

**FEBRUARY 1998 CALIFORNIA BAR EXAMINATION  
ESSAY QUESTIONS AND SELECTED ANSWERS**

*Evidence*

**QUESTION**

Don is being prosecuted criminally for committing an armed assault against Victor. The evidentiary issues presented in his jury trial are based upon 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. August 1, 1997: Don confessed privately to his long-time fiancée, Bernice, that he (Don) is the one who assaulted Victor;
6. August 15, 1997: Detective Phillips, who had been present at the June 4 lineup, testified at a preliminary hearing that Victor identified Don at the June 4 lineup, and Phillips was cross-examined by Don's attorney;
7. September 1, 1997: Don and Bernice were married;
8. September 15, 1997: Detective Phillips was shot and killed in a hunting accident;
9. October 1, 1997: Don, again privately, confessed to Bernice that he (Don) is the one who assaulted Victor;
10. November 1, 1997: Don and Bernice were divorced;
11. December 1, 1997: The case against Don comes to trial;
12. December 1, 1997: Victor testifies at trial, remembers making a lineup identification, but cannot make an in-court identification;
- 13. December 3, 1997: The prosecution seeks to introduce a certified transcript of the preliminary hearing testimony of Detective Phillips;**
- 14. December 4, 1997: The prosecution calls Bernice, seeking to have her testify to the August 1 and October 1 confessions of Don, and both Bernice and Don raise marital privilege objections;**
- 15. December 8, 1997: The prosecution calls a witness, seeking testimony as to Victor's reputation for peacefulness in the community;**
16. December 9, 1997: The prosecution rests; and
- 17. December 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.

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**ANSWER A**

1) Transcript of Detective Phillips

The transcript of Detective Phillips will be objected to as double hearsay (hearsay within hearsay). To be admissible an exception must be found for both the transcript and Victor's non verbal assertion.

Hearsay is an out of court statement introduced to prove the truth of the matter asserted. Unless it falls under an exception, it is excluded.

Victor's Identification a "statement" can be non verbal conduct intended to assert something. Here Victor's identification of Don is an assertion that Don is the one responsible for the assault. This assertion was made out of court and is therefore hearsay.

However, a prior identification is excluded from the hearsay that must not be admitted. Because it is an exception, it will be admitted.

Detective Phillips' Testimony Detective Phillips' testimony that Victor identified Don was an out of court statement offered for the truth of the matter asserted, and is therefore hearsay. If there is no exception to the hearsay rule, it must be excluded.

Former Testimony Phillips' testimony may be admissible under the former testimony. The prosecution must show:

A) The former testimony was given under oath and subject to penalty of perjury in a judicial proceeding. Here, the preliminary hearing was likely conducted under oath, and the preliminary hearing is a sufficient proceeding.

B) The declarant must be unavailable for this exception. Here, the detective is dead, and is therefore unavailable to testify in the present proceeding.

C) The party who it is offered against must have had the opportunity to cross-examine the declarant in the former proceeding. Here, Don's attorney did cross-examine Phillips.

Therefore, because victim's identification and Phillips' testimony falls under hearsay exceptions, it should be admitted.

The Supreme Court has ruled that these hearsay exceptions do not violate a defendant's right to confront witnesses.

Relevance The transcript is relevant because it has a tendency in reason to show that Don is the one who committed the assault against victim.

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2) Claim of Marital Privilege

Relevance - (Tendency in reason to make a fact more likely than not). The confession made by Don to Bernice is relevant to show that Don committed the crime.

Hearsay Don's confession is an out of court statement offered for the truth of the matter asserted and is therefore considered hearsay.

Admission An admission is a statement that implicates one's penal or pecuniary interests and is offered against a party opponent. This is not considered hearsay under the rules.

Here, Don admitted to Bernice that he assaulted victim. Don is also a party opponent, and the admission is therefore not hearsay and is admissible absent privilege.

This is not a declaration against interest because Don is available.

Privilege

Spousal Privilege

A spouse has a privilege against testifying in a criminal matter against his or her defendant spouse. The government cannot compel the innocent spouse to testify if unwilling against the charged spouse. The testifying spouse holds the privilege and there must be a valid marriage at the time of trial.

Here there is no valid marriage because Bernice and Don are divorced. Therefore there is no privilege to claim. (And Don had no right to claim it in any regard).

Marital Privilege

The marital privilege protects confidential communications between spouses. Both hold the privilege. Here there were two different confessions.

A) August 1, 1997 - there was no marriage, therefore no reliance on the confidence of marriage.

B) October 1 - there was a valid marriage, and it appears the communication was made in confidence. Therefore either spouse can claim this privilege.

Therefore the prosecution can properly inquire as to the August statement only.

3) Prosecution's Introduction of Victim's Character

Normally character evidence is not admissible to prove conduct.

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However, if a defendant introduces evidence such as a claim of self-defense, the prosecution may introduce evidence as to the victim's character to rebut this.

Here it is unclear if Don has claimed self-defense. If he hasn't, the character evidence is inadmissible.

If Don did introduce this theory, then the prosecutor can introduce evidence of victim's character that is relevant to rebut the charge.

Here, peacefulness would tend to rebut a claim of self-defense and is therefore relevant and admissible.

Additionally, the offering of reputation or opinion evidence is always admissible to prove character, once character is at issue.

Here, Don opened the door (possibly) and the evidence is therefore admissible.

4) Impeachment of Don

When a witness testifies, the other side is entitled to impeach that witness's credibility. When impeaching a witness's credibility, the other side can introduce evidence that puts the witness's credibility in doubt.

Felony Felony convictions are permitted to impeach a witness. However, the judge has discretion to determine if it is more prejudicial than probative, and if over 10 years old, will not likely be admitted.

Here Don was convicted of Bribery (a felony because punishable by more than one year in prison). However, the conviction is more than 10 years old and is less probative. But the court will measure the 10 years by the date of conviction, or the date released, whichever is later.

Here, the release date was nine years ago, and can be admitted.

Prejudicial The judge has discretion on this, and if the witness is a criminal defendant, he may exclude as too prejudicial.

Here Don is a criminal defendant, and the judge may exclude.

Prior Convictions of Untruthfulness A conviction for a falsity (fraud crime) can be admitted to impeach a witness. The court has no discretion on this type of evidence.

Here Don was convicted of bribery, a falsity offense, therefore it should be admitted.

**ANSWER B**

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1. Detective Phillips' Testimony Transcript

Relevance

The issue is whether the certified transcript is relevant. The testimony contained is logically relevant to show that Victor identified Don as his assaulter. It is legally relevant because it shows high probative value that Don was in fact identified.

Reliability/Authentication

The document is reliable because it contains testimony by Detective Phillips of which he had firsthand knowledge.

Similarly, the document itself is self-identifying because it is a certified official public record.

Best Evidence

The Best Evidence Rule requires presentation of the original document whenever its writings are at issue. However, certified copies of official records will meet this rule where the original is customarily unavailable, such as official public records.

Here, this is a certified public record, and thus it meets the Best Evidence Rule unless its authenticity is challenged. No such challenge was raised.

Hearsay

The next issue is whether the record of testimony is hearsay. Hearsay is any out-of-court statement offered for its truth.

Here, the testimony contained within the transcript is offered to prove the truth of whether Victor said he identified Don as the assaulter. This is actually double hearsay, and the statement should not come in absent exceptions for both hearsay statements.

Non-Hearsay

Don's identification by Victor is non-hearsay because it is a prior identification. Prior identifications by the original declarant are non-hearsay because they are offered for what was said, not their truth.

Thus, Don's statement to Phillips is admissible.

Exception - Former Testimony

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Since Victor's identification is non-hearsay, it must be established that Phillips' statement in the transcript is admissible. Phillips' statement constitutes former testimony, which is an admissible hearsay exception.

Former testimony is admissible where the declarant is unavailable, and it was given under oath in a proceeding where cross-examination was available.

Here, Phillips is dead, and his statement was made in a preliminary hearing where cross-examination was available. In such an instance, the certified transcript from the hearing is the proper method of admitting such former testimony.

Thus, the transcript was properly admitted.

#### 2. Testimony of Bernice

##### August 1 Statement and October 1 Statement Relevance/Admissible Non-Hearsay

If Bernice is permitted to testify, the admissions of Don will come in as evidence of his guilt and are thus relevant. They would come in as admissions by a party opponent (Don), which is non-hearsay.

##### Privilege

Thus, the issue is whether Bernice and/or Don can invoke some form of marital or spousal privilege to keep Bernice from testifying.

##### Statements Before Marriage-Spousal Privilege

The August 1 statement is a statement before marriage and would thus need to qualify under the spousal privilege. The spousal privilege protects any communications before, during or after marriage while the parties are married. Either spouse may invoke the privilege as to their own testimony regarding the other spouse.

Here, Bernice would be testifying, so she could invoke the right not to testify. However, Bernice and Don were not married at the time she was called December 4, 1997.

Thus no spousal testimony should be allowed for the August 1, 1997, communication. The court's admission of this evidence over her objection is proper.

##### Confidential Marriage Communications

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The October 1, 1997 was a confidential statement during marriage and thus falls under the marital privilege rule. Under the rule, confidences communicated to a spouse during marriage will attach regardless of current marital status. The non-testifying party - Don - hold this right to invoke the privilege.

Since Don's statement was given to Bernice privately during marriage, he can revoke the privilege to keep out this statement by Bernice.

Thus, the October 1 statement should not have been allowed.

3. Witness's Testimony as to Victor's Reputation

Relevance

This evidence is relevant to prove whether Victor might have been the first aggressor and could negate a self-defense argument by Don.

Character Evidence

Character evidence of reputation cannot be offered on direct unless the defendant has put his character into issue. Then such evidence may be allowed to repute a showing of the plaintiff's bad character offered by the defendant.

Impeachment

If offered for impeachment to rebut a showing of the plaintiff's bad character by the defendant, such evidence may come in by the prosecution on cross-examination.

Reliable

Such evidence would only be admissible if the witness had personal knowledge of the plaintiff's reputation for peacefulness in the community.

Thus, the evidence should have been excluded absent an attack on plaintiff's character by the defendant.

4. Impeachment of Don

Impeachment

The issue is whether a prior bribery conviction can come in to impeach Don. A prior conviction involving truth or veracity of the witness can come in regardless of the time since the conviction. Crimes involving felonies over 10 years are generally excludable by the judge at his discretion for policy reasons.

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Thus, if Don is being impeached based on the truth or veracity of what he testified to, the conviction record comes in. However, a felony conviction of over three years and over 10 years ago (1985) should not come in if offered to impeach Don on some other testimonial matter not involving truth or veracity.

Relevancy

The evidence is relevant because it could defeat Don's defense if admissible.

Reliability

The conviction is reliable as to its contents if certified and authenticated as an official public record.

Hearsay

No hearsay problem exists if the record is official, public, and certified.

Thus, the record likely should have been admitted as a crime involving veracity and truth, as to Don's defense of assault.