | Article also admissible as substantive evidence ("Learned Treatise") ("reliable") (FRE 803(18)). | 7. | ○ |

Testimony of Sal Hutton

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| 8. | Opinion testimony allowed on character of witness, provided the evidence refers only to truthfulness. | 8. | ○ |
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QUESTION 9

Wally works for Massive Machines, a heavy equipment company. One day at work Wally's leg got caught and was injured by the gears of a large crane. Wally sued Massive for negligently causing his injuries.

In his complaint, Wally's attorney alleged that the gears in which Wally's leg was caught had been left exposed due to the failure of Massive's maintenance technician to properly replace the crane's gear guard after he had worked on the crane. Massive denied the allegation.

The following evidence was offered at trial:

1. Wally testified that just after helping free Wally's leg from the engine gears, the plant manager said to Wally, "Just a little while ago I reminded the maintenance technician to make sure the gear guards were replaced after he worked on the crane."
2. Massive offered into evidence a copy of a form entitled "Engine Maintenance Record," a document used by Massive to record all service work done on its cranes. The form contained an entry by the maintenance technician indicating that the crane that injured Wally had been serviced, and the gear guard replaced, just hours before Wally's accident. The technician who made the entry on the form was not in court. The plant manager, however, was familiar with the document and she testified to its creation.
3. Wally testified that Massive offered him \$100,000 to settle the suit.
4. During discovery, the parties deposed a non-employee, Sally Witness. Witness had seen the entire accident, and testified that the gear guard over the crane's gears was in place. At the time of the trial, Witness was living in a different state and was unwilling to attend the trial. Massive offered Witness' deposition testimony into evidence.

QUESTION:

Discuss the admissibility of the evidence described above under the Federal Rules of Evidence.

DISCUSSION FOR QUESTION 9

As a threshold matter, to be admissible, all evidence must be relevant. FRE 402. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” FRE 401.

1. The plant manager’s statement is relevant. The statement creates the inference that the technician disobeyed or neglected explicit instructions. It also might create other inferences, including that the technician did, in fact, follow orders. Either inference is relevant to Wally’s contention that the gear guard was not properly replaced, thus causing his leg injury. Thus, pursuant to FRE 401, the statement is admissible unless some other rule of evidence precludes admission.

The plant manager’s statement is also subject to a hearsay objection. Even if it is relevant, hearsay is not admissible. FRE 802. Hearsay is an out-of-court statement offered for the truth of the matter asserted therein. FRE 801(c). She obviously made a statement and it was not made in this courtroom. In addition, the relevance of the statement results from the truth of the matter it asserts. The finder of fact must conclude that the plant manager did instruct the technician to replace the gear guard in order to conclude from this statement that the technician was either negligent or dutiful.

Although hearsay, a statement can nevertheless be admissible if it meets one of the “exceptions” to the hearsay prohibition. One exception, which is actually an exemption to the hearsay rule, is for admissions by party-opponents. FRE 801(d)(2). This exception requires that the statement be made by a party and offered into evidence by the party’s opponent. Here, the plant manager’s statement is deemed to have been made by Massive Machines. A statement by an agent is deemed to have been made by the principal if the statement is within the scope of the agency or employment and made during the existence of the employment relationship. FRE 801(d)(2)(D). The plant manager was Massive’s employee at the time she made the statement, and the statement, involving quality control on the assembly line, concerned a matter within the scope of her employment as the plant manager. Finally, the statement was offered into evidence by Wally, Massive’s party opponent. The plant manager’s statement constituted a party admission, and is admissible on that ground.

2. The maintenance form offered by Massive is relevant. If accurate, it tends to prove Massive’s contention that the gear guard was in place at the time of the accident. It also shows that Massive’s quality control measures were not negligent.

Wally may object to the document as hearsay. The document is an out-of-court statement offered for the truth of the matter it asserts. The finder of fact must believe in the truth of the entry on the form, indicating recent maintenance, to use the document to conclude that the gear guard was properly in place. An exception to the hearsay prohibition exists for business records. FRE 803(6) permits the admission of records in any form of “regularly conducted activity” if the records were made at or near the time of the event recorded by a person with knowledge, if kept

in regular course of a business activity and if it was a regular practice of the business to make that record.

The maintenance form meets the requirements of the business records exception. It is a document that is used to record maintenance service on the crane. The plant manager will testify that the relevant entry on the form is customarily made by a person with knowledge, the maintenance technician, and is made in a timely fashion, just after completing service on the crane. She can also testify that Massive customarily uses these forms as part of its ongoing business operations.

The fact that the technician is not in court does not matter. Hearsay exceptions found in FRE 803 are admissible without regard to the availability of the declarant. The plant manager can testify to all the pertinent aspects of the record-keeping at her assembly plant. The document is admissible.

With regard to the copy of the maintenance form being offered rather than the original document, the best evidence rule (FRE 1002) requires that where the terms of a writing are material, the original document must be produced unless it has been shown that the original is unavailable for some reason other than the serious misconduct of the proponent.

3. Massive's offer of \$100,000 to settle the case may be relevant. One plausible inference from the offer is that Massive believes it was in fact negligent in injuring Wally. Massive's knowledge on this point is relevant to establish that it was negligent.

FRE 408 specifically provides that evidence of offering valuable consideration to attempt to compromise a claim is not admissible to prove liability or validity of the claim. Because the only inference that makes Massive's settlement offer relevant goes to its liability, the offer is inadmissible.

4. Sally's recollections as to events at the accident scene are obviously relevant to the issue of whether or not the gears were properly guarded at the time of the accident. The relevance of Sally's statements stems from the truth of the matter they assert. They are being offered to prove the gear guard was fastened at the time of Wally's accident. As a result, the deposition testimony is admissible only if an exception to the hearsay prohibition applies.

FRE 804(b)(1) allows the admission of former testimony given in a deposition as long as the party against whom the deposition is offered had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination. The declarant must also be "unavailable." The facts indicate that both parties deposed Sally. Although a deposition examination is not a perfect substitute for trial examination, the rule permits its substitution in cases where the declarant is unavailable. FRE 804(a)(5) includes within the definition of

DISCUSSION FOR QUESTION 9

Page Three

“unavailable” a witness who is absent from the hearing and whose presence the proponent of the evidence cannot obtain by process or other reasonable means. Because Sally is now living in another state, she is outside the subpoena power of the court and cannot be compelled to attend through process. She is also unwilling to attend the trial. Therefore, she is “unavailable” within the meaning of FRE 804(a).

ESSAY Q9

SEAT

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ISSUE

POINTS
AWARDED

1. General rule that evidence must be relevant in order to be admissible. 1. ○
2. Under FRE 401, relevant evidence has the tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. 2. ○
3. General rule that hearsay is inadmissible unless an exception applies. 3. ○
4. Under FRE 801, hearsay is an out of court statement offered for the truth of the matter asserted. 4. ○

Plant Manager's Statement

5. Plant Manager's statement may be admissible as an "admission by a party-opponent" under the hearsay prohibition. 5. ○

Maintenance records

6. The maintenance records may be admissible under the "business records" exception to the hearsay prohibition. 6. ○
7. FRE 803(6) permits the admission of business records if (1) the records were made at or near the time of the event, (2) by a person with knowledge, (3) were kept in the regular course of a business activity. 7. ○
8. The unavailability of the technician is immaterial as to whether the records are admissible. 8. ○
9. The best evidence rule requires that an original document be used unless it is shown that the original is unavailable for some reason other than misconduct of the proponent. 9. ○

Settlement Offer

10. Compromises or offers to compromise are not admissible. 10. ○

Sally's Deposition

11. The deposition may be admissible under the "former testimony" exception to the hearsay prohibition. 11. ○
12. FRE 804(b)(1) allows the admission of former testimony given in a deposition as long as the party against whom the deposition is offered had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination. 12. ○
13. In order for this exception to apply, Sally also must be unavailable to testify. 13. ○

QUESTION 7

In an interview related to a criminal domestic violence case, the victims, a mother/wife and her twelve year old son, stated that although this incident is the first they've reported, there is a long history of physical and emotional abuse. They claim that almost every evening for the past three or four years, the father/husband ridiculed both of them, and frequently hit, slapped, and punched them.

Three years ago, father/husband beat his son at a family gathering in front of several of their relatives. When the mother/wife tried to help her son, father/husband punched her in the face and then dragged her across the ground by her hair, causing multiple bruises and cuts. The mother/wife did not make a criminal complaint at that time, although she did take refuge in a shelter for a month.

Last year, the father/husband hit his son on one occasion causing injuries severe enough that he had to go to the emergency room. The son convinced the doctor not to report the incident to the authorities, claiming that it would just upset things further.

The occasion for which father/husband is charged now occurred in June 2006. On that date, father/husband slapped his wife on the back, precisely where she had had recent surgery. When the son tried to intercede on his mother's behalf, father/husband knocked him to the ground and then kicked him several times, causing extensive bruising to the son's torso and upper legs. (The defendant is 6'2" and weighs 195 pounds; the son was then 5'0" and weighed 95 pounds).

At trial, father/husband intends to offer two defenses to the latest charges. First, that he did not mean to touch his wife, but lost his balance and bumped into her. Secondly, he will claim that he was only disciplining his son for his insubordinate behavior.

QUESTION:

Discuss whether evidence of father's/husband's earlier abuse may be introduced at trial; the objections father/husband will raise; and the likely rulings by the judge.

DISCUSSION FOR QUESTION 7

The issue here is the applicability of the “prior bad acts” doctrine. Under Rule 404(a) FRE, character evidence is not admissible for the purpose of proving action in conformity therewith on a particular occasion. This rule directly contradicts common experience in which we routinely use our knowledge of a person’s character to predict how he or she has behaved or will behave. Thus, if we know that someone is temperamental, for instance, we more easily believe that he flared up on the occasion in question, or we predict that she will flare up under pressure in the future. However, Rule 404 specifically prohibits use of this information in the trial setting.

The Advisory Committee Note to the federal version quotes from the California Law Revision Commission: “Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.”

There are some exceptions to 404(a)’s prohibition against the use of character evidence. In criminal cases, the defendant’s pertinent character trait can be proven, but only if the defendant makes the offer first. *See*, 404(a)(1). Here, although we do have a criminal case, the evidence is of the prior abuse, which itself is not evidence of character but rather conduct. Further, the defendant himself has not offered any character evidence which would allow the prosecutor to rebut the defense view of defendant’s character. If the defendant had offered a witness to say “Harry is a non-violent person,” the prosecutor could then offer witnesses who knew Harry, or his reputation, to testify about their opinions of Harry’s violent nature or their knowledge that Harry has a reputation for violence. In sum, this exception would not allow the prosecution’s character evidence to be admitted.

Rule 404(b) does apply more directly. It continues the prohibition against character evidence by closing the loophole whereby a prosecutor might invite the jury to infer a violent character through evidence of a pattern of violent incidents. “Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Thus, Rule 404(b) generally prevents the prosecutor from asking either victim about earlier abuse by the defendant to lead the jury to infer that defendant was likely to have abused them this time because he’d done so many other times.

Rule 404(b) *does* permit evidence of prior acts for purposes *other than* proving character to prove action in conformity therewith. The rule actually specifies several of these other permissible purposes: proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In this instance, the defendant has offered two defenses. With regard to his slap on the wife’s back, the husband defends on the ground of accident: “he did not mean to touch the wife but just lost his balance as he was going by her.” This fits squarely into the rule’s allowable purpose

DISCUSSION FOR QUESTION 7

of “absence of mistake or accident.” Thus, the prosecutor should be able to admit all the prior instances of assaults on the wife, even if they were not reported. (Rule 404(b) allows evidence of “other acts” so there is no requirement that the prior abuse have been reported or that the defendant was tried or convicted to qualify).

Similarly, the defendant claims that his motive was to discipline the son, not simply to inflict pain. This is not quite as clearly within the grounds specified by the rule, but likely still will fit within “proof of motive.” The defendant claims he had a permissible motive, so lacks criminal intent; the prior acts of abuse negate this contention because he did not have any colorable disciplinary purpose in those events. Further, the rule is not exclusive: it allows other prior acts to be introduced “for other purposes, such as...”.

In *People v. Rath*, a 2002 Colorado Supreme Court opinion, the Court affirmed the trial court’s admission of prior act evidence against a defendant. The defendant was charged with kidnapping and sexual assault of a young woman to whom he had offered a ride. The prosecutor put on evidence from four other young women who had similar experiences with the defendant, each of whom said they accepted rides and then that the defendant had taken them to remote wooded sites against their will and sexually assaulted them. [t]he combination of all four incidents added substantial weight to the inference of a technique to isolate young women for the purpose of having sex. A greater number of incidents of similar behavior is important in proving that it is directed or purposive rather than coincidental. *See Spoto, 795 P.2d at 1320; Wigmore, supra, § 302.*”

The judge will make the admissibility determination under Rule 104, to a preponderance of the evidence standard. *See Rath, supra.* So long as the defendant maintains these defenses, the judge should allow the prosecutor to use prior acts evidence under 404(b) not to show action in conformity, but to disprove the intent defenses. The defendant will not be able to prevent the admission of this evidence unless he gives up one or both defenses. The judge may grant a limiting instruction, however, telling the jury that they may consider the prior acts only for the purpose of assessing the defendant’s intentions, and not for inferring that the defendant is a violent or abusive person.

Note that some jurisdictions, including the FRE, require advance notice of the use of 404(b) evidence in order to give the defendant a chance to try to exclude such evidence before the jury hears it. This answer assumes that this requirement has been met.

ESSAY Q7

SEAT

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<u>ISSUE</u>	<u>POINTS AWARDED</u>
1. Character evidence not admissible for purpose of proving action in conformity therewith on a particular occasion. FRE 404(a)	1. ○
1a. Character evidence is of slight probative value and may be very prejudicial.	1a. ○
2. One exception is in criminal cases where defendant's pertinent character trait can be proven, but only if defendant makes an offer first.	2. ○
2a. Husband hasn't made first offer of character evidence.	2a. ○
2b. Prosecutor will argue the evidence s/he wants to introduce isn't of character, it is of conduct.	2b. ○
3. Evidence of other crimes, wrongs or acts is not admissible to prove character of a person to show conformity with those acts. FRE 404(b)	3. ○
3a. 404(b) does permit evidence of prior acts for purposes other than proving character to prove action in conformity therewith.	3a. ○
3b. Specifically 404(b) allows evidence of prior acts as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, or accident (need only ID one).	3b. ○
4. Husband will offer that with respect to his wife, that he didn't mean to touch her.	4. ○
5. Prosecutor will argue that Husband's touching of Wife was intentional and fits within exception of "absence of mistake or accident" and other incidents may be brought in.	5. ○
6. Husband will claim he was only disciplining his son (permissible motive)	6. ○
7. Prosecutor will argue this is "proof of motive" and past acts should be admissible.	7. ○
8. Judge will make the determination under Rule 404 by a preponderance of the evidence.	8. ○
9. Limiting instruction may be granted - jury shouldn't infer defendant is an abusive person.	9. ○

QUESTION 3

John flew his plane out of town on a business trip. When he got to the airport for the trip home, he went into the pilot planning room to chart his flight. Another pilot, Paul, was already there, charting his own flight. The two made small talk for about fifteen minutes. During their conversation, Paul noticed that John's speech was slurred and that John appeared intoxicated. In front of Paul, John then called his wife, Cathy, to let her know he was leaving. He told Cathy he had had several drinks on his way to the airport and probably shouldn't be flying, but was determined to get home that night. Cathy asked John not to fly, but John insisted he was fine. Two hours after John left the airport, his plane crashed, killing him.

Cathy sued Wings, the manufacturer of the plane. Wings settled the lawsuit with Cathy for an undisclosed sum.

Cathy then sued Fly Right, the manufacturer of the plane's autopilot, claiming the autopilot was at fault in the crash. At trial, Cathy testified that John was not a drinker and that he was a cautious pilot.

Fly Right's defense claims that John's reflexes and judgment were impaired because he was drunk, and that the crash was caused by pilot error. Fly Right called Paul as a witness to testify regarding John's drunken state at the airport shortly before he took off.

QUESTIONS:

Discuss: (1) the admissibility of Paul's testimony that John was drunk and seemed confused when planning his flight; (2) whether Cathy can be cross-examined about her phone conversation with John; and (3) whether Cathy can be cross-examined about her settlement with Wings.

Assume the Federal Rules of Evidence apply and that the court in which the Fly Right trial is being held follows the majority of jurisdictions on all issues.

DISCUSSION FOR QUESTION 3

(1) Paul's testimony that John seemed drunk and confused when planning his flight

Opinion testimony of lay witnesses is generally inadmissible. However, it is admissible when it is rationally based on the perception of the witness; helpful to a clear understanding of his testimony or to the determination of a fact in issue; and not based on scientific, technical, or other specialized knowledge (the subject of expert testimony). Fed. R. Evid. 701; see also FRE 602 (a witness may not testify unless a foundation is laid that the witness has personal knowledge of the matter).

The determination whether opinion testimony (whether of an expert or lay witness) is admissible is within the discretion of the trial court. See FRE 104(a).

Paul's testimony is based on his observations of John during a 15 minute conversation with him, and of John preparing his flight plan. Thus, Paul's testimony that John was drunk and confused is based on his personal observations and experience, not scientific, technical, or other specialized knowledge. His testimony is helpful to the determination of a fact in issue: whether John was drunk when he flew the plane.

Accordingly, Paul's testimony is admissible.

(2) Cross-examination of Cathy regarding her phone conversation with John

The short answer is that the cross-examination of Cathy about her conversation with John is proper. This question involves three issues: the proper scope of cross-examination; the marital privilege; and hearsay.

Scope of Cross-Examination

"Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." FRE 611(b). The facts indicate that Cathy testified on direct that John did not drink and was a cautious pilot. Questioning her about her conversation with John, in which he told her he was drunk and shouldn't be flying, is within the proper scope of cross-examination.

Marital Privilege

FRE 501 provides that privileges are recognized only as provided by the common law. Thus, privileges are not created by the Rules.

At common law, confidential communications between a husband and wife are inadmissible into evidence against either spouse, absent the consent of the spouse against whom the communications are offered. The marital privilege is different from the testimonial privilege, which enables one spouse to prevent the other spouse from testifying against him. Trammel v. United States, 445 U.S. 40, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980).

For the marital privilege to apply, the communication must be made during a valid marriage. United States v. Lustig, 555 F.2d 737 (9th Cir.), cert. denied, 434 U.S. 926, 98 S.Ct.

408, 54 L.Ed.2d 285 (1977). The facts indicate that Cathy is John's wife, so the examinees should assume they are married.

In addition, the communication must be made in confidence. It is generally presumed that communications between spouses are intended to be confidential. Pereira v. United States, 347 U.S. 1, 74 S.Ct. 358, 98 L.Ed.2d 435 (1954); Hipes v. United States, 603 F.2d 786 (9th Cir. 1979). However, the presumption can be overcome where the communication is made in the known presence of a third party. Under those circumstances, the communication is not privileged. Pereira v. United States, *supra*; Wolfle v. United States, 291 U.S. 7, 54 S.Ct. 279, 78 L.Ed.2d 617 (1934); United States v. Koehler, 790 F.2d 1256 (5th Cir. 1986).

The facts indicate that John called Cathy in front of Paul. Thus, even though Paul did not listen, the communication was made in the known presence of a third party and is not privileged.

Hearsay

Hearsay is "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FRE 801(c).

John's statement that he was drunk and shouldn't be flying is admissible under the present state of mind or declaration of physical condition exception to the hearsay rule. Under this rule, a declarant's statement about his then-existing state of mind or physical condition is admissible when his state of mind or physical condition is directly in issue and material to the controversy. The declarant's availability is immaterial to the application of this exception.

Some examinees might argue that the statement is admissible hearsay because it is a statement against interest by an unavailable declarant. See FRE 804(3). John is obviously unavailable. But for this rule to apply, the statement must have been "contrary to the declarant's pecuniary or proprietary interests, or so far tended to subject him to civil or criminal liability" when the statement was made. Although flying drunk might be a crime and might subject John to civil liability, the materials the examinees study for the bar exam don't cover such a crime or aviation law, so they shouldn't be expected to cover this point.

Some examinees might also argue that the statement is non-hearsay because it is an admission by a party-opponent. See FRE 801(d)(2). But John is not a party. Although some types of relationships can result in the declarant's statement being admissible against the party ("vicarious admissions"), none of those relationships exists here (co-parties, principal-agent, partners in a partnership, co-conspirators). See e.g., United States v. Hendricks, 395 F.3d 173 (3rd Cir. 2005); Boren v. Sable, 887 F.2d 1032 (10th Cir. 1989).

(3) Cathy's settlement with Wings

FRE 408 provides that evidence of a settlement is inadmissible to prove the validity or amount of a claim. The rule also bars the admission of evidence of conduct and statements made during the course of compromise negotiations.

The examinees should recognize that the situation here does not involve a settlement between the same parties who are involved in the suit being litigated. Rather, this situation involves a settlement of a claim arising out of the same transaction, but between a party to the suit being litigated (Cathy) and a third party (Wings). Rule 408 makes compromise agreements inadmissible in such circumstances as proof of liability for, or invalidity of, the claim or its amount, because:

Settlements have always been looked on with favor, and courts have deemed it against public policy to subject a person who has compromised a claim to the hazard of having a settlement proved in a subsequent lawsuit by another person asserting a cause of action arising out of the same transaction.

Hawthorne v. Eckerson Co., 77 F.2d 844, 847 (2nd Cir. 1935); see also 2 Weinstein's Federal Evidence § 408[04], especially notes 9-13.

Thus, Fly Right cannot introduce evidence of Cathy's settlement with Wings to establish the invalidity of her claim against Fly Right.

Evidence of settlements may be admissible if it is offered for purposes other than to prove liability or invalidity of the claim amount. 2 Weinstein's Federal Evidence § 408[05]. However, none of the enumerated exceptions applies here, and the facts do not suggest a valid purpose for admitting the evidence of Cathy's settlement with Wings.

Some examinees might discuss whether the amount of any judgment Cathy gets from Fly Right should be offset by the amount she got in her settlement with Wings. But the question asks only about the admissibility of the settlement, not the damages/set-off issue.

ESSAY Q3

SEAT

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ISSUE

POINTS
AWARDED

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| 1. | To be admissible, evidence must (among other things) be relevant. | 1. | ○ |
| 2. | Relevant evidence is evidence that makes a fact of consequence more likely than not either true or not true. (FRE 401). | 2. | ○ |

Paul's testimony

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|-----|---|-----|---|
| 3. | Paul's testimony regarding John's apparent intoxication would be opinion testimony by a lay (non-expert) witness. | 3. | ○ |
| 4. | To be admissible as lay (non-expert) opinion testimony (FRE 701), it must be, | | |
| 4a. | Rationally based on his perceptions of John; | 4a. | ○ |
| 4b. | Helpful to the jury; | 4b. | ○ |
| 4c. | Not based on scientific, technical or other specialized knowledge. | 4c. | ○ |

Cathy's testimony

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|-----|---|-----|---|
| 5. | Cathy's testimony regarding John's call is within the proper scope of cross-examination (FRE 611(b)); her testimony about John opened the door. | 5. | ○ |
| 6. | As John's wife Cathy would normally be prohibited from testifying due to marital privilege. | 6. | ○ |
| 7. | However, privileges are waived if the communication was not made confidentially. | 7. | ○ |
| 8. | Cathy's testimony about what John said to her is hearsay. | 8. | ○ |
| 8a. | Hearsay is an out of court statement offered for the truth of the matter asserted (FRE 801(c)). | 8a. | ○ |
| 8b. | John's statements are arguably admissible as an admission by a party opponent (FRE 801(d)(2)). | 8b. | ○ |
| 8c. | Or arguably as a contemporaneous declaration of his present state of mind (FRE 803(3)). | 8c. | ○ |
| 8d. | Or arguably as a statement against interest (FRE 804(b)(3)). | 8d. | ○ |
| 8e. | Some hearsay exceptions (former testimony, statement against interests, etc.) require proof of the declarant's unavailability. | 8e. | ○ |

Settlement

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|-----|--|-----|---|
| 9. | Cathy's settlement with Wings is arguably inadmissible because it was a settlement (FRE 408). | 9. | ○ |
| 9a. | However it might be admissible for a purpose other than to show Fly Right's culpability (e.g., that Cathy has already recovered and/or that Wings not Fly Right was culpable.) | 9a. | ○ |