

Scott Pearce's
Master Essay Method

Evidence

EVIDENCE APPROACH

I. Relevance

A. Logical Relevance: Why is this item of evidence of any interest?

1. Explain what the evidence tends to prove.
2. It is often helpful to note the nature of the underlying lawsuit.

B. Practical objections involving relevance:

1. Character Evidence - three factors:
 - a. The purpose for presenting character evidence
 - b. The method of proving character
 - c. Civil / Criminal distinctions
2. Habit and routine practice
3. Similar happenings (prior accidents, contracts)

C. Policy objections involving relevance:

1. Subsequent remedial measures
2. Liability insurance
3. Offers to compromise
4. Payment of medical expenses
5. Criminal pleas and plea bargains

II. Objections

A. Hearsay (Easily the most frequently tested objection)

1. Remember that hearsay is objectionable because it cannot be subject to cross examination.
2. Certain statements are not hearsay even though they fit the definition:
 - a. State of mind re: domicile, donative intent
 - b. Statements with independent legal significance
3. Hearsay Exceptions
 - a. Admissions (Non hearsay under the Federal Rules)
 - b. Business records
 - c. Declarations against interest
 - d. Spontaneous utterances
 - e. Catchall exception

B. Privileges

1. Marital Privilege
 - a. Spousal incompetence
 - b. Confidential communications
2. Attorney / Client
3. Doctor / Patient
4. Clergy
5. 5th Amendment privilege against self-incrimination (criminal procedure)

C. Competence: Everybody is competent except as otherwise provided.

1. Capacity to communicate
2. Understand the duty to be truthful
3. Personal knowledge

D. Opinion

1. Lay Opinion
2. Expert Opinion
3. Opinion about the ultimate issue

E. Credibility: Impeachment and Rehabilitation

1. Impeachment
 - a. Competence
 - b. Character (different here than under relevance, above)
 - c. Bias
 - d. Prior inconsistent statements
2. Rehabilitation
 - a. Attack the fact asserted to impeach.
 - b. Attack the inference drawn from a fact.

F. "Real" Evidence: Physical, not testimonial evidence

1. Documents
 - a. Authentication
 - b. Best Evidence
2. Physical and Demonstrative Evidence (weapons, drugs, maps, photos)
 - a. Foundation
 - b. Authentication
 - c. Chain of Custody
3. Scientific Tests: The expert witness standard applies. (ballistics, drugs)

III. Admissibility

- A. Judicial Notice of facts
- B. Mechanics of Eliciting Testimony: Examination and Cross-Examination
- C. Mechanics of Objecting to Evidence
- D. Roles of Judge and Jury
- E. Jury Instructions
 - 1. Burden of Proof
 - 2. Presumptions

EVIDENCE

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Dave brought his sports car into the local service station for an oil change. While servicing the car, Mechanic checked the brakes and noticed that they needed repair. The following events occurred:

- (1) Mechanic commented to Helper, “Dave had better get these brakes fixed. They look bad to me.”
- (2) Mechanic instructed Helper (who did not himself observe the brakes) to write on the work order: “Inspected brakes – repair?”, which Helper then wrote on the work order. However, Helper currently does not remember what words he wrote on the work order.
- (3) Many hours later when Dave picked up his car, Helper overheard Mechanic say to Dave, “I think your brakes are bad. You'd better get them fixed.”
- (4) Dave responded, “I am not surprised. They've felt a little funny lately.”
- (5) Later that day, when Helper was walking down Main Street, he heard the sound of a collision behind him, followed by a bystander shouting: “The sports car ran the red light and ran into the truck.”

The sports car involved in the accident was the one that Dave had just picked up from Mechanic. Polly owned the truck. Polly sued Dave for negligence for damages sustained in the accident. Polly's complaint alleged that the accident was caused by the sports car running the red light because the sports car's brakes failed. Polly's theory of liability is that Dave knew or should have known that his brakes were bad and that driving the car under those circumstances was negligent.

Polly called Helper as a witness to testify as to the facts recited in items (1) through (5) above, and she also offered into evidence the work order referred to in item number (2).

Assume that in each instance, appropriate objections were made.

Should the court admit the evidence offered in items numbers (1) through (5), including the work order referred to in item number (2)? Discuss.

EVIDENCE – Outline of Issues
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- I. Mechanic's comment to Helper about Dave's brakes
 - A. Relevance
 - B. Objection: Hearsay
 - 1. Present Sense Impression / Spontaneous Utterance
 - 2. Expert opinion
 - 3. More probative than prejudicial
 - C. Conclusion: Admit the testimony.
- II. Mechanic's instruction to Helper and the Work Order
 - A. Mechanic's Instruction
 - 1. Relevance
 - 2. Objection: Hearsay
 - 3. Conclusion: Admit the Testimony.
 - B. Work Order
 - 1. Relevance
 - 2. Objection: Hearsay (business record)
 - 3. Conclusion: Admit the Work Order.
 - C. Conclusion: Admit the testimony and the work order.
- III. Mechanic's statement to Dave
 - A. Relevance
 - B. Objection: Hearsay – effect on the listener
 - C. Conclusion: Do not admit the testimony.
- IV. Dave's reply to Mechanic
 - A. Relevance
 - B. Objection: Hearsay (admission, declaration against interest)
 - C. Conclusion: Admit the testimony.
- V. Sound of Collision and Bystander's Shout
 - A. Relevance
 - B. Objection: Hearsay (excited utterance, present sense impression)
 - C. Conclusion: Admit the testimony.

EVIDENCE

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Officer Will, a police officer, stopped Calvin, who was driving a rental car at five miles an hour over the speed limit. Calvin gave legally valid consent to search the car. Officer Will discovered a substantial quantity of cocaine in the console between the two front seats and arrested Calvin. After being given and waiving his Miranda rights, Calvin explained that he was driving the car for his friend, Donna. He said that Donna was going to meet him at a particular destination to collect her cocaine, which belonged to her. Hoping to obtain a favorable plea bargain, Calvin offered to cooperate with the police. The police then arranged for Calvin to deliver the cocaine. When Donna met Calvin at the destination, she got into the car with Calvin. She was then arrested. Each was charged with and tried separately for distribution of cocaine and conspiracy to distribute cocaine.

Donna's trial began while Calvin's case was still pending.

At Donna's trial, the following occurred:

- (1) The prosecutor called Officer Will, who testified to Calvin's statements after his arrest concerning Donna's role in the transaction.
- (2) The prosecutor then called Ned, an experienced detective assigned to the Narcotics Bureau, who testified that high level drug dealers customarily use others to transport their drugs for them.

In the defense case, Donna testified that she was not a drug dealer and that she knew nothing about the cocaine. She stated that she was merely meeting Calvin because he was an old friend who had called to say he was coming to town and would like to see her.

- (3) Donna further testified that when she was in the car with Calvin, she found a receipt for the rental car, which showed that Calvin had rented it six months prior to his arrest. She offered a copy of the receipt into evidence. The court admitted the document in evidence.
- (4) On cross-examination, the prosecutor asked Donna whether she had lied on her income tax returns.

The prosecutor had no evidence that Donna had lied on her tax returns, but believed that it was likely on the basis that drug dealers do not generally report their income. Donna denied lying on her income tax returns.

Assuming that, in each instance, all the appropriate objections were made, should the evidence in numbers 1, 2, and 3 have been admitted, and should the cross-examination in 4 have been allowed? Discuss.

EVIDENCE
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Outline

I. Officer Will's Testimony

- A. Relevance: Compelling evidence of Donna's guilt
- B. Objection #1: Hearsay
 - 1. Co-Conspirator Exception
 - 2. Admission / Declaration Against Interest
- C. Objection #2: 6th Amendment Right to Confront
- D. Conclusion: Officer Will's testimony should not have been admitted.

II. Detective Ned's Testimony

- A. Relevance: Expert Testimony supporting the prosecution's case against Donna
- B. Objection: Improper expert testimony
- C. Conclusion: With the right foundation, Detective Ned's testimony should come in

III. Donna's copy of Calvin's car rental receipt

- A. Relevance: Supports Donna's claim that Calvin is solely responsible for the drugs
- B. Objection: Authentication / Best Evidence
- C. California Distinction
- D. Conclusion: Admissible in California

IV. Prosecutor's Cross-Examination re: income taxes

- A. Relevance: Questionable
- B. Objection: Improper Character Evidence
- C. No Extrinsic Evidence
- D. Conclusion: Not an abuse of discretion to allow this cross-examination question

EVIDENCE

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Answer

I. Officer Will's Testimony

A. Relevance: Compelling evidence of Donna's guilt

Officer Will testified that Calvin told him the cocaine in the car he was driving belonged to Donna, and that he was delivering the drugs to her at the time the officer stopped him for speeding. Officer Will's testimony is relevant because it supports the conspiracy and distribution charges against Donna.

B. Objection #1: Hearsay

Hearsay is an out-of-court statement being offered in court to prove the truth of the matter asserted. Calvin spoke to Officer Will outside of court, and Calvin's alleged statements were offered in court to prove the truth of the matter asserted. The court should not have admitted these statements over a defense objection, because no exception to hearsay applies to these facts.

1. Co-Conspirator Exception

This exception allows hearsay statements made by co-conspirators to be admitted. The problem for the prosecution is that only statements made in furtherance of the conspiracy are covered by this exception. Calvin's statements were made while he was in custody. Calvin made these statements with the hope of obtaining a favorable plea bargain, which has nothing to do with furthering the conspiracy.

2. Admission / Declaration Against Interest

Calvin's statements would be considered an admission, and thus would be deemed non-hearsay as to Calvin. They could also be characterized as a declaration against interest, which is an exception to hearsay. There is little doubt that Calvin's statements could be used against Calvin, since he waived his Miranda rights. At the same time, it is not reasonable to admit these statements in Donna's trial, because they are self-serving. Calvin was caught with a substantial amount of cocaine in the car he was driving. He had a strong incentive to try to put the blame on somebody else.

3. Conclusion

The court should not have admitted Officer Will's testimony over a hearsay objection.

C. Objection #2: 6th Amendment Right to Confront

The Sixth Amendment to the US Constitution guarantees to criminal defendants the right to confront adverse witnesses. In this case, Officer Will has presented Calvin's words to be used against Donna. Although Donna was free to confront Officer Will, it is Calvin, not the police officer, who implicated Donna in the drug trade.

Calvin's criminal case was pending when Donna's case went to trial. The prosecution should have put Calvin on the witness stand in Donna's case, even if doing so would have required them to grant immunity to Calvin in order to avoid running afoul of his Fifth Amendment rights.

D. Conclusion

Officer Will's testimony should not have been admitted. The trial court was wrong to do so.

II. Detective Ned's Testimony

A. Relevance: Expert Testimony supporting the prosecution's case against Donna

Detective Ned testified that high-level drug dealers customarily use others to transport their drugs for them. This testimony supports the People's case against Donna, because it is consistent with Calvin's claim that the cocaine belonged to Donna and that he was just transporting the drugs for her.

B. Objection: Improper expert testimony

Donna's only objection to the Detective's testimony is that Ned is not a proper expert. The judge has to determine whether or not the expert's testimony is likely to be helpful to the jury. Relevant factors include the technical complexity of the issue and the knowledge, experience and training of the expert.

Donna will have trouble showing that admitting Ned's testimony was an abuse of judicial discretion. Ned is an experienced detective assigned to the Narcotics Bureau. He has more specialized knowledge and experience about the inner workings of the illegal drugs trade than does an ordinary juror. It does not seem unreasonable for the judge to conclude that, on balance, the testimony of Detective Ned would be helpful to the jury.

It is true that the detective is a member of the same police department as Officer Will. One could well infer that Detective Ned would tend to offer testimony that would back up his professional colleagues. But this possibility of bias does not invalidate the detective's status as an expert or the possibility that a judge could find Ned's expert testimony helpful to the jury. The defense is free to expose Ned's bias, if any, and let the jury make up its mind about what weight to give the testimony.

C. Conclusion:

Ned's testimony should have been admitted.

III. Donna's copy of Calvin's car rental receipt

A. Relevance: Supports Donna's claim that Calvin is solely responsible for the drugs

Donna testified that she was not a drug dealer and didn't know anything about the cocaine. She said she met Calvin because he was an old friend, and claimed he had rented the car six months earlier. To support her claims, Donna produced a copy of a car rental receipt, which showed Calvin rented the car six months before he was arrested. The receipt is relevant because it would tend to show that Calvin lied when he said he was driving the car for Donna at the time of his arrest.

B. Objection: Authentication / Best Evidence

Donna will have to authenticate the document. She will have to establish that the document is what she claims it is. It is apparent that the document she is offering into evidence is a copy of the receipt she says she found in Calvin's car. Assuming Donna is able to testify that the document is a true and correct copy of the document she found in Calvin's car, that will probably be good enough to authenticate the document.

The Federal Best Evidence Rule requires that an original document be presented in court. If the receipt Donna is offering is the actual piece of paper she found in Calvin's car, the federal best evidence rule likely is satisfied. If she is merely offering a copy, a strict application of the best evidence rule could well lead to the document's exclusion. In this area of evidence law as well as in others, the judge's discretion will be deferred to unless a clear abuse of discretion is present.

C. California Distinction

California's version of the best evidence rule is more liberal than its counterpart in the Federal Rules of Evidence. In a California courtroom, it is even more likely that the judge's decision to admit the document would be deferred to.

D. Conclusion

The copy of the receipt should have been admitted into evidence.

IV. Prosecutor's Cross-Examination re: income taxes

A. Relevance: Questionable

The prosecutor asked Donna whether she had lied on her tax returns. This question does not appear

to be logically relevant to the case against Donna. The prosecutor has put Donna on trial for distribution of cocaine and conspiracy to distribute cocaine. Although it is common for drug dealers to lie about their income and thereby avoid paying taxes on their illicit trade, this question appears to confuse the case rather than to clarify it.

B. Objection: Improper Character Evidence

Donna will argue that the prosecutor's question is improper character evidence of specific bad acts. The problem with this claim is that the prosecutor's question goes to Donna's credibility and truthfulness. Furthermore, Donna is testifying in her own defense and the prosecutor is cross-examining her. The rules allow counsel reasonable latitude to challenge witnesses on cross-examination.

C. No Extrinsic Evidence

Assuming the court allows the prosecutor to ask the question, the prosecutor will not be allowed to pursue the matter further. Donna will be free to answer the question, and her answer will have to be judged on its face. Donna's compliance with the tax laws is collateral to the charges she is being tried on. The prosecutor cannot use extrinsic evidence to impeach Donna on a collateral matter.

D. Conclusion:

Although the question reasonably could have been deemed more prejudicial than probative, it would not be an abuse of discretion for the court to allow this cross-examination question

EVIDENCE

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Phil sued Dirk, a barber, seeking damages for personal injuries resulting from a hair treatment Dirk performed on Phil. The complaint alleged that most of Phil's hair fell out as a result of the treatment. At a jury trial, the following occurred:

A. Phil's attorney called Wit to testify that the type of hair loss suffered by Phil was abnormal. Before Wit could testify, the judge stated that he had been a trained barber prior to going to law school. He took judicial notice that this type of hair loss was not normal and instructed the jury accordingly.

B. Phil testified that, right after he discovered his hair loss, he called Dirk and told Dirk what had happened. Phil testified that Dirk then said: (1) "I knew I put too many chemicals in the solution I used on you, so won't you take \$1,000 in settlement?" (2) "I fixed the solution and now have it corrected." (3) "Don't worry because Insko, my insurance company, told me that it will take care of everything."

C. Phil produced a letter at trial addressed to him bearing the signature "Dirk." The letter states that Dirk used an improper solution containing too many chemicals on Phil for his hair treatment. P testified that he received this letter through the mail about a week after the incident at the barbershop. The court admitted the letter into evidence.

D. In his defense, Dirk called Chemist, who testified as an expert witness that he applied to his own hair the same solution that had been used on Phil and that he suffered no loss of hair.

Assume that, in each instance all appropriate objections were made. Did the court err in:

1. Taking judicial notice and instructing the jury on hair loss? Discuss.
2. Admitting Phil's testimony regarding Dirk's statements? Discuss.
3. Admitting the letter produced by Phil? Discuss
4. Admitting Chemist's testimony? Discuss

EVIDENCE
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Outline

I. Judicial Notice

- A. Rule of Judicial Notice
- B. The court had expert knowledge.
- C. Conclusion: The court erred.

II. Paul's Testimony About Defendant's Statement

- A. "I knew I put too many chemicals...take \$1,000 settlement."
 - 1. Relevance - Proves Plaintiffs Case
 - 2. Objection #1: Hearsay
 - 3. Objection #2: Offer to Compromise
 - 4. Conclusion: Inadmissible in federal court, severance OK in California.
- B. "I fixed the solution and now have it corrected."
 - 1. Relevance: Supports Plaintiff
 - 2. Objection: #1 Subsequent Remedial Measure
 - 3. Objection: #2 Hearsay
 - 4. Conclusion: Error to admit
- C. "Don't worry because Insco...will take care of everything."
 - 1. Relevance: Supports Plaintiff
 - 2. Objection: #1 Insurance evidence excluded on public policy grounds
 - 3. Objection: #2 Hearsay
 - 4. Conclusion: Error to admit

III. Letter

- A. Relevance: Supports Plaintiff
- B. Objection #1: Authentication / Best Evidence
- C. Objection #2: Hearsay
- D. Conclusion: Properly Admitted

IV. Expert testimony of Chemist

- A. Relevance: Supports Defendant
- B. Objection: Improper Expert Testimony
- C. Conclusion: Error to Admit

EVIDENCE

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Dan was arrested and charged with possession of heroin with intent to sell. Dan allegedly sold a small bag of heroin to Peters, an undercover officer at Guy's Bar and Grill. In his opening statement, Dan's lawyer said the evidence would show that Dan was entrapped. The following incidents occurred at trial:

1. The prosecutor called Wolf, a patron at Guy's, who testified over defense objection that Dan told him the night before the alleged sale that Dan intended to "sell some baggies" to Peters the next night.
2. The prosecutor called Peters, who testified that she was working as an undercover officer and received information that Dan was selling heroin at Guy's. She testified she went to Guy's two nights before the date of the arrest. Over defense objections, Peters testified she talked to Bob, another bar patron, who told her he had bought marijuana from Dan at Guy's the night before.
3. Peters testified she found out that Dan used e-mail. Over defense objections, she testified that she had e-mailed Dan a message to meet her at Guy's with a small bag of heroin on the night in question. Peters preserved a paper copy of her e-mail message, which, over defense objections, was introduced into evidence.
4. The defense called Dan as a witness. Dan testified that Peters had begged and pleaded with him to get heroin for her because she was suffering from withdrawal and needed a fix. On cross-examination, the prosecutor asked Dan, over defense objections: "Isn't it true that you were arrested by the police for selling marijuana in 1994?" Dan answered: "Yes, but they didn't have any evidence to make the charge stick." The prosecutor moved to strike Dan's answer.
5. The defense called Cal, Dan's employer, as a character witness. The defense laid a foundation showing that Cal had known Dan for ten years. Over the prosecutor's objection, Dan's lawyer asked Cal if he had an opinion on Dan's good moral character. Cal answered: "Yes, I and everyone else who have known Dan for many years know that he always tells the truth." The prosecutor moved to strike Cal's answer.

Assume all appropriate objections were made. Was the objected-to evidence in items 1 through 4 properly admitted, and should the motion to strike in items 4 and 5 have been granted?

Discuss.

EVIDENCE

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- I. Wolf's Testimony Re: Dan's statement
 - A. Relevance
 - B. Objection: Hearsay
 - 1. Admission - Nonhearsay
 - 2. Declaration Against Interest
 - 3. State of Mind / Present Intent
 - C. Conclusion: Properly Admitted
- II. Officer Peters' Testimony Re: Bob
 - A. Relevance
 - B. Objection: Hearsay
 - 1. Admission
 - 2. Declaration Against Interest
 - C. Objection: Improper Character Evidence
 - 1. Specific Bad Acts
 - 2. MIMIC Rule
 - D. Conclusion: Error to admit.
- III. Peters' Testimony and the E-Mail Message
 - A. Peters' Testimony
 - 1. Relevance
 - 2. Objection: Hearsay
 - 3. Conclusion
 - B. The E-Mail Message
 - 1. Relevance
 - 2. Authentication / Best Evidence
 - 3. Hearsay
 - 4. Conclusion
 - C. Conclusion: Properly Admitted
- IV. Dan's Cross-Examination
 - A. "Isn't it true that you were arrested..."
 - 1. Relevance
 - 2. Objection #1: Leading
 - 3. Objection #2: Improper Character Evidence
 - 4. Conclusion: Inadmissible
 - B. "Yes, but they didn't have any evidence."
 - 1. Relevance
 - 2. Objection: Non-Responsive
 - 3. Conclusion: Strike both question and answer.
 - C. Conclusion
- V. Cal's Opinion Testimony
 - A. Relevance
 - B. Objection: #1: Non-Responsive
 - C. Objection #2: Improper Character Evidence
 - D. Conclusion

EVIDENCE

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Mary Smith sued Dr. Jones, alleging that Jones negligently performed surgery on her back, leaving her partly paralyzed. In her case-in-chief, Mary called the defendant, Dr. Jones, as a witness. The following questions were asked and questions given:

- [1] Q. Now, you did not test the drill before you used it on Mary Smith's vertebrae, did you?
- [2] A. No. That's not part of our procedure. We don't ordinarily do that.
- [3] Q. Well, since Mary's operation, you now test these drills immediately before using them, don't you?
- A. Yes.
- [4] Q. Just before you inserted the drill into my client's spine, you heard Nurse Clark say "The drill bit looks wobbly," didn't she?
- A. No. I did not.
- Q. Let me show you what has been marked as plaintiff's exhibit No. 10. [Tendering document] This is the surgical report written by Nurse Clark, isn't it?
- A. Yes.
- [5] Q. In her report she wrote: "At time of insertion I said the drill bit looked wobbly," didn't she?
- A. Yes. That's her opinion.
- Q. OK, speaking of opinions, you are familiar with the book, General Surgical Techniques by Tompkins, aren't you?
- A. Yes.
- Q. And it is authoritative, isn't it?
- A. Some people think so.
- [6] Q. And this book says, at page 255, "Always test drill bits before using them in spinal surgery," doesn't it?
- A. I guess so, but again that's his opinion.
- Q. Now, you've had some trouble yourself in the past?
- A. What do you mean?
- [7] Q. Well, you were accused by two patients of having sexually abused them, weren't you?
- A. That was all a lot of nonsense.
- [8] Q. But you do admit that in two other operations which you performed in 1993 the drill bit which you were using slipped during back surgery, causing injury to your patients?
- A. Accidents do happen.

What objection or objections could Dr. Jones' attorney reasonably have made to the question or answer at each of the places indicated above by the numbers in the left hand margin, and how should the court have ruled in each instance? Discuss.

EVIDENCE
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Outline

- I. “Now, you did not test the drill before you used it...”
 - A. Objection: Leading
 - B. Conclusion: Overrule the objection for leading.

- II. “No. That’s not part of our procedure...”
 - A. Objection: Non-Responsive
 - B. Conclusion: Strike the answer after the word “No”.

- III. “Well, since Mary’s operation you now test these drills...”
 - A. Objection: Legal Relevance - Subsequent Remedial Measures
 - B. Conclusion: Sustain the objection.

- IV. “...you heard Nurse Clark say ‘The drill bit looks wobbly...’”
 - A. Objection: Hearsay
 - B. Exception: Present Sense Impression
 - C. Non-hearsay - Offered for its Effect on the Listener
 - D. Conclusion: Overrule the objection.

- V. “In her report she wrote...the drill bit looked wobbly.”
 - A. Objection: Improper Opinion
 - B. Objection: Hearsay
 - C. Exception: Business Records Exception
 - D. Conclusion: Overrule the Objection

- VI. “And this book says...always test drill bits...”
 - A. Objection: Hearsay
 - B. Exception: Learned Treatise
 - C. Conclusion: Overrule the Objection

- VII. “Well, you were accused...”
 - A. Objection: Irrelevant
 - B. Objection: Character Evidence / Specific Bad Acts
 - C. Objection: Hearsay
 - D. Conclusion: Sustain the Objection

- VIII. “But you do admit...”
 - A. Objection: Character Evidence / Specific Bad Acts
 - B. Conclusion: Sustain the Objection

EVIDENCE

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A car driven by Dunn collided with Empire Trucking Co.'s truck driven by Kemper. Kemper died at the scene. Dunn and Dunn's passenger, Paul, were seriously injured. Paul sued Empire for personal injuries. Paul attempted to serve Sigel, an Empire mechanic who was on duty the day of the collision, with a subpoena to appear at the trial, but the process server could not locate Sigel. The following occurred at the jury trial.

1. Paul called the investigating police officer, Oliver, who testified that he talked to Wit at the scene a half hour after the collision. Oliver wrote down Wit's statement and attached it to his report. Oliver testified that Wit told him that he ran over to the scene from the curb and spoke to the driver of the car, Dunn, who told Wit: "I'm not going to make it and I want you to know the truth - the truck ran a red light."
2. Paul called a court reporter who properly authenticated the trial transcript of Sigel's testimony in *People v. Dunn*, a reckless homicide case relating to the same incident, in which Sigel testified that on the morning of the incident he warned Kemper that the brakes on the truck were defective, but Kemper drove the truck anyway. The transcript was admitted into evidence.
3. Paul called Dunn who testified that she had a green light and was driving below the speed limit when defendant's truck struck her car.
4. Empire offered into evidence a properly authenticated copy of the conviction of Dunn for reckless homicide based on this incident. Paul's objections to this offer were sustained.
5. Empire asked Dunn on cross examination: "Q. Isn't it true your insurance carrier reached a settlement with Paul and as part of that written agreement, you agreed to testify on Paul's behalf today?" Paul's objections to this question were sustained.

Assume that all appropriate objections were made. Was the evidence in items (1), (2), and (3) properly admitted, and were the objections in (4) and (5) properly sustained? Discuss.

EVIDENCE
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Outline

- I. Officer Oliver's Testimony
 - A. Relevance - Supports Paul's theory of liability
 - B. Objection: Double Hearsay
 - 1. Wit's statement to Officer Oliver
 - a. Excited Utterance
 - b. Present Sense Impression
 - c. Catch-All Exception
 - d. Conclusion - Admissible
 - 2. Dunn's Statement to Wit
 - a. Dying Declaration
 - b. Excited Utterance
 - c. Present Sense Impression
 - d. Conclusion - Admissible
 - C. Conclusion - Court Properly Admitted
- II The Trial Transcript
 - A. Relevance - Supports Paul's theory of liability
 - B. Objection: Double Hearsay
 - 1. The Trial Transcript - former testimony - inadmissible
 - 2. Siegel's Statement - non hearsay
 - a. Effect on the Listener
 - b. Vicarious Admission
 - C. Conclusion - Court Erred when it admitted the transcript
- III Dunn's Testimony
 - A. Relevance - Supports Paul's theory of liability
 - B. Objection: lay opinion - bias
 - C. Conclusion - Court properly admitted
- IV Dunn's Conviction for Reckless Homicide
 - A. Relevance - Supports Defense theory of liability
 - B. Objection: Improper Character Evidence for Impeachment
 - C. Objection: Hearsay
 - D. Conclusion - Court Improperly Excluded Dunn's conviction
- V Empire's Cross-Examination of Dunn
 - A. Relevance - Shows Dunn's Motive to Lie
 - B. Objection: Leading Question - Compound Question
 - C. Objection: Policy Exclusion re Insurance, Settlement Negotiations
 - D. Conclusion - Court Improperly Excluded Empire's Cross-Examination of Dunn

EVIDENCE

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Don is being prosecuted criminally for committing an armed assault against Victor. The evidentiary issues presented in his jury trial are based on the following chronology of events:

1. June 5, 1985: Don was convicted of bribery and received a three-year sentence which he served in full without parole;
2. June 1, 1997: Victor was assaulted, allegedly by Don;
3. June 4, 1997: Victor identified Don from a lineup as the person who assaulted him (Victor);
4. June 6, 1997: Don was arrested and charged with the assault of Victor;
5. Aug. 1, 1997: Don confessed privately to his long-time fiancée, Bernice, that he (Don) is the one who assaulted Victor;
6. Aug. 15, 1997: Detective Phillips, who had been present at the June 4 lineup, testified at the preliminary hearing that Victor identified Don at the June 4 lineup, and Phillips was cross-examined by Don's attorney;
7. Sept. 1, 1997: Don and Bernice were married;
8. Sept. 15, 1997: Detective Phillips was shot and killed in a hunting accident;
9. Oct. 1, 1997: Don, again privately, confessed to Bernice that he (Don) is the one who assaulted Victor;
10. Nov. 1, 1997: Don and Bernice were divorced;
11. Dec. 1, 1997: The case against Don comes to trial;
12. Dec. 1, 1997: Victor testifies at trial, remembers making a lineup identification, but cannot make an in-court identification;
13. **Dec. 3, 1997: The prosecution seeks to introduce a certified transcript of the preliminary hearing testimony of Detective Phillips;**
14. **Dec. 4, 1997: The prosecution calls Bernice, seeking to have her testify to the Aug. 1 and Oct. 1 confessions of Don, and both Bernice and Don raise marital privilege objections;**
15. **Dec. 8, 1997: The prosecution calls a witness, seeking testimony as to Victor's reputation for peacefulness in the community;**
16. Dec. 9, 1997: The prosecution rests; and
17. **Dec. 10, 1997: Don testifies in his own defense, and on cross-examination the prosecution seeks to impeach Don with his 1985 bribery conviction.**

Assuming that all appropriate objections were made, should the court admit the evidence offered by the prosecution in numbers 13, 14, 15, and 17, as specified above? Discuss.

EVIDENCE
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Outline

- I. Certified transcript of Detective Phillips' preliminary hearing testimony
 - A. Relevance - evidence of Don's guilt.
 - B. Authentication / Best Evidence
 - C. Objection #1: Double Hearsay
 - 1. Victor's statement: A prior identification is not hearsay.
 - 2. Detective Phillips' testimony:
 - a. Detective Phillips was under oath.
 - b. Detective Phillips is unavailable.
 - c. Don was able to cross-examine Detective Phillips
 - 3. Conclusion
 - D. Objection #2: 6th Amendment right to confront.
 - E. Conclusion: Admissible
- II Bernice's testimony about the Don's August 1 and October 1 confessions:
 - A. Relevance: convincing evidence of Don's guilt.
 - B. Objection #1: Hearsay
 - C. Objection #2: Marital Privilege
 - 1. The August 1 confession:
 - 2. The October 1 confession:
 - D. Conclusion: Admit only the August 1 confession.
- III. Victor's Reputation for Peacefulness
 - A. Relevance
 - B. Objection: Improper Character Evidence
 - C. Conclusion: Inadmissible in Prosecution's case in chief
- IV Don's Bribery Conviction
 - A. Relevance
 - B. Objection #1: Improper Character Evidence: 10 year rule
 - C. Objection #2: More prejudicial than probative
 - D. Conclusion: Not an abuse of discretion either to admit or exclude.

EVIDENCE

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Dave has been charged with one count of selling cocaine on May 30 of this year. The key government witness against Dave is Carl Smith. The government's theory is that Dave and Carl together sold substantial quantities of illegal drugs, including the particular sale which is the subject of this indictment. Carl has pleaded guilty to a lesser offense and has agreed to testify against Dave. At the jury trial, Carl was called as the first witness and the following questions were asked and answers given:

[Direct Examination of Carl]

Q: What is your name?

A: Carl Smith.

Q: Where do you live?

A: 1117 North University, here in town.

Q: Are you acquainted with the defendant Dave?

[1] A: Yes, we have been selling cocaine together for years.

Q: Directing your attention to the evening of May 30 this year at approximately 7:00 pm, where were you?

[2] A: I got home at about 7:00 that night. When I got there, I found a message on my answering machine from Dave.

[3] Q: What message had Dave left you?

A: He said that he had a guy who wanted a kilo of cocaine and that we were to meet him at the motel on the edge of town later that night. So I called Dave back and we worked out the details about where the two of us were going to meet before going to the motel.

Q: What happened then?

A: We met up together and took the coke to the motel. I went in and made the sale while Dave waited outside in the car.

[Carl proceeded to testify in detail about the sale of cocaine]

Q: Now, you were arrested the next day for the sale of that cocaine, weren't you?

A: Yes.

[4] Q: At that point, after you were asked to cooperate with the government, did you plead guilty to possession of cocaine and agree to testify truthfully at this trial?

A: Yes.

Q: Did you testify before the grand jury in this matter?

A: Yes I did.

[5] Q: Was your testimony there the same as your testimony here today?

A: Yes, it was. I told them the truth just like I'm telling it today.

[Cross-examination of Carl]

[6] Q: Now, you are the same Carl Smith who was convicted of criminal assault in 1994, aren't you?

A: Yes.

Q: And you've been on probation for that charge since 1994, haven't you?

A: Yes.

Q: One of the conditions of your probation was that you not commit any criminal offense, wasn't it?

A: Yes.

[7] Q: And you told your probation officer last week that you haven't done anything illegal since 1994, didn't you?

A: Yes.

Q: And that was a lie, wasn't it?

A: Yes.

At each of the seven indicated points, what objection or objections could reasonably have been made, and how should the court have ruled? Discuss.

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Outline

- I. “Yes, we have been selling cocaine together for years”
 - A. Non-responsive - Sustained
 - B. Character: Prior bad acts - Overruled
 - C. Conclusion

- II. “I got home at about 7:00...” - Non-responsive - Sustained

- III. “What message had Dave left you?”
 - A. Hearsay
 - B. Authentication / Best Evidence
 - C. Conclusion

- IV. “At that point...”
 - A. Compound - Sustained
 - B. Leading - Sustained
 - C. Assumes Facts Not In Evidence - Sustained
 - D. Conclusion

- V. “Was your testimony there the same...”
 - A. Hearsay - Sustained
 - B. Improper Bolstering - Sustained
 - C. Conclusion

- VI. “Now you are the same Carl Smith...”
 - A. Leading - Overruled
 - B. Character: Prior Conviction - Probably Sustained
 - C. Conclusion

- VII. “And you told your probation officer...”
 - A. Hearsay
 - B. Character: Prior Bad Act
 - C. Conclusion

EVIDENCE

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Don has been charged with murder. The prosecution claims that Don started a fistfight in a boardinghouse where he and the victim, Vic, were staying and that when Vic seemed to be getting the better of him, Don drew a dagger and stabbed Vic. Don testifies in his own defense and claims that Vic started the fight, and that he (Don) drew the dagger only when he became afraid that Vic was going to “beat my brains out.”

Should each of the following items of evidence offered by the defense be admitted into evidence? Why or why not? Discuss.

1. Don’s testimony that several other residents of the boardinghouse told him that Vic was out to get him.
2. Testimony of Fred, that he had seen Vic start many other fights.
3. Testimony of Mindy, the boardinghouse manager, that in her opinion Don is ordinarily a nonviolent person, and that she remembers several occasions when Don “walked away” from potentially explosive situations in the boardinghouse.

Should each of the following items of evidence offered in rebuttal by the prosecution be admitted into evidence? Why or why not? Discuss.

4. Evidence in the form of a certified judgment that Don was convicted of assault with a deadly weapon eight years ago. (The prosecution had not asked Don about this conviction while he was on the stand.)
5. Testimony by Smith, another boardinghouse resident with a long acquaintance with both Vic and Don, that Smith heard Don lie to a census taker about his age, his family, and other matters. (The prosecutor had asked Don about these incidents during his testimony and Don had denied them.)
6. Testimony by Smith that in his opinion Vic was a very peaceful and nonaggressive person, but that Don has “a very short fuse.”

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Outline

- I. Don's Testimony
 - A. Relevance: Supports Dan's self-defense claim.
 - B. Objection: Hearsay
 - C. Conclusion: Admissible as nonhearsay to show Don's state of mind.

- II. Fred's Testimony
 - A. Relevance: Supports Dan's self-defense claim.
 - B. Objection: Improper Character Evidence
 - C. Conclusion: Specific Bad Acts Evidence is Inadmissible.

- III. Mindy's Testimony
 - A. That Don is Non-Violent
 - 1. Relevance: Supports the Defense
 - 2. Objection: Improper Opinion Evidence
 - 3. Conclusion: Admissible
 - B. That Don "Walked Away"
 - 1. Relevance: Supports the Defense
 - 2. Objection: Improper Character Evidence
 - 3. Conclusion: Specific Acts Evidence is Inadmissible.

- IV. Certified Judgment
 - A. Relevance: Supports Prosecution, Rebuts Defense Claims
 - B. Objection: Authentication
 - C. Objection: More Prejudicial than Probative
 - D. Objection: Improper Rebuttal Evidence
 - E. Conclusion: Inadmissible

- V. Smith's Testimony That Don Lied
 - A. Relevance: Suggests Defendant is not Truthful
 - B. Objection: Hearsay
 - C. Objection: Improper Character Evidence for Rebuttal
 - D. Conclusion: Inadmissible

- VI. Smith's Opinion
 - A. Relevance: Supports Prosecution Theory
 - B. Objection: Improper Opinion Evidence
 - C. Objection: Improper Character Evidence
 - D. Conclusion: Admissible

EVIDENCE

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Mary sued Trucking Company (TruckCo) for the wrongful death of her husband, Hal. Hal was killed when a log truck driven by Boyd crossed the center line and struck Hal's car. Boyd was severely injured and died a week later from complications. TruckCo asserts that Boyd was an independent contractor hauling logs for TruckCo and not a TruckCo employee. At the trial by jury, the following occurred.

1. Plaintiff called Tom, TruckCo's president, as a hostile witness. Plaintiff asked the following question: "Didn't you call Mary the day after the crash, tell her it was Boyd's fault, and offer to pay Hal's funeral expenses?"
2. Plaintiff then asked Tom: "Didn't TruckCo have a liability insurance policy covering the truck driven by Boyd at the time of the collision?"
3. Plaintiff called Officer Reno. Reno testified that Boyd had given him a statement after the crash. Reno then read the following from his report: "Boyd stated he fell asleep at the wheel and ran over the center line."
4. Mary testified that Hal loved her and was a kind and considerate spouse. Defendant then called Smith, Mary and Hal's long-time neighbor, and asked Smith the following: "What was Hal's reputation in the community, prior to the crash, for fighting with Mary?" Plaintiff's objection was sustained. If allowed to testify, Smith would have testified that Hal had a reputation for being quarrelsome and physically violent with Mary.

Assume that in each instance all appropriate objections were made.

1. Was the question asked in paragraph 1 objectionable? Discuss.
2. Was the question asked in paragraph 2 objectionable? Discuss.
3. Should Reno have been permitted to read from his report as set forth in paragraph 3? Discuss.
4. Was the objection in paragraph 4 properly sustained? Discuss.

EVIDENCE
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Outline

- I. Tom's alleged admission and offer to pay Hal's funeral expenses
 - A. Relevance: establishes liability
 - B. Objection: hearsay
 - C. Objection: public policy
 - D. Conclusion: Inadmissible in federal court, admit only the admission in CA
- II. TruckCo's liability insurance on Boyd's truck
 - A. Relevance: attacks the defense that Boyd was an independent contractor
 - B. Objection: public policy
 - C. Conclusion: admit to show ownership and control
- III. Reno's testimony about Boyd's statement
 - A. Relevance: establishes liability.
 - B. Objection: double hearsay.
 - 1. Reno's report
 - 2. Boyd's statement
- IV. The objection to Smith's testimony was improperly sustained.
 - A. Relevance: attacks Mary's loss of consortium claim.
 - B. Objection: Improper Character Evidence
 - C. Conclusion: Smith's statement should have been admitted.