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Presentation of Evidence

1. The admissibility of the note as a dying declaration is

In a prosecution of the defendant for murder, the government seeks to introduce a properly authenticated note written by the victim that reads: "[the defendant] did it." In laying the foundation for admitting the note as a dying declaration, the prosecution offered an affidavit from the attending physician that the victim knew she was about to die when she wrote the note.

- A preliminary fact question for the judge, and the judge must not consider the affidavit
- **A preliminary fact question for the judge, and the judge may properly consider the affidavit**
- A question of weight and credibility for the jury, and the jury must not consider the affidavit
- A question of weight and credibility for the jury, and the jury may properly consider the affidavit

Note:

B is correct. Preliminary questions concerning the admissibility of evidence shall be determined by the court. Specifically, the court determines the trustworthiness of alleged exceptions to the hearsay rule, which includes dying declarations. In making its preliminary determination, the court may consider affidavits or hearsay. Therefore, the admissibility of the note should be determined by the judge, and he is permitted to consider the affidavit.

A is incorrect. This answer is only partially correct. The judge must determine the preliminary admissibility of the note, but he is permitted to consider the affidavit even if it were hearsay.

C is incorrect. The determination of whether to admit evidence that falls within an exception to the hearsay rule, including a dying declaration, is for the judge to rule on, and the judge may consider affidavits and/or hearsay.

D is incorrect. As explained above, the note's admissibility is a preliminary question for the judge, not the jury. Furthermore, the judge may properly consider the affidavit.

2. Which one of the following is the LEAST likely to be admissible during the prosecution's rebuttal?

A defendant is on trial for the brutal murder of a victim. The defendant's first witness testified that, in her opinion, the defendant is a peaceful and nonviolent person. The prosecution does not cross-examine the witness, who is then excused from further attendance.

- **Testimony by the witness's former employer that the witness submitted a series of false expense vouchers two years ago**
- Testimony by a police officer that the defendant has a long-standing reputation in the community as having a violent temper
- Testimony by a neighbor that the witness has a long-standing reputation in the community as an untruthful person
- Testimony by the defendant's former cell mate that he overheard the witness offer to provide favorable testimony if the defendant would pay her \$5,000

Note:

The general rule is that the prosecution cannot initiate evidence of the bad character of the defendant merely to show that he is more likely to have committed the crime of which he is accused. However, the accused may introduce evidence of his good character to show his innocence of the alleged crime.

A defendant puts his character in issue by calling a qualified witness to testify to the defendant's good reputation (or that he has heard nothing bad) for the trait involved in the case. Under Federal Rule of Evidence (FRE) 405, the witness may also give his personal opinion concerning that trait of the defendant. However, the witness may not testify to specific acts of conduct of the defendant to prove the trait in issue.

If the defendant puts his character in issue by having a character witness testify as to his opinion of the defendant or the defendant's reputation, the prosecution may rebut in the following manner: (i) by calling its own character witness to testify to the defendant's bad reputation or their opinion of the defendant's character for the particular trait involved; and (ii) on cross-examination, by inquiring whether the reputation witness knows or has heard of particular instances of the defendant's misconduct pertinent to the trait in question. Fed. R. Evid. 405(a).

Evidence of other crimes or misconduct is admissible if these acts are relevant to some issue other than the defendant's character or disposition to commit the crime charged. While acknowledging that prior acts or crimes are not admissible to show conformity or to imply bad character, FRE 404(b) goes on to say that such prior acts or crimes may be admissible for other purposes (e.g., to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident) whenever these issues are relevant in either a criminal or a civil case.

A is correct. The applicable rule is that specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, may not be proven by extrinsic evidence. Testimony from a former employer that the witness submitted a false expense report is extrinsic evidence that is being sought to be admitted to attack the witness's character for truthfulness and is thus inadmissible.

B is incorrect. Because the defendant opened the door by presenting evidence of his peaceful and nonviolent character, the prosecution is permitted to then present character evidence to rebut the defendant's evidence. This may be done through testimony as to the defendant's reputation in the community for having a violent temper.

C is incorrect. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation testimony if it relates to a witness's character for truthfulness or untruthfulness. The witness's neighbor's testimony that the witness has a reputation for untruthfulness would be admissible.

D is incorrect. A witness's bias or motive to lie can be shown through extrinsic evidence. The defendant's former cell mate's testimony that the witness asked for money in return for testimony favorable to the defendant would be admissible to show the witness's bias and motive to lie. Most jurisdictions have held that a foundation must be laid on cross-examination before extrinsic evidence of bias is admissible. Although this rule is widely accepted, there is no federal rule in place that mandates this foundation.

3. Which of the following is correct?

During litigation on a federal claim, a plaintiff had the burden of proving that a defendant received a notice. The plaintiff relied on the presumption of receipt by offering evidence that the notice was addressed to the defendant, properly stamped, and mailed. The defendant, on the other hand, testified that she never received the notice.

- The jury must find that the notice was received
- **The jury may find that the notice was received**
- The burden shifts to the defendant to persuade the jury of nonreceipt
- The jury must find that the notice was not received, because the presumption has been rebutted and there is uncontradicted evidence of nonreceipt

Note:

A presumption is a rule that requires a particular inference to be drawn from an ascertained set of facts. It is a form of substitute proof or evidentiary shortcut, where "proof" of the presumed fact is rendered unnecessary once evidence has been introduced to the basic fact that gives rise to the presumption.

Under Federal Rule of Evidence (FRE) 301, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut the presumption. However, this rule does not shift the burden of persuasion, which remains throughout the trial upon the party who had it originally. A presumption is overcome or destroyed when the adversary produces some evidence contradicting the presumed fact. In other words, the presumption is of no force or effect when sufficient contrary evidence is admitted. Fed. R. Evid. 301.

A letter shown to have been properly addressed, stamped, and mailed is presumed to have been delivered in the due course of mail. The presumption is said to be based upon the probability that officers of the government will perform their duty.

B is correct. The rule is that the jury may, but is not required to, find that the notice was received by the defendant. The plaintiff's presumption under the mailbox rule that the properly addressed, stamped, and mailed notice reached its destination (the defendant's receipt) then imposes on the party against whom it is directed (here, the defendant) the new burden of presenting evidence to rebut or meet the presumption. In response to the presumption under the mailbox rule, the defendant testified that she never received the notice. The jury is thus empowered to judge the credibility of both sides and may, but is not required to, find that the notice was received.

A is incorrect. The plaintiff's presumption that notice was received was rebutted by the defendant's testimony that she did not receive it. The jury's duty is to then decide the weight to give to both sides; it is not required to find that the notice was received.

C is incorrect. The burden of persuasion does not shift under FRE 301. It is up to the defendant to rebut the mail delivery presumption if she so chooses, but the burden of persuasion remains upon the party on whom it was originally cast (the plaintiff in this case) throughout the trial. The defendant is not required to persuade the jury of non-receipt.

D is incorrect. The rebuttal of a presumption does not require a finding for the rebutting party. In addition, the evidence that the notice was not received was contradicted by evidence of the properly mailed notice. The jury, as fact finder, may find the notice was received, but is not required to.

4. The question is

A defendant was prosecuted for sexually abusing his 13-year-old stepdaughter. The stepdaughter testified to the defendant's conduct. On cross-examination, defense counsel asks the stepdaughter, "Isn't it true that shortly before you complained that your stepfather abused you, he punished you for maliciously ruining some of his phonograph records?"

- **Proper, because it relates to a possible motive for the stepdaughter to falsely accuse the defendant**
- Proper, because the stepdaughter's misconduct is relevant to her character for veracity
- Improper, because the incident had nothing to do with the stepdaughter's truthfulness
- Improper, because it falls outside the scope of direct examination

Note:

A is correct. A witness may be properly questioned about any bias or motive to lie the witness may have. The defendant's counsel is permitted to inquire into whether the stepdaughter may have a bias or motive to lie about the abuse since the defendant had punished her shortly before the complaint of the abuse.

B is incorrect. The stepdaughter's misconduct is actually irrelevant to her character for veracity. Ruining phonograph records has nothing to do with the stepdaughter's character for truthfulness or her credibility.

C is incorrect. Although the incident had nothing to do with the stepdaughter's character for truthfulness, the question is still proper to show that the stepdaughter may have a bias against the defendant or a motive to lie.

D is incorrect. A witness's bias or motive to lie can be inquired into upon during cross-examination, even if the direct examination did not deal with the incident. Cross-examination into matters affecting the credibility of the witness is proper.

5. Which of the following statements is most clearly correct with respect to possible judicial notice of the fact that Capitan is the state's capital?

In contract litigation between the plaintiff and the defendant, a fact of consequence to the determination of the action is whether the plaintiff provided the defendant with a required notice at the defendant's branch office "in the state capital." The plaintiff introduced evidence that he gave notice at the defendant's office in the city of Capitan. Although Capitan is the state's capital, the plaintiff failed to offer proof of that fact.

- **The court may take judicial notice even though the plaintiff does not request it**
- The court may take judicial notice only if the plaintiff provides the court with an authenticated copy of the statute that designates Capitan as the capital
- If the court takes judicial notice, the burden of persuasion on the issue of whether Capitan is the capital shifts to the defendant
- If the court takes judicial notice, it should instruct the jury that it may, but is not required to, accept as conclusive the fact that Capitan is the capital

Note:

A is correct. A court may take judicial notice of a relevant fact whether a party requests it or not.

B is incorrect. A court can take judicial notice of a fact that is not subject to reasonable dispute, and the plaintiff would not have to provide any information to the court before it can take judicial notice.

C is incorrect. There is no burden shifting in cases involving judicial notice.

D is incorrect. In civil cases, the court shall instruct the jury to accept as conclusive any fact judicially noticed. The jury is required to accept a judicially noticed fact as conclusive on the issue. Because the identity of the capital of a state is a fact not subject to reasonable dispute, the judge can take judicial notice of it, even if neither party requests it.

6. This question is

On cross-examination of the witness, the plaintiff's counsel asks, "Isn't it a fact that when you bought your new car last year, you made a false affidavit to escape paying the sales tax?" In an automobile negligence action by a plaintiff against a defendant, a bystander testified for the plaintiff. The defendant later called a witness, who testified that the bystander's reputation for truthfulness was bad.

- Proper, because it will indicate the witness's standard of judgment as to reputation for truthfulness
- **Proper, because it bears on the witness's credibility**
- Improper, because character cannot be proved by specific instances of conduct
- Improper, because one cannot impeach an impeaching witness

Note:

B is correct. As a general rule, character evidence used as propensity evidence is not admissible in civil cases unless character is directly at issue in the case. Character evidence that deals specifically with a witness's credibility may be admissible for impeachment. On cross-examination, a witness may be asked about prior bad acts of specific instances of conduct if they are probative of truthfulness. Here, the witness's creation of a false affidavit is probative of his character for truthfulness and bears on his credibility. The plaintiff's counsel's questioning of the witness is proper.

A is incorrect. The question is admissible as to the witness's credibility and not to his standard for judgment of reputations.

C is incorrect. On cross-examination, a witness may be asked about prior bad acts of specific instances of conduct if they are probative of truthfulness.

D is incorrect. This is a misstatement of the law. Any witness may be impeached.

7. On the issue of the expert's qualifications, the letter may be considered by

In the prosecution of a defendant for forgery, the defense objects to the testimony of a government expert on the ground of inadequate qualifications. The government seeks to introduce a letter from the expert's former criminology professor, stating that the expert is generally acknowledged in his field as well qualified.

- The jury, without regard to the hearsay rule
- **The judge, without regard to the hearsay rule**
- Neither the judge nor the jury, because it is hearsay not within any exception
- Both the judge and the jury, because the letter is not offered for a hearsay purpose

Note:

Federal Rule of Evidence (FRE) 104 says that preliminary questions concerning the admissibility of evidence shall be determined by the court. In making an admissibility determination, the court is not bound by the rules of evidence except those with respect to privileges.

B is correct. Under FRE 104, preliminary questions concerning the qualification of a person to be a witness shall be determined by the court. In making its determination, the court is not bound by the rules of evidence except those with respect to privileges. The letter, although hearsay, may be considered by the judge in determining whether the witness is qualified as an expert.

A is incorrect. Although it is without regard to the hearsay rule, it is the judge, not the jury, who is to determine the admissibility of the expert testimony based on the qualifications provided.

C is incorrect. The FRE, including the rule against hearsay, do not apply to the judge's initial determination of whether the witness is qualified to testify as an expert.

D is incorrect. It is only the judge, without the jury's involvement, who is to determine the qualifications offered in support of the expert testimony. The rules governing hearsay do not apply, so the letter may be considered by the court because it will not be seen by the jury.

8. Whether this presumption should be applied is to be determined according to

In a federal court diversity action by a plaintiff against a defendant on an insurance claim, a question arose whether the court should apply a presumption that, where both husband and wife were killed in a common accident, the husband died last.

- Traditional common law
- Federal statutory law
- **The law of the state whose substantive law is applied**
- The federal common law

Note:

C is correct. In civil actions and proceedings, whether a presumption should be applied is determined in accordance with the state law whose substantive law is applied to the case.

A is incorrect. Traditional common law should not be applied here; the state whose substantive law is being applied in the case determines whether the presumption should be applied.

B is incorrect. Federal statutory law should not be applied here; the determination of whether a presumption should be applied is based on the state law whose substantive law is applied.

D is incorrect. Federal common law should not be applied, for the reasons stated above.

9. The defendant's testimony is

A plaintiff sued a defendant for dissolution of their year-long partnership. One issue concerned the amount of money the plaintiff had received in cash. It was customary for the defendant to give the plaintiff money from the cash register as the plaintiff needed it for personal expenses. The plaintiff testified that, as he received money, he jotted down the amounts in the partnership ledger. Although the defendant had access to the ledger, he made no changes in it. The defendant seeks to testify to his memory of much larger amounts he had given the plaintiff.

- **Admissible, because it is based on the defendant's firsthand knowledge**
- Admissible, because the ledger entries offered by a party opponent opened the door
- Inadmissible, because the ledger is the best evidence of the amounts the plaintiff received
- Inadmissible, because the defendant's failure to challenge the accuracy of the ledger constituted an adoptive admission

Note:

A is correct. The defendant is seeking to testify that he provided larger amounts to the plaintiff than was indicated in the ledger. That testimony is based on the defendant's firsthand knowledge; he was the one who handed the plaintiff the money. Therefore, his testimony is admissible.

B is incorrect. The testimony is admissible as relevant, firsthand knowledge evidence, not because the "door had been opened."

C is incorrect. The best evidence rule does not apply to testimonial evidence.

D is incorrect. There are no facts that support the idea that the defendant failed to challenge the accuracy of the ledger or that he adopted it as the truth. The defendant can certainly offer testimony on matters within his firsthand knowledge, and the mere fact that there may be contradictory evidence in the ledger does not foreclose his testimony.

10. Before permitting evidence of the dying declaration, the judge should hear evidence on the issue from

A defendant is on trial for killing the victim. The prosecutor calls a witness to testify that after being shot, the victim said, "The defendant did it." Before the testimony is given, the defendant's lawyer asks for a hearing on whether the victim believed his death was imminent when he made the statement.

- **Both sides, with the jury not present, and decide whether the witness may testify to the victim's statement**
- Both sides, with the jury present, and decide whether the witness may testify to the victim's statement
- Both sides, with the jury present, and allow the jury to determine whether the witness may testify to the victim's statements
- The prosecutor only, with the jury not present, and if the judge believes a jury could reasonably find that the victim knew he was dying, permit the witness to testify to the statement, with the defendant allowed to offer evidence on the issue as a part of the defendant's case

Note:

A is correct. Preliminary questions concerning the admissibility of evidence shall be determined by the court. Both sides are permitted to present evidence and argument about the admissibility of the evidence, and the hearing should be conducted outside of the presence of the jury.

B is incorrect. In jury cases, evidentiary hearings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury. The jury should not be present for the evidentiary hearing.

C is incorrect. The jury should not be present and the determination is to be done by the judge.

D is incorrect. Both sides, not just the proponent of the evidence, must be permitted to present evidence and arguments about the admissibility of evidence.