

4)

Threshold issue of Prop 8

Under Proposition 8, in California, all relevant evidence is admissible in criminal cases subject to CEC 352 balancing. The exceptions to Prop 8 are confrontation clause, hearsay, open door in character evidence, privilege, secondary evidence rule, unfair prejudice through CEC 352 balancing, and rape shield.

Here, this is a case in California regarding a drug distribution case--a criminal case.

Thus, prop 8 may apply in some situations that were not listed above and all relevant evidence in criminal cases will be admissible.

1. a. Pages 1-4 of the Notes

Relevance

Relevance includes logical and legal relevance.

Logical relevance is when there is any tendency to make a material fact of consequence that **is in dispute** more or less probable than it would be without the evidence. It is a low threshold.

Here, there is logical relevance because the notes tend to show whether Carol who had allegedly acted as a distributor for a ring of cocaine dealers has indeed distributed. The notes tend to show that people, including Des, have sold hundreds of pounds of cocaine. The notes tend to support that C had been a distributor for the D who is being tried for the cocaine distribution based on the record she had kept. Because she had testified that all her customers agreed to sell cocaine, whoever was included in the notebook would be more probable than not to have intended to sell cocaine.

Thus, logical relevance is met.

Legal relevance means that the probative value is not substantially outweighed by the undue prejudice, unnecessarily waste of time, or misleading the jury.

Here, there is a strong argument that it may mislead the jury because pages 1-2 of the notebook were notations on sale to various people other than Des. It does not necessarily relate to the case on hand, which is D's trial for possession with intent to distribute cocaine. Should the court admit this despite the possibility of undue prejudice, the jury may be misguided in

thinking that D had bought the drugs not only from May to October, as stipulated in pages 3-4, but also between the time listed on pages 1-2.

While it will be a close call, the court will likely admit this evidence based on legal relevance because the probative value of C's role as a distributor is necessarily stronger than the possibility of undue prejudice.

As for the pages 3-4, it does specifically provide probative value on whether D had been engaging in the cocaine business.

Thus, pages 1-4 all satisfies the legal relevance.

Thus, both logical and legal relevance were met.

Authentication

The notebook is an extrinsic evidence that is subject to authentication. Evidence needs to be authenticated to show that it is what it purports to be through authentication. The person authenticating has to have personal knowledge and competence.

Personal knowledge comes based on whether the person had knew prior to the evidence was presented about what the evidence was.

Competence requires mental capacity to state truthfully and 18 years of age. California requires under competence that the person understand the duty to provide truthful information.

Here, Carol was asked to identify notebook. C testified that it was hers, and that she used to keep track of income and expenses. She had personal knowledge of what it was and what it purported to be. Furthermore, as the owner of the notebook, she had personal knowledge of what it purported to be.

Presumably, she was competent to testify.

Thus, the notebook was properly authenticated.

Secondary Evidence Rule

Under Secondary Evidence Rule ("SER")--the CA version of the best evidence rule, when a writing is introduced into evidence, it has to an original. Unless the genuine nature of the writing

is being questioned by the other party, a duplicate or a copy may suffice.

Here, the facts indicate that the notebook was C's, and there is no indication that it was not an original or a duplicate.

Thus, SER requirement has been met.

Hearsay

Hearsay is an out of court statement that is being offered for truth. A statement could be oral or written, but has to be an assertion. It cannot be in the form of a question but it can be an un-vocal assertion such as nodding. Generally, hearsay is inadmissible unless an exception applies. In CA, there are no exemptions, only exceptions to the hearsay rule.

Here, the pages 1-4 of the notes are an out of court statement because it was made outside of the courtroom before the case in October in 2019. They were produced from January to October. It was a statement in the form of a written assertion, because it notated the sales by C. It is being offered for the truth of the matter--that from May through October, Des was one of the people who had purchased cocaine from C.

Thus, the pages 1-4 of the notes will be considered hearsay and inadmissible unless an exception applies.

Possible Hearsay Exceptions

Contemporaneous Statement

Contemporaneous statement is the CA version of present sense impression. It's a statement that describes an ongoing event. Under CA rules, it should be explaining the course of conduct that one is engaging in.

Here, the notation may be contemporaneous statement because C is writing down what is happening at the moment of the sale. She is explaining that D is buying the drugs, and explaining that she has sold it.

Thus, it is admissible under contemporaneous statement exception.

State of Mind (Present)

State of mind exception can be used to show intent or circumstantial evidence of intent.

Here, depending on what exactly was written down, it could show C's intent to sell drugs to D. If what C wrote down was that she was going to sell drugs, then it will be admissible as a circumstantial evidence of her intent to sell drugs.

Thus, it is admissible under state of mind exception.

Recorded Recollection

Recorded recollection is when the party does not remember the contents at the moment, but had produced the writing with certainty, and did so in a manner that shows it was accurate.

Here, there's no indication that C failed to remember the contents of the notebook.

Thus, this exception will not work.

Business Records

Business records are the records that are conducted regularly in the course of business, by someone who has authority to record, and is not made in preparation of the litigation.

Here, C was a "distributor" in the business or dealing cocaine. She presumably made the record to keep track of the sales that were taking place.

Thus, it could be admissible under business records exception.

Confrontation Clause

Under the 6th Amendment, when there is a co-defendant situation with testimonial evidence that's involved, the evidence will be inadmissible unless the defendant gets a chance to confront the witness in testifying. It only applies to testimonial evidence such as statements made during police investigations.

Here, Carol's notebook, although it was used as evidence, is not testimonial in nature. It was simply a notebook, and not a testimony that was given to the police or to the court.

Thus, confrontation clause will not be applicable with regards to the pages 1-4 of the notes.

1.b. Des's conviction for Forgery

Relevance

See rule above.

Here, it was logically relevant because it tends to show that D may not be a trustworthy witness based on the prior conviction of a forgery, which is a felony that goes to honesty.

Thus, it was logically relevant.

It was also legally relevant because the probative value is great in the truthfulness of the witness. Furthermore, crimes involving moral turpitude is admissible in California for impeachment purposes (see below).

Thus, it was legally relevant as well.

Thus, relevant was met.

Scope of Cross-examination

Scope of cross-examining a witness is not only limited to the questions that were asked in direct. It could also include questions regarding impeachment of the witness.

Here, P's asking of forgery was an admissible question in cross-exam.

Thus, the court properly admitted the evidence.

Impeachment

In California, prior bad acts can be used to impeach a witness if they had engaged in a crime of moral turpitude. Moral turpitude includes, but is not limited to theft and as applied here, crimes involving truthfulness such as forgery. It is subject to balancing.

Here, despite that the felony had taken eleven years ago, it was a crime of moral turpitude. It will be subjected to CEC 352 balancing.

The probative value will illustrate that C had a history eleven years ago of committing forgery. However, the undue prejudice is not that great because forgery is a serious crime that involves moral turpitude. It may not be appropriate to admit a testimony by someone who has been convicted of forgery.

Thus, the court will allow D's conviction for forgery as an impeachment evidence of D as a witness.

2. Denial of the assertion of Attorney-Client Privilege (ACP)

ACP is created when between the attorney and the client. It is limited in scope when compared with duty of confidentiality. In CA, it ends when when the representation is over.

More importantly, it can only be invoked by the privilege holder--namely the attorney and the client.

Here, the ACP was asserted by P, the prosecutor. P was not D's attorney; Abe was. P could not exercise the ACP because he did not hold the privilege.

Thus, the court did NOT err in denying the assertion of attorney client privilege.

Question #4 Final Word Count = 1581

END OF EXAM