

Exam # _____
Part I: Retain Exam and Answer X
Part II: Return Exam and Answer to
Student X

UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW

FINAL EXAMINATION: EVIDENCE
(COURSE # 36821)

PROFESSOR ROGER PARK

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SPRING SEMESTER 2005

FRIDAY, MAY 6, 2005

TOTAL TIME: THREE HOURS AND THIRTY MINUTES

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CLOSED BOOK EXAMINATION

(Instructions on Next Page)

Spring 2005

Final Examination
Evidence
Professor Roger Park

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PART II

ESSAY QUESTIONS
TWO HOURS AND FIFTEEN MINUTES
(135 Minutes)

QUESTION ONE
(45 Minutes)

In a civil action for sexual harassment, the plaintiff claims that the defendant, her boss, constantly made unwanted overtures toward her, creating a hostile work environment. She testified that he started asking her for dates when she first was hired in February, 2003 and that he kept on asking despite her repeated refusals and her requests that he stop. On direct examination as the first witness, she further testified as follows. (Questions of counsel are omitted.)

"Things got worse in April, 2003. Almost every day he would come up to me and say something like, 'are you ready to go out with me yet'? The same month, he kept sending me emails from his office email address containing the same question about whether I wanted to go out with him. I told him no again and again. The same thing happened to my friend Vanessa. When I told her in early April what he was doing to me, she got very excited and said 'He does the same thing to me!' Later I had a conversation with him in which I said, 'Vanessa said you do the same thing with her' and he said, 'Can't you see I'm busy? Get back to work.'"

Question 1-A. Identify objections that could be made to the quoted testimony and analyze them. Where reasonable arguments can be made on both sides about whether testimony is admissible, describe them.

Question 1-B. If the plaintiff's attorney could plausibly lay further foundation through the plaintiff that would obviate objections discussed in part A, describe that foundation and why it would obviate the objections.

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QUESTION TWO
(45 Minutes)

In the sexual harassment case described above:

A. The defendant plans to offer testimony of his office manager about his good reputation for fairness, propriety and "being a perfect gentleman."

B. The defendant plans to offer own testimony claiming that he caught the plaintiff having sex with a co-worker in an empty office at 3 PM on April 25, 2003, leading to a heated exchange during which the plaintiff told him to go to hell. [The plaintiff resigned three days later.]

C. The plaintiff denies that the April 25 incident took place and offers testimony that she was attending a company-sponsored motivation seminar in another building the entire afternoon of April 25. She has several witnesses who saw her there. She plans to ask the judge to determine whether incident in which she allegedly had sex in an empty office took place and to exclude the evidence if the judge is persuaded that it did not happen.

Question 2. Considering these plans, analyze evidence issues that will arise.

QUESTION THREE
(45 Minutes)

Suppose that Rule 801(c) were amended to provide that "hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, whose use in evidence depends for value upon the credibility of the declarant."

Question 3. What difference would the amendment make? Give specific examples.

END OF PART II

* * * * (End of Examination) * * * *

Park's Evidence
Spring, 2005

MODEL ANSWERS TO ESSAY QUESTIONS

Note: I have included boldfaced titles at the beginning of each issue, but I don't expect students to do this on exams. In fact, trying to come up with a title before writing the paragraph may not be a good idea when composing an answer under time constraints. –RCP

QUESTION ONE

A. Objections

1. Asking for and refusing dates. [Note: Most students discussed the admissibility of the requests and refusals, though it was not necessary to do so because there was no real issue. The utterances are clearly admissible.] The requests by the boss are admissions of a party opponent. [They also show effect on the hearer.] P's refusals are admissible because they are not assertive, they are offered for their effect on the hearer, they show declarant's state of mind, and the mere making of them makes the boss's subsequent statements harassing.

2. Email from the boss

a. Authentication – The emails from the boss are authenticated circumstantially by the fact that it has the same content as verbal statements that the plaintiff personally heard.

b. Best evidence – Without further foundation, oral testimony describing the emails is inadmissible because it is being used for its contents with no excuse proffered for failure to present the original or a duplicate.

3. "The same thing happened to my friend Vanessa." The statement "the same thing happened to my friend Vanessa" is objectionable because there is no foundation showing P's personal knowledge. If Vanessa's statement is admissible, the objection is obviated. [minor point.]

4. Vanessa's excited statement "He does the same thing to me!"

a. Hearsay.

P will argue that this statement falls under the excited utterance exception. However, the excited utterance exception requires a startling event. If P argues that the boss's conduct toward Vanessa was the startling event, then for all we know there was a period of calm reflection between the event and the statement. D could argue that the policy of the rule requires that the "stress of excitement" be continuous, while P could point out that the rule does not explicitly state a requirement of continuity. If P argues that the statement by P to Vanessa was the startling event, D can argue that this statement is not objectively startling. If Vanessa has been harassed by the boss, it should not be very startling to hear that P was also harassed. This is a close question.

Conceivably, the judge might admit the evidence for a nonhearsay purpose, instructing the jury not to use the evidence for the truth of what it asserts, but rather to show the oppressiveness of the environment. But the danger that the jury would use it for its truth outweighs its value for this purpose – See R. 403.

If P's later statement to the boss is admissible (see below), this statement could arguably be used could be used for its effect on hearer, showing why P made the statement to boss. If the statement by Vanessa is admissible, then plaintiff's statement to Vanessa is admissible for its effect on the hearer (to put Vanessa's reply into context). Otherwise it is not admissible. It does not qualify as a prior consistent statement under 801(d)(1)(B) because there has been no charge of recent fabrication or the like.

b. Character evidence.

Defendant may argue that evidence of his treatment of Vanessa is inadmissible character evidence. However, might be admitted as KIPPOMIA evidence under Rule 404(b). P can argue that

D behaved

toward similarly situated employees in a very similar fashion (asking for dates). But the conduct is not exactly a signature m.o. Also, it might be admitted to show a hostile work environment, with an instruction not to use it to show character. With more foundation, maybe it could even fit the habit concept.

5. Exchange with the boss.

The exchange with the boss may be admissible as an adoptive admission, depending on whether the judge believes that if the accusation were untrue, the boss would have denied it. It matters whether the boss realized that the "same thing with her" statement referred to asking for dates and whether there was a work emergency that made it impractical to discuss the issue. (Some jurisdictions say that the question of adoption is a 104(b) question, in which case the evidence is more likely to be admitted, because the judge is supposed to let it in if a reasonable jury could find adoption.) Alternatively, maybe it could be admissible for the nonhearsay purpose of showing that plaintiff found the overtures unwelcome, though the other evidence seems sufficient on that point, hence R. 403 would be an obstacle.

B. Additional Foundation

1. Email

a. Authentication.

The circumstantial authentication is probably enough, but if not, then authentication through the business records of the IT department might be needed, if the boss will not admit that the emails came from him. Other evidence, such as evidence that a unique password was needed to access the email account, could also authenticate the emails.

b. Best evidence

Plaintiff's lawyer clearly needs to offer the original, a duplicate, or an excuse for not having the original. An excuse might be that the plaintiff deleted her emails. She could still have tried to subpoena them from the company, though. Is the company a defendant, too? Then plaintiff could invoke the excuse applicable when the original is in the hands of the opposing party, provided that the opponent received notice.

2. Vanessa's statement

If available, more evidence about Vanessa's appearance of excitement would be helpful, as would evidence about the similarity and frequency of actions by the boss toward the two employees. Other evidence that the bosses' harassing actions caused her to make the statement to P would help the nonhearsay oppressiveness-of-environment theory.

3. Exchange with the boss.

It would be helpful to have further testimony showing that the boss heard the statement, that the exact words used put him on notice that Vanessa had accused him of making unwelcome advances, and that the press of work was not so great that it would be an impediment to denying the accusation.

QUESTION TWO

A. Defendant's reputation evidence

-The language of Rule 404(a)(1), with its references to the "accused" and the "prosecution," indicates that the "mercy rule" allowing defendants to call character witnesses applies only in criminal cases.

-The minority of courts that have allowed defense character testimony in civil cases have limited the testimony to cases in which the defendant is accused of criminal behavior in the civil action. Asking for dates is probably not a crime, even when the asking is carried out in the extreme and harassing fashion alleged here. However, one could argue that the question should be whether immoral conduct is alleged, not whether the conduct is technically a crime.

-The reputation for fairness does not seem pertinent; "perfect gentleman" is vague.

B. Sex in the empty office; "go to hell"

-P's alleged sexual conduct lacks probative value on the issue whether the requests for dates

were unwelcome. It is the sort of evidence that Rule 412(b)(2) seeks to protect against. Although Rule 412(b)(2) does not contain an absolute prohibition, it sets forth a balancing test that is more strongly slanted toward exclusion of evidence than the test of Rule 403.

-Evidence that the plaintiff and defendant had an angry exchange is relevant to show plaintiff's bias. The fact that defendant caught her in an act that is inappropriate in an office is also relevant to bias, since plaintiff's sense of embarrassment at being caught and criticized could be a motive for bringing the action. Hence there is the problem of weighing its value in showing bias against its prejudice under Rule 412(b)(2). There is also the question whether there is other evidence of bias that might accomplish the same purpose without the same danger of prejudice. Also, the judge might consider whether this evidence could be sanitized in some way to leave out the sexual aspect. Sanitizing is going to be hard to do because the defendant would have to be instructed to testify in something other than his own words, saying that plaintiff was doing something that was against office policy or was "embracing" the co-worker or some such thing. It will be a judgment call for the judge. Some judges would admit the evidence of sexual conduct, thinking

that the jury is not likely to be prejudiced because jurors would not think that P's willingness to have sex with a co-worker indicated that she wanted to be pestered for dates by the boss. But Rule 412(b)(2) mentions not only "undue prejudice" but also the need to protect against harm to the victim. Bringing out this evidence in open court would be harmful to the plaintiff and would discourage claims of sexual harassment. Rule 412 aims not only at achieving accurate results but also at reducing the ordeal of bringing suit.

-Was notice given, as required by Rule 412(c)?

-It is possible that the judge will consider that unwelcome and continuous requests for dates is not "sexual misconduct" within the meaning of Rule 412. If so, then Rule 412 does not apply and we should look to Rules 403 and 404 for guidance. The value in showing bias would be weighed against the danger of prejudice (use as evidence of bad character) under the more lenient balancing test of Rule 403.

C. Request for pretrial ruling.

This is like a case we studied [Platero] in which the Court held that whether a rape victim was having an affair with a witness was a question for the jury. The judge has the authority to exclude sexual conduct evidence on grounds of prejudice, but the judge cannot exclude it solely on grounds that the witness to the alleged conduct is not credible. [Ballou] The question whether the conduct occurred at all is likely to be regarded as a 104(b) question, not a 104(a) question. (If the witness is not at all credible, the evidence has no probative value.) Under 104(b), all that the judge does is decide whether there is evidence sufficient to support a finding, and D's testimony is enough to do that, despite counterevidence. Nevertheless – and here the law is somewhat of a muddle – other cases [Huddleston, Elk River] have said that the weakness of evidence that a prior act occurred can be taken into account in balancing under 403, so taking into account the weakness of the evidence would be appropriate under 412 as well.

QUESTION THREE

Comment on grading for Spring, 2005 students: A number of students read this question as if the amended Rule 801(c) provided that "hearsay is admissible if the declarant is credible." This seemed like a horrible mistake to me, but it was so common that I decided to mitigate its effect on your grade. If you made this mistake, or if for some other reason you did not do as well on this question as on the other two essay questions, I wrote "N/A" on your bluebook and did not count the answer in grading. In those cases the essay grade was based solely on questions one and two. If your grade on this question would improve your overall essay grade, then I gave you a grade and counted the question for one-third of your essay grade.

Question: Suppose that Rule 801(c) were amended to provide that "hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, whose use in evidence depends for value upon the credibility of the declarant." What difference would the amendment make? Give specific examples.

Model Answer:

The amendment switches from an assertion-centered definition to a declarant-centered definition. Instead of focusing upon whether the statement is offered for its truth, the new definition focuses on whether the statement depends for value on the credibility of the out-of-court declarant – that is, on the declarant's sincerity, narrative ability, memory, and perception.

Where under current law a statement is not hearsay because it is legally operative language or because it is offered for its effect on the hearer, the amendment would probably not make any difference. Statements such as "do it or I'll kill you" (offered to show duress) or "I accept your offer" (offered to show acceptance of a contract offer) are not offered for their truth, nor do they depend for value upon the credibility of the declarant, so the same result would be reached under either definition. [In the case of statements offered to show their effect on the hearer, hidden defects in the credibility of the declarant make no difference. Apparent defects do make a difference, whether real or spurious. Apparent defects include an apparent joking attitude or the apparent display of mental disability. These apparent defects can be described by the in-court witness, who is subject to cross, so there is no hearsay problem.]

Where the statement is deemed not to be hearsay under the current assertion-centered definition because it is circumstantial evidence of the declarant's state of mind, a different result might be reached under the declarant-centered definition. In an example given in the casebook, when the prosecution offers evidence that the defendant's wife made up a false alibi for him, as evidence that he was guilty of a crime, the evidence might be deemed hearsay under the declarant-centered definition but not under the assertion-centered definition. It depends for value upon the wife's memory and perception.

In the case we studied in which the police intercepted calls to a bookie from callers trying to place bets [Zenni], a different result might also be reached. The statements by the callers depend for value upon the accuracy of the memory and perception of the callers. They might conceivably be mistaken about whether the place called was a bookie establishment. The British House of Lords, applying the declarant-centered approach, reached a different result on similar facts [Kearney].

The amendment might conceivably make a difference in other cases in which the declarant's statement is used to show the declarant's state of mind, for example in cases where a statement is used circumstantially to show the declarant's fear. However, courts would probably interpret the hearsay exception for statements of present state of mind, 803(3), in a way that filled the gap. There would likely only be a change in situations in which the statement is a statement of memory or belief offered to show the fact remembered or believed, so that it fell outside of 803(3).

Other examples might include the cases saying that records of drug dealing are "circumstantial evidence" of the use of the premises, or cases in which a person's statement is used to show association.

The amendment does not completely adopt the declarant-centered approach. It does not say "hearsay is evidence that depends for value on the credibility of an out-of-court declarant." Instead, it says that hearsay is a statement that depends for value on the credibility of an OCD. Thus, there would be no change in the nonverbal conduct cases, because the definition of "statement" in 801(a) would still apply and would mean that in cases in which the conduct was not intended as an assertion, it would not be hearsay even if using it in evidence required depending on the credibility of the actor.

Courts are likely to resist the change in cases in which it would result in exclusion of valuable evidence. In cases involving intercepted calls to bookies and drug dealers, they could do so by saying that the calls were not "statements" at all. That would be consistent with the reasoning of the case that we studied on the subject [Zenni].

[No credibility judgment is involved in administering the declarant-centered definition. The judge merely decides whether the statement's value varies with the declarant's credibility, and makes no judgment about the degree to which the declarant is credible.]

(For background on this question, read the materials on pp. 100-03 and 114-19 of the casebook.)