JULY 1999 CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS

Evidence

QUESTION

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 her witness. The following questions were asked and answers 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 you?
A. No. I did not.
Q. Let me show what has been marked as plaintiff's exhibit number 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. Okay, 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

ANSWER A

1. "You did not test the drill, did you?"

1. Objection: Relevance
Dr. Jones's attorney may agree that the evidence is irrelevant. Evidence is relevant if it has any tendency to prove or disprove any fact of consequence to the outcome of the litigation. If Dr. Jones did not test the drill bits, this would tend to prove his negligence, therefore the objection would be overruled.

Objection: Leading
A leading question is one which suggests the answer, such as a question phrased "Didn't you?" Leading questions are not allowed on direct examination. However, leading questions on direct, as here, are allowed when the witness is the adverse party, an infant, insane, or in other circumstances not relevant here. Since this leading question is of Dr. Jones, Mary's opposition, the leading question is allowed. Objection overruled.

Objection: Misleading/Argumentative
A question phrased with a negative or double negative may mislead the witness and the jury. It may also confuse the witness and not allow him to answer correctly. Because it appears that the question here, although negatively phrased, is clear, the objection will be overruled.

2. "NO. THAT'S not part of our procedure. . ."

Objection - Non responsive
A witness must answer only the question posed to him. If a question calls for a yes or no answer, the answer that is in excess of yes or no may be objected to.

Here, Dr. Jones answered more than yes or no, and the objection will be sustained. The judge should instruct the jury to disregard the non responsive portion of the answer.

Motion to Strike
Dr. Jones may move to strike the non responsive answer from the record. Mary's attorney will correctly argue that a motion to strike will be denied to the non examining party, Dr. Jones.

3. "Well, since Mary's operation, you now test these drills immediately before using them, don't you?"

Objection: Relevance
The question calls for an answer indicating that the defendant changed practices after the injury. It is clearly relevant because it tends to prove the negligence of Dr. Jones.

"Legal Relevance"
Dr. Jones's attorney will argue that otherwise relevant evidence should be excluded if it is "legally irrelevant." This evidence will be excluded for public policy reasons.

Subsequent Remedial Measures
Dr. Jones's attorney will successfully argue that evidence of defendant's subsequent remedial measures (taken after plaintiff's injury) is inadmissible to prove negligence on the part of the defendant. Such measures are excluded because public policy favors these measures. Evidence of subsequent remedial measures is admissible to prove ownership or control of instrumentalities causing harm.

The evidence sought here, of the new process Dr. Jones uses in testing is being offered to prove negligence of Dr. Jones. It is therefore inadmissible for public policy reasons and the objection will be sustained.

You heard Nurse say, "The drill looks wobbly?"

4. Objection: Hearsay

This question offers the statement of another. It may be hearsay.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Hearsay will be excluded unless the evidence fits into an exception to the hearsay rule.

Admission of a Party Opponent
A statement that amounts to an admission of a party offered against that party is admissible non hearsay under the federal rules and an exception to the hearsay rule in most states.

Here, the statement is made by Nurse Clark, who is not a party opponent.

Vicarious Admission
When a statement is made by the agent or employee of a party opponent, the statement will be deemed admission of the party opponent where it is made during the agency or employment in the scope of agency or employment. If Nurse is deemed an agent or employee of Doctor Jones, the statement will be admissible against him as an admission.

Silence as Adoptive Admission
Where a statement is not made by the party opponent, it may constitute an admissible non hearsay admission if the doctor's silence is deemed adoptive of the admission. Dr. will be deemed to have adopted the statement if his silence was unreasonable in that normally, one would disagree at the time the statement was made. Since a

normal doctor would probably address Nurse after a statement about the surgical equipment, Dr. Jones adopted the statement by Nurse, and here too, the admission is admissible non hearsay.

Objection: Hearsay
If the Nurse's statement is not an admission by Dr. Jones, it must be excluded unless another exception applies.

State of Mind Exception
If the out-of-court statement of another is offered not for its truth, but to prove its effect on the listener, it is admissible hearsay.

Here, the statement is offered to prove that the Doctor was on notice that the drill may have been wobbly, his state of mind. Therefore, the statement should be admitted.

Present Sense Impression
If otherwise inadmissible, hearsay will be admitted if it was made by declarant while perceiving an event, and was made about the event. The availability of the declarant is irrelevant.

Here, Nurse made the statement while perceiving it, therefore it is admissible as a present sense impression.

Objection Overruled
"In her report she wrote. . ."

5. Objection: Hearsay
Double hearsay
In this question, Mary is attempting to offer an out-of-court statement (the Nurse's quote in 4. supra) contained in another out-of-court statement (the report).

This constitutes double hearsay, and at each level, an exception to hearsay exclusion must apply or the statement is inadmissible.

Nurse's Quote
Per 4. supra, Nurse's statement about the wobbly drill bit is admissible.

Nurse's Report
The report is being offered to prove the truth of the matter asserted. (e.g. that nurse wrote her observations in the report). It is therefore hearsay and should be excluded unless an exception applies.

Business Records

Business records are admissible as an exception provided a proper foundation is laid. The record will be admissible if the proponent shows that 1) Recorder was under a duty to record the record 2) it was recorded as a normal business practice, 3) Recorder or another can verify the record.

Since no such foundation was laid, the business record is inadmissible at this point in the trial.

Objection sustained.

6. "And this book says. . ."
Objection: Hearsay
This is an out-of-court statement offered to prove that Dr. Jones was negligent.

Exception: Authoritative Treatise
If a witness verifies the authoritative nature of a "learned treatise" it may be read into evidence. This book was properly identified by Dr. Jones, and therefore the evidence is admissible. Objection overruled.

7 "Well, you were accused."
Objection Character Evidence/Improper Impeachment
Character evidence in civil cases cannot be used to prove conduct inconformity therewith. Evidence of prior bad acts may not be admitted.

A party may impeach the credibility of a witness by inquiring about the witness's prior bad acts. If these bad acts are probative of truthfulness, and such probative nature is not substantially outweighed by prejudice to the part, it will be admitted.

The evidence here about sexual abuse is not probative of truthfulness, and its prejudice to Dr. Jones is substantial.

It should therefore be excluded.

Objection sustained.

8. Objection: Improper Character Evidence
Where defendant's character is not in issue in a civil case, as here, evidence of prior bad acts is not admissible to prove conduct in conformity thereof. The evidence is being sought to be admitted here is of Dr. Jones's prior, possibly negligent, activities and is offered to prove that Doctor acted negligently in this case. It is, there, improper character evidence, since Dr. Jones's character is not "in issue."

Objection sustained

ANSWER B

1. Jones's attorney could argue that this question was both leading and argumentative. These arguments would be rejected, because leading questions are admissible when

examining a hostile witness, even on direct examination (this applies also to many questions below) and the question is not overly argumentative given that the attorney could also argue the question is misleading or confusing because it uses a double negative. Objection sustained - question should be rephrased.

2. Jones's attorney could argue this evidence is not legally relevant, but probably it is. Evidence of procedures is circumstantial evidence of what happened here, as Jones endorsed the procedure.

   Jones's attorney could also argue the answer was non responsive to the question asked. Probably sustained Jones was asked what he did, not about procedures.

   Jones's attorney would also argue this request inadmissible character evidence. However, this is more likely to be habit evidence, assuming it is in fact (properly) attributed to Jones himself evidence of something Jones always did in a specific situation. Thus, it is admissible.

3. Jones's statement is logically relevant it makes more likely that Jones was negligent with regard to the drill (a fact of consequence).

   However, evidence of subsequent remedial measures by Jones is inadmissible to prove his negligence. The new procedure clearly seems remedial, and as there is no apparent purpose for the evidence except to show fault, it is excluded.

4. Hearsay
   Jones will argue this question involved inadmissible hearsay evidence. Hearsay is an out-of-court statement repeated in court and used to prove the truth of the matter asserted. C's operating room statement is apparently used to prove its truth - that the needle was wobbly. Smith could argue the statement was used to show it was made - that Jones had notice of the wobbly bit. But as Jones denies that the bit was wobbly, this is incorrect.

   Exceptions

1. Admission by a party, - opponent - it could be argued that Clark was an agent of Jones, and thus that her statement could be imputed to him as a party - admission (non hearsay). But it appears Clark was rather a hospital employee. Thus, the statement is not an admission by a p-o.

2. Present sense impression - it appears Clark's statement was a present sense impression. It was made while she was observing an event and described what she observed. (We have no evidence she was excited, although it likely would have been reasonable to be excited, and so this isn't an excited utterance.) As a present sense impression, it would be admissible.

Objection denied.

3. Hearsay

The statement from Clark's report is double hearsay. It is an out of court statement which contains another out of court statement.

Both statements are being used to prove the truth of what they assert. The statement from the report is being used to show that Clark did in fact say that the bit was wobbly. As noted above, the statement by Clark in the operating room was used to prove the bit was wobbly. Thus, the statement in the report is admissible only if both statements fall under a hearsay exception. But, as noted above, the operating room statement is admissible as a present sense impression. This leaves the report statement.

Business Record

Clark's report is probably admissible as a business record. It was made pursuant to established hospital procedures, by one with a business duty to do the recording, soon after the events recorded took place. There may, in fact, be an exception for the operating room statement by Clark in the business record exception because the statement was made and reported by one with a business duty to be truthful (the oddity being that this was Clark reporting to Clark). But this is not necessary.

Authentication/Best Evidence Rule

Clark's report is adequately identified. Jones, a person with personal knowledge of what the report is, testifies that it is what it is claimed to be. This is adequate authenticating evidence.

The Best Evidence rule requires that, to prove the contents of a writing, that an original (or proper copy) of the writing be used. It seems to apply here because Jones's knowledge of the contents of the report is based only by looking at it. However, it appears that the original report is available. Thus, it should (assuming as above it is admissible) be admitted into evidence. Jones's testimony is thus unnecessary, and should be struck. If Jones were being asked about his personal knowledge of Clark's operating room statement, the Best Evidence rule would not bar the testimony just because a writing exists, but here Jones is just being asked to read from the report. Thus, inadmissible.

4. Hearsay

The Tompkins book is also hearsay. It is being used to prove Jones should've tightened the drill. Thus, it is admissible only if it falls within an exception.

Learned Treatise

The only applicable exception is for learned treatises. The treatise must be introduced to the expert (authenticating it as well) which has occurred here. But, while the expert need not have relied on the treatise, it must be shown to be

reasonably authoritative in the field. Here Jones just said that some people think this is authoritative. Is this enough evidence? Probably, given that the standard doesn't require complete authority and Jones has an incentive to entirely deny it. Thus, the statement is substantively admissible as a learned treatise.

Impeachment
The book could be used to impeach Jones. Any party is now allowed to impeach a witness. As for impeachment, the treatise would still be used to prove truth, but we have established it isn't inadmissible hearsay. It is extrinsic evidence but extrinsic evidence may be used to impeach by contradiction on a non collateral matter. Jones's negligence isn't collateral thus, the treatise can be used to contradict and thus impeach Jones.

Best Evidence Rule (Auth.)
Widely published matter such as books and newspapers is regarded as self-authenticating and subject to an exception to the Best Evidence rule. Thus, even though the contents of the book are being proven, the Best Evidence rule isn't violated.

5. Character Evidence
Substantive Evidence
Evidence of Jones's prior bad acts is being used.

First, Jones could claim this testimony is logically irrelevant. It appears to be so - sexual assault is unrelated to the instant case. Thus, the evidence is excluded.

Moreover, character evidence is not admissible in civil cases to prove conduct in conformity therewith. Character is not in issue here, so this character evidence is inadmissible.

Finally, even if found otherwise admissible, this evidence should be excluded under Rule 403 as highly prejudicial with law probative value.

Impeachment
The acts involved can be introduced, because bad acts are subject to a good faith standard. The fact Jones was only accused is not dispositive if plaintiff believes in good faith he did the assault.

But prior bad acts are admissible to impeach only if relevant to honesty. It is unclear how the assaults are. If there had been a felony conviction, it would be admissible to impeach regardless; but there was not. Thus no use to impeach.

6. Character Evidence
As noted above, character evidence is not admissible in civil trials to show fault. It is doubtful evidence of these accidents has any purpose other than propensity for

negligence and thus negligence. Character isn't in issue in negligence. Thus, inadmissible.

Impeachment
The prior bad acts can't be used to impeach, because, as noted above, they are unrelated to truthfulness.