

1)

Question 1

This is a criminal case. Prosecution (P), Defense/Defendant (D), Judge (J)

P called Ace's (A) psychotherapist (PT) to testify to statements A made to him

D - Obj, relevance. Statements are irrelevant to case. Statements regarding A being drunk are irrelevant.

P - Evidence contained in statement is relevant to the person (A) and event (night of killing at bar)

J - Obj overruled, statements are relevant (statements made by A). However, redact of info related to being drunk as they are irrelevant.

D - Obj hearsay. A's comments made to PT and now relayed in court by PT are out of court statements made for the truth of the matter, i.e. whether A hit V at the bar. A is on trial for "punching V to death".

P - Statements made by A constitute an admission, which is a hearsay exception. In addition, the statement "I feel dangerous" is not hearsay, as it is being introduced not for the truth of the matter but instead to show A's state of mind. It is also being offered to show A's present bodily condition, not that A punched V.

J - Obj overruled. Statements meet hearsay exception, and "I feel dangerous" is non-hearsay. Admissible.

D - Obj PT/Patient privilege. Communications made between a patient and a PT are protected via the privilege.

P This was not a confidential communication between a PT and a patient. It was made at a bar. A had no expectation of privacy when he made the statements. Also, A was not at PT's office, where normal PT/patient communications occur. Also, others overheard the conversation so it wasn't confidential. A had no intention of confidentiality while making such statements to his PT in public, at a bar, in a "not so low voice"

D - A asked PT for help because he was "feeling dangerous", a mental condition that is normally treated by a PT. Thus, the communication was made while A was seeking "help", thus it IS a PT/patient communication. A also received help when PT snapped his fingers followed by a command to "fall into a deep sleep". This constitutes sought treatment and received treatment. The Eavesdropped doctrine precludes others from overhearing a communication and repeating it.

P - Because A "accidentally" ran into the therapist, this was unintentional. Also, A ran into PT at "a bar", not the regular bar they go to, but a random location. Also, A was "extremely drunk", which is not the condition he would normally seek therapy in. Therefore, this is not treatment under the PT/patient privilege but an accidental meeting at a random location. The snapping fingers and command to fall into a deep sleep because the PT slipped "drops" into A's Coors Lite. Thus, the PT knew it wasn't treatment. He was drugging him outside standard treatment (secretly sneaking knockout drops into a beer).

D - PT "treated" A by hypnotizing him. Thus, A was clearly seeking PT for "help" and received it. Therefore, the communication was while A was seeking treatment and privileged.

P - This constitutes a crime/tort exception to the PT/patient privilege given the PT sent A out onto the road after giving him knockout drops. PT also has a duty to warn the public of potential danger when there is a reasonable belief of someone being harmed, PT didn't do this.

D - It is unclear whether a reasonable belief of harm existed given the facts.

P - slipping an extremely drunk person knockout drops and instructing them to "go directly home" is a situation where a reasonable belief of harm to someone exists.

D - "go directly home" is not an instruction to drive a vehicle. PT didn't instruct A to drive a motor vehicle, thus no expected harm would be reasonable.

J - Obj overruled. This interaction does not constitute treatment since A accidentally ran into PT, and snapping his fingers isn't treatment given the PT slipped knockout drops into A's beer.

P sought to call PO to testify to Bill's comment to police

Relevant to case. No objection on it.

D - Bill's statement to Police Officer (PO) is inadmissible hearsay upon hearsay. It is hearsay that B communicated something he overheard, and the PO testifying to B's out of court statement. Confrontation is also absent since B vanished.

P - B's statement to the PO was an excited utterance ("excitedly tipped off police), thus is a hearsay exception. PO's testifying is a business record (police reports are business records, which are a hearsay exception). Statements made to police during an investigation are admissible within the business record exception.

D - B's statement is inadmissible as it was obtained by being an eavesdropper. CA, under the eavesdropped doctrine, prohibits confidential communications that were overheard to be communicated. Thus, B's eavesdropping on a PT/patient communication is inadmissible. In addition, the claim of excited utterance as a hearsay exception is accurate but invalid here because B's statement was not made at the time of the incident, and the incident of overhearing a conversation does not fall under the requirements of an excited utterance. An excited utterance must be made at the time of observing an exciting incident (e.g. like a car accident). A conversation does not fall under this. Therefore, there is no exception for B's statement to get into the police report. That part must be redacted.

P - B's statement also shows his state of mind (excitedly) thus it isn't even hearsay, it is non-hearsay. And since the communication between PT and A was deemed NOT to be treatment (see above), the eavesdropper doctrine is irrelevant since there was no confidential communication eavesdropped upon.

J - Obj overruled. The hearsay upon hearsay has proper exceptions and the PO can testify but not about what B said. However, B's statement within the report is not allowed given B is unavailable and the statements were made without the chance for A to confront his accuser (*Ewoldt*). Confrontation violation exists.

D called Wally (W) regarding V's statement prior to death about "another guy"

P - Obj hearsay. This is brought for the truth of the matter stated.

D - This is a dying declaration (statement by V, he's dead). This is admissible as a hearsay exception.

P - No opportunity to cross examine - confrontation violation (*Ewoldt*). V is unavailable

D - Unavailable not an issue here as A caused V's unavailability by killing him.

J - Obj overruled. Dying declaration allowed.

To impeach A, DA/P asked A about the following:

1) asked about arrest for misdemeanor battery

D - Obj arrests are not admissible for impeachment in CA criminal cases, nor federal cases

J - Obj sustained, arrest not allowed in

2) Felony conviction for burglary, A denied

D - Obj character evidence

P - To impeach, in CA criminal cases, felony convictions that show a readiness to do evil (i.e. moral turpitude) are allowed (*Castro*). In Federal court, under 609, felony convictions for dishonest acts are admissible to impeach.

D - Burglary is not moral turpitude.

P - CA case precedent has shown burglary to fall under *Castro*.

D - Because A denied all, extrinsic testimony of court records for burglary.
 P - Extrinsic evidence is allowed for felony convictions in both CA criminal and federal cases.
 J - Overruled, questions allowed. Extrinsic evidence (court records) allowed

3) Ned's testimony that A beat him up

D - Obj character evidence.
 P - This is a 'bad act' and is allowed in CA crim and Federal cases
 D - A denied this act and thus Ned's testimony not allowed as extrinsic evidence.
 P - bad acts in CA criminal can be supported by extrinsic, federal cannot.
 J - Allowed in CA criminal, not in federal

D called Ned's wife

P - Obj spousal privilege. Wife does not have to testify against spouse in a case where he is not a party.
 D - she must take the stand since N is not a party.
 P - Wife can invoke marital communication privilege also, but spousal 2 is sufficient since they are still married. Thus, the question about his statement is not admissible, privileged. This is also hearsay
 J - Wife must take stand. Spousal privilege 2 says she does not have to testify against her spouse so the questions will have to be specific. Question about the communication is privileged under marital communication and Spousal 2

2)

V = plaintiff
 A - defendant
 P = defendant
 Dr. Dan
 Ozzie (O) - Optometrist

V called Dr. Dan (DD) who treated A using TMOT machine.

Defendant (D) - Obj, TMOT machine not admissible
 P - DD is an expert and TMOT is a machine used during treatment
 D - In CA, treatment must meet the *Kelly* test. Federal must meet *Daubert*. The *Kelly* test says that it must be generally accepted in the medical community. In federal court *Daubert* says that it must meet four tests. Similar to *Kelly* it must be standard in the medical community, also has to pass peer review. The TMOT machine doesn't do this.
 P - Doctor's conclusion outside TMOT should be allowed regardless of *Kelly* or *Daubert*
 J - changing my mind since I don't want to be overruled on appeal. Doesn't meet *Kelly* or *Daubert*. TMOT results/diagnosis is inadmissible. Doctor's conclusion, if supported by generally accepted means within the medical community are allowed.

P sought to call Optometrist (O)

D - irrelevant. No issue about A's vision was mentioned in the complaint.

P - A's vision is relevant to the event (car accident) and the negligence action. Vision is an important aspect and in controversy when auto accidents are litigated.

D - subsequent remedial acts are not admissible for public policy reasons. Allowing these acts would deter people from fixing problems that exist, leading to more litigation. Thus the prescription comments are not admissible as they are subsequent remedial acts.

P - new prescription is admissible as it shows that at the time of the accident, A couldn't see properly and thus was negligent.

J - overruled. Subsequent remedial acts are not admissible for public policy reasons.

However, the new prescription is admissible because this is a negligence action and driving without proper glasses implies negligence. It would be an injustice to not allow this.

P calling Mechanic Mel (M) to testify regarding M's report

D - atty/client privilege

P - M is an independent mechanic and not client. Privilege doesn't apply.

D - Regardless, M's report is work/product, prepared in anticipation and/or preparation for litigation. This is protected under *Hickman v Taylor*. The lawyer's opinion was spoken to M, as well as A's claim about what happened. This is specific language about details of the case.

P - leaving the report on V's doorstep is an implied waiver of atty/client privilege. Also, by attorney telling mechanic confidential attorney client conversations (substantial portion of them) atty/client privilege was waived. Work Product includes attorney opinions, comments, research and conclusions. M's report doesn't include any of those items. This is discoverable and thus admissible. D - Because M was hired for litigation, M's report is work/product. M's report also protected as M was an extension of the client relationship, therefore atty/client applies.

J - M's report protected by both privileges. Inadmissible.

Defense (Dr. Phil) called A's ex-girlfriend Kathleen (K) to give her opinion of A's driving.

Defendant Dr. Phil called defendant Ace's ex-girlfriend (?)

Ace - K's opinion inadmissible character evidence.

Dr. Phil - not introduced to show A's character but to show A's poor driving ability

Ace - K's opinion not allowed as she isn't an expert on driving ability

Dr. Phil - K's statement about "lousy" driving does not require expertise. As a "longtime" girlfriend, her knowledge is based on substantial experience driving with Ace.

Ace - Statement about "every time" he drives home he hits somebody or something is character

Dr. Phil - Statement "every time" is an exception, shows habit/custom.

Ace - "every time" he hits "something or somebody" is too vague to be habit or custom, thus not admissible.

Dr. Phil - Statement is specific..."every time Ace drove home *from the bar...*" is specific habit when driving home from "the bar", not "a" bar. "*The bar*" is a specific location, known between the "longtime girlfriend and boyfriend Ace."

Ace - confidential communication...privileged. Marital communication.

Dr. Phil - confidential communications are only privileged if communicated during a valid marriage. No valid marriage exists thus no privilege. Also, NO communication is being testified to anyway. Related to marital privilege...since no valid marriage existed, this doesn't apply.

They are broken up anyway, thus it wouldn't apply if they were once married.

J - character exception of habit or custom must be specific i.e. 'Ace always runs that specific stoplight' The statement it "seemed to her" appears to be more of an opinion rather than a definitive habit. Obj sustained regarding the "every time Ace drove home he hit somebody or something" is inadmissible.