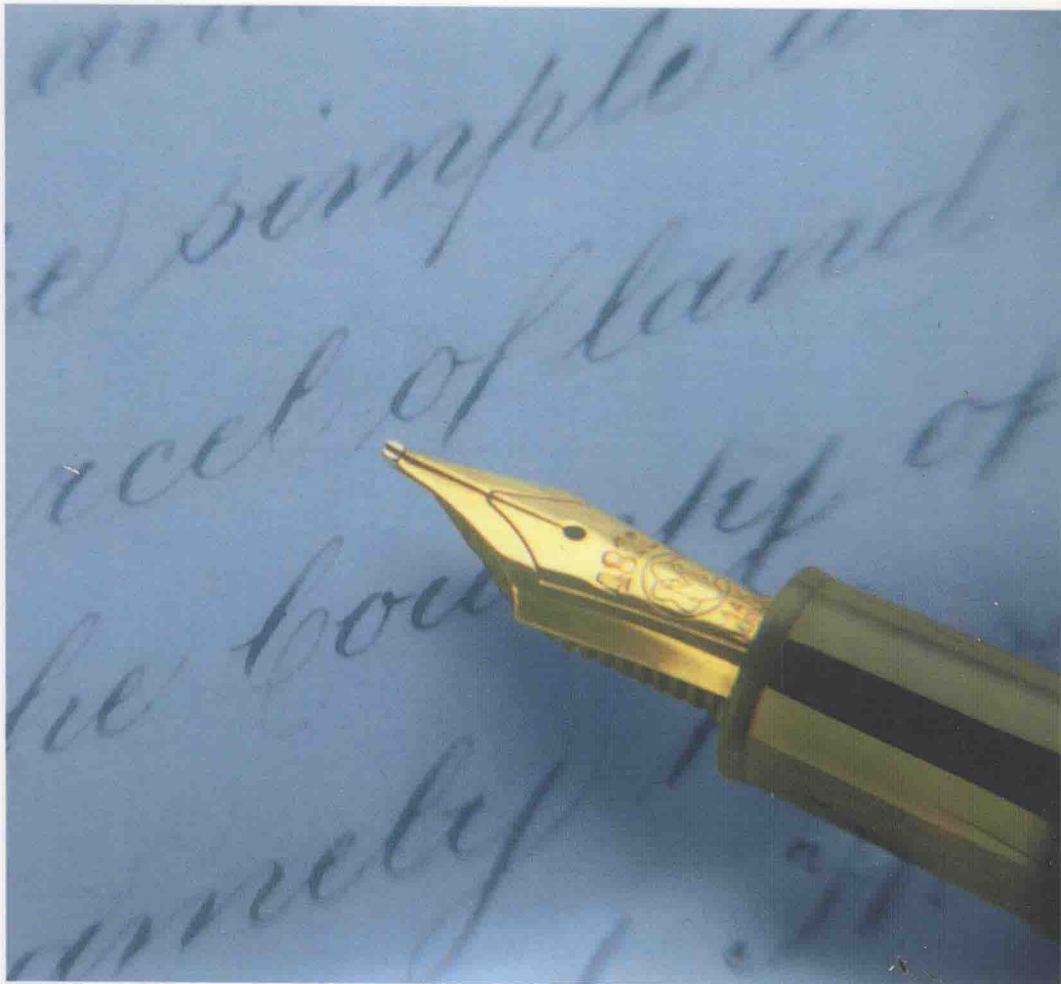


Evidence

Michael H. Graham SECOND EDITION



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EVIDENCE—ESSAY

Second Edition

By

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Exam Pro

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610 Opperman Drive

St. Paul, MN 55123

1-800-313-9378

Printed in the United States of America

ISBN: 978-0-314-27364-2

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SPECIFIC SUBJECT MATTER ESSAY QUESTIONS

ARTICLE I GENERAL PROVISIONS

Preliminary Questions of Admissibility

Question: Manny, a 350 lb. ex-football player, is attempting to load a 150 lb. bag of metal parts onto the top of his Ford Expedition. Manny steps on the running board. To get the bag where he wants it positioned within the luggage rack on the roof, he steps on the running board with one foot. He lifts the bag over his head and lurches upward and forward. The bag lands where intended on the roof of the Expedition. However, the running board bends downward causing Manny to fall off. Manny breaks his arm and suffers other injuries as well. The Ford Expedition in fact is sold with many different style running boards. The one on Manny's Expedition was a flat running board with indentations near both doors. The expert hired by Manny's lawyer is an automotive engineer. He worked ten years on the Chevy Impala design and 10 other years in other car divisions of Chevrolet. He never worked on a SUV designed with a running board. Manny's expert is prepared to testify that if the Ford Expedition had a tubular running board, which is already a standard running board offered on some Ford Expeditions, then the accident would not have happened.

Ford intends to challenge Manny's expert witness on several grounds:

- a) lack of qualification
- b) lack of an adequate factual basis, Rule 702(b)

- c) *Daubert/Kumho*/Rule 702(c) and in particular
- d) the absence of testing.

Discuss the application of Rule 104 in this context, i.e., which, if any, determinations involve a matter of conditional relevancy, Rule 104(b), and which determinations, if any, are solely for the court, Rule 104(a).

Question: Lori, age 4, was playing at school during recess when an accident occurs involving Mary who was on foot and a car driven by Bob. Lori is prepared to testify that as she was swinging real high on the big kids' swing in the playground at school she saw a lady walk into the crosswalk when the sign across the street from her was green. Lori says she could see this only when she was at the top of her swinging, high off the ground. Lori also says she saw the car hit Mary as she was in the crosswalk when the sign was green. The school crossing guard is prepared to testify that Lori was in fact on the swing when the accident happened and that Lori told her the same story in a calm voice ten minutes after the accident.

Discuss the application of Rule 104(a) and Rule 104(b) to the determination of whether Lori is a competent witness possessing personal knowledge as required by Rule 602.

Motions in Limine

Question: Counsel for Robert has caused his expert on high tension electric wire safety and a computer animation professional to prepare a computer animation illustrating counsel's theory of how the accident happened. Opposing counsel is as of now unaware of the existence of the computer animation. It is likely that Robert's counsel will have to disclose its existence at the next pre-trial conference where the judge is expected to require a list of proposed exhibits. Robert's counsel wants your advice as to whether he should make a motion in limine prior to trial seeking an order holding the computer animation admissible at trial.

How would you advise Robert's counsel? If Robert's counsel's motion is denied, what must Robert's counsel do at trial, if anything, to preserve error for appeal?

Door Opening

Question: Butch is on trial for armed robbery of a gas station. On his direct examination, when asked by his counsel, "Butch, did you walk in to the XYZ Shell station, point a gun at the clerk, and demand

that he give you all his money?” Butch says, “Absolutely not. It wasn’t me. I didn’t rob nobody. I don’t own a gun. I never even held a gun in my hands in my life.” Counsel for the prosecution does not object to Butch’s testimony. However, on cross-examination the prosecution asks, “Butch, isn’t it a fact you were illegally in possession of a firearm in Oakland, California in 2007?” The prosecution is prepared to call the police officer who arrested Butch at that time to testify to the foregoing event if Butch denies the gun possession in answering the question prepondered on cross-examination. Defense counsel objects, “Your Honor, I object to that question as improper impeachment introducing inadmissible evidence of character.” You are the trial judge. How do you rule and why?

Curative, Cautionary and Limiting Instructions

Question: George and Ringo are arrested for armed robbery of a liquor store. Officer Smith testifies that Ringo gave an oral confession to the police in which he said he stayed in the car while George stuck up the liquor store. Ringo does not testify at their joint trial. The clerk behind the counter testifies that she thinks it was George who robbed her but she is not 100% sure. Mary is called by the prosecution. On direct examination she says she saw a man run out of the liquor store. She heard a person scream at the same time, “Stop. Thief! I’ve been robbed.” The man fleeing the liquor store jumped through the passenger side window of a late model Ford Explorer, black. When asked to further describe the person fleeing the liquor store, Mary says, “All I recall is a guy. Not old, not young. White. Average everything.” When asked whether he had anything unusual such as tattoos, scars, a ponytail, etc., she said, “I don’t recall noticing anything like that.” The prosecution then impeaches Mary by means of an alleged prior inconsistent statement in which she stated that the man fleeing the liquor store had a long red ponytail and that he had a skull and cross-bones tattoo on his right arm. Mary says that she recalls talking to the police but does not recall saying anything like that. George has a long red ponytail and a skull and cross-bones tattoo on his right arm.

a) George’s counsel at no time objects to the introduction of Ringo’s confession that implicates George nor does he request a cautionary or limiting instruction. None is given by the trial court sua sponte.

Discuss.

b) George’s counsel at no time objects to any of the questions or

answers given by Mary nor does he at any time request a cautionary or limiting instruction with respect to the prior inconsistent statement.

None is given. Discuss.

Admissibility of Related Writings, Recordings and Oral Statements

Question: Matthew sends an e-mail to Mary breaking off their engagement. In the e-mail he agrees that Mary should keep the engagement ring on condition that the diamond brooch that was his grandmother's that she received from his parents at the engagement party is returned. Mary replies by e-mail many things including that the brooch was given to her by Matthew well before they were engaged and she intends to keep it as well. Matthew calls Mary and gives her the what for. In the conversation Matthew tells Mary that she knows that when he gave her the brooch, he said it was his grandmother's and that it was a pre-marriage gift which he would have to have back if things didn't work out. Matthew said she acknowledged having agreed to return the brooch and that at the time she agreed saying, "Sure, I'm not concerned. I know we will be happy forever." Mary's version of the telephone conversation with Matthew following the e-mails and his version of the circumstances and conversation that accompanied her receiving the brooch differs from Matthew's. Big surprise.

Mary sues Matthew to keep both the engagement ring and the brooch. Mary testifies first at trial. Her counsel offers into evidence that portion of Matthew's e-mail agreeing that the engagement ring is to remain with Mary. Matthew's attorney moves to require that Mary's counsel also introduce at the same time the remainder of Matthew's e-mail.

The trial judge notices that lunch is in order and recesses the trial. The trial judge desires that you advise him as to how he should rule under Rule 106 when trial recommences after lunch. The trial judge is also concerned as to how he should proceed with Mary's e-mail and the oral communications if either counsel in addition moves that such evidence should be admitted under Rule 106 on Mary's direct examination at the same time as well.

ARTICLE II

JUDICIAL NOTICE

Adjudicative Facts

Question: At the conclusion of the government case in a prosecution for car theft, the trial judge states that the government failed to introduce evidence that the Mercedes 500 SL convertible purchased new three months ago was valued in excess of \$10,000. The trial judge states that he has priced Mercedes cars before and knows them to cost much more than \$10,000. The trial judge at the conclusion of the case instructs the jury that they are to accept as conclusive the fact that the car allegedly stolen, a three month old Mercedes 500 SL, was worth over \$10,000 at the time of theft.

Discuss the application of Rule 201 to the foregoing.

ARTICLE III

PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

Presumption in Civil Cases

Question: You are a law clerk to a judge new to the bench. The judge wants to be educated concerning the operation of presumptions in a civil case. Although the judge sits in a federal court, she has requested a full briefing as to the various approaches to presumptions that exist at common law. The particular problem at hand involves the receipt of a notice. The contract in question provides that if party X wants to extend the contract for two additional years, it must provide written notice of such to a given address. The contract states that notice is effective upon receipt. X says it mailed the notice. Y, the other party, denies receipt. The trial judge is aware of a presumption dealing with the mailing of a letter and wants its operation pursuant to all common law approaches fully explained. The trial judge advises that Y would lose a considerable amount of money if Y has to perform under the contract for an additional two years. Advise the trial judge as requested.

Presumptions in Criminal Cases

Question: Harry is on trial for receipt of stolen property, i.e., television sets. The trial judge is concerned that the jury may not realize on its own that it may infer knowledge that the televisions were stolen from the mere fact of possession of recently stolen property. She wants to employ a “criminal presumption” in this context. Explain how this “criminal presumption” would operate and how the jury would be instructed, if they should be instructed, as to its operation.

