QUESTION 6

Paul has commenced an action in intentional tort against Don, alleging injuries suffered from stab wounds inflicted by Don, and seeking damages. At the trial by jury, Paul was called as the first witness and the following questions were asked and answers given:

[Direct examination of plaintiff Paul]

Q: What is your name?
A: Paul Jones.
Q: Where do you live?
A: 637 Broadway, here in town.
[1] Q: And you've lived there for the past eight years?
A: That's right.
Q: What do you do for a living?
A: For the past four years I've been the assistant dean at the College of Law.
Q: Directing your attention to January 11th of this year at about 8:00 a.m., where were you?
A: I was standing in the reception office of the law school.
Q: Tell the jury what happened when you were standing there.
[2] A: Well, the first thing I remember is that a student, Bonnie Brown, said, "Paul, here comes Don, and he seems to be pointing at you."
Q: Then what happened?
A: I noticed that defendant Don was rushing toward the office, screaming at me and waving his arms.
[3] Q: O.K., what happened after he rushed toward you screaming and waving a knife?
A: Well, I just turned and ran down the hall.
[4] Q: I see. So you didn't say anything to him and you didn't provoke him in any way?
A: Yes, definitely. I didn't know what had gotten into him.

[Paul proceeded to testify about the chase, the attack, and its aftermath.]

Q: Where were you interviewed by the police?
A: At the hospital.
Q: And did you tell them anything different from what you have told the jury today?
[5] A: No, I told the police exactly what I've said here. I have had a

clear recollection of what happened ever since that day.

[Paul was then examined about his damages.]

Q: How much were your medical expenses?

A: I don't remember specifically.

[6] Q: Would it refresh your recollection if I told you it was $27,520?

A: No, but it's on the bill from the University Hospital.

Q: Showing you the bill, do you now remember the specific amount?

[7] A: (Reading from the bill) Yes, it says here $27,520.

[Cross-examination of plaintiff Paul]

[8] Q: You testified that you didn't know what had provoked Don, but the day before the incident you expelled six of his students for no reason, changed the lock on his office, and scraped the parking sticker off his car. Isn't that correct?

A: That's not right.

Q: You would agree that Don and you had your differences?

[9] A: No, we always got along well, and when he came after me that morning he had a lethal weapon.

At each of the nine indicated points, what objection or objections, if any, should have been made, and how should the Court have ruled?

Discuss.

ANSWER A TO QUESTION 6

Paul (P) v. Don (D)

1. Leading Question Objection.

D's counsel could object that this is a leading question being asked on direct examination. While this is technically correct, because the question itself contains the evidence solicited, this type of leading question is usually ignored because it relates only to collateral facts about address, education, etc. However, the judge could sustain this as being leading, though too many of these non-crucial objections tend to irritate the judge and jury.

2. Hearsay Objection

Hearsay is an out-of -court statement offered for the truth of the matter asserted. Thus, D's counsel would object that D's testimony about Bonnie Brown's (B) remark was hearsay, because it was made out of court and is being offered for its truth.

P's counsel could respond that it is not being offered for its truth, but merely for the fact that it was said, to show the effect on the hearer. That argument seems weak, as P is probably intending that the jury believe that D was coming towards him when B said that. Therefore, the statement is probably hearsay because it is being offered for its truth.

P's counsel would also argue that the statement falls within the present sense impression exception. This is probably accurate because P can show that the statement was made by B at a time when she was witnessing an event, and the statement describes the event as it was happening. There was no time lapse between D's approach and B's statement; her statement was contemporaneous to his approach.

Thus, the hearsay objection would be overruled, and the statement by D would be allowed under the present sense impression exception.

3. Facts not in Evidence, Testimony by Lawyer

D's counsel would object, and rightfully so, that the question by P's counsel assumes facts not in evidence and is therefore testimony being made by the lawyer, not the witness.

The question refers to D waving a knife, which P did not testify about in his previous answer. He merely said that D was waving his arms, and that B said D was "pointing."

Therefore, this objection will be sustained because a lawyer may not testify for his client by introducing facts through his questions about which the witness has not testified.

4. Leading, Compound Question; Ambiguous Answer

D's counsel will object that the opposing lawyer has asked a compound question. This is a proper objection because the question asked whether:

a. P said anything to D, and

b. whether P provoked him in any way.

Since each of these is an independent question with an independent answer, they should be asked separately.

The question is also leading because it suggests the answer by saying "You didn't…" The question should be asked as, "Did you…"

Therefore, the judge will sustain the objection because the question is both leading and compound. He will also strike the answer as being ambiguous because the witness answered yes when he meant no. Also, answers to compound questions are inherently ambiguous.

5. Hearsay: Prior Consistent Statement

D will object that P's statement is hearsay because it is an out-of-court statement offered for its proof. This is true even though the statement is offered by its original speaker, P.

This statement does not fall within any exception to the hearsay rule. As a prior consistent statement, it cannot be offered unless it is for refuting bias or a charge of recent fabrication. Since P is the first witness, that cannot be a possibility here. It also does not qualify as an admission because it is not offered against the speaker (P is not an opponent of himself).

Therefore, the objection will be sustained. The objection should have been made when the question was asked, though, because the question indicated that it would call for hearsay.

Thus, the judge might refuse to strike the witness's testimony because D waived the objection by not making it in a timely manner.

6. Improper Method of Refreshing Witness's Memory

The objection to this question is that a lawyer may not refresh a witness's memory by merely telling the witness what the answer to the question is supposed to be. The proper method would have been to show the bill and say, "Does this hospital bill refresh your memory?"

Thus, this objection will definitely be sustained.

7. Hearsay; Non-Responsive Answer; No Foundation

The witness's answer should be stricken as to both hearsay and as being non-responsive to the question. It is hearsay because the witness is reading from an unauthenticated document that is basically the hospital's statement. It is being offered for the truth of the matter therein. No foundation has been laid for this document, either. Therefore, the witness may not read from the bill.

Furthermore, the answer is non-responsive. The witness was asked whether he remembered the amount; instead, he just read it from the bill.

Since the bill was not properly authenticated, had no foundation, and no exception to the hearsay rule was established (though it could be if done properly), the witness's answer be stricken.

8. Compound Question

P's counsel will object that this is a compound question. This is a proper objection because it asks P to answer to three allegations at once - expelling students, changing locks, and removing the parking sticker. This objection will be sustained.

Also, the question would be more properly phrased if it began with the statement, "Isn't it true that you…" As stated, it sounds like testimony by the lawyer. While leading questions are acceptable on cross-examination, this may be beyond leading and more like a statement being made by the lawyer.

9. Non-Responsive Answer

D's counsel should move to have the answer stricken because the witness has volunteered an answer which goes far beyond the question asked. By including the statement that D came at him with a lethal weapon, P has not responded to the question, which asked whether he and D had their differences in the past.

Thus, this answer should be stricken by the judge.

ANSWER B TO QUESTION 6

1. Defense should have objected to this question as a leading question because it provides the answer within the question. Leading questions are generally not allowed on direct examination, which Paul (P) was under. However, when they involve preliminary matters, such as where a person lives and how long he has lived there, a court will generally overrule any objections as to leading the witness and allow the testimony, to speed up the trial, in its discretion.

Defense might object to relevance since the fact about how long P has lived in his home does not prove any of his case in any way. However, it tends to show P's competency to testify and will be allowed.

2. This testimony involves an out-of-court statement made by Bonnie Brown (B) which appears intended to prove the fact that Don (D) was coming towards P pointing at P (the truth of the matter asserted). Defense counsel should object that this is hearsay. However, P has two arguments to counter. First, this statement was not evidence to prove what D was doing, but rather the effect it had on D (not for the truth) of scaring D. This will be relevant for an assault claim. If this argument fails, then P should argue that this statement is excepted from the hearsay rule as a present sense impression. B made the statement as she contemporaneously saw D coming towards P, and the statement describes the event. A court will thus allow the evidence.

3. The defense attorney should object to this question as assuming facts not in evidence, move to have it struck from the record, and have the jury instructed to disregard it. The fact that a knife was involved has not been attested to by P yet. P is the first witness. Therefore, the knife is not in evidence and the question is improper. The judge should allow the objection and strike it from the record and admonish the jury to disregard it.

4. This question is objectionable as leading and does not involve a preliminary matter or a forgetful witness. Thus, the objection should be sustained.

This question is also objectionable as asking a multiple question. It asks about what, if anything, P might have 1) said to D and 2) acted towards D. Multiple questions are often misleading to the jury because the

jury is not sure which question the witness is answering. The objection should be sustained.

Finally, this question calls for hearsay and is objectionable. The question asks for statements that P might have made to D out of the court. Defendant has no idea of whether such statements will be used to prove the matter asserted. The objection should be sustained.

Also, the question is argumentative in that it calls for a witness to testify as to a conclusion of whether a material element was present, namely, provocation. However, since “provocation” is not really confusing to the jury, the judge may allow it.

5. This testimony is objectionable first as giving hearsay in the first sentence. However, since P is not testifying about his out-of -court statements to the police to prove the truth of these statements, but rather for another purpose of proving what was said to bolster his credibility with prior consistent statements, there is no hearsay.

However, a witness may not have his testimony bolstered with prior consistent statements unless his testimony is impeached with evidence of bad faith motive or recent fabrications. Since P has not been cross-examined yet, none of the exceptions apply and the bolstering testimony is properly objectionable and should be sustained.

P’s second sentence may be grounds for objecting to P’s testimony completely since he claims to have a clear memory of what happened only since the day he spoke to the police. If that day was following the day of the attack, P may not have foundation to testify as to the actual day of the attack. The defense counsel should subject the witness to an examination for competency upon a proper objection and motion. Since P’s memory seems fairly clear and capacity to testify is a very minimal barrier, defense counsel should lose.

Finally, this second sentence is objectionable as unresponsive to any question asked by plaintiff’s counsel. A judge may sustain this objection but to instruct the jury may be just a waste of time.

6. This question is objectionable as leading since it provides the answer in the question. Such an objection should be sustained.

This question is also objectionable as assuming facts not in evidence (this is the first mention of $27,520) and should be sustained.

This question is objectionable as lacking in foundation and as having the attorney testifying. Both should be sustained.

If plaintiff's counsel claims to be refreshing recollection, he will fail. In order to refresh recollection, an attorney must do so by a writing and first give the opposing counsel the opportunity to view that writing. Plaintiff's counsel did neither and the question should be stricken.

7. This answer is objectionable as violating the best evidence rule. P is testifying as to the contents of a writing (the bill) without showing that he has any personal knowledge of the contents, aside from his reading it today while on the stand. Since the writing is available, it must be used to evidence the medical bills it contains, rather than P's reading of it.

The answer is also unresponsive because P did not answer the attorney's question as to whether P now remembers the specific comment.

Since it appears P has no personal knowledge or recollection of the exact amount, the testimony should be excluded and P must either submit the bill under the best evidence rule after laying a proper foundation to prove its authenticity, or have the bill read into evidence as past recollection recorded.

8. This question, first of all, is leading. However, an attorney may ask leading questions on cross-examination and so any objection as to leading will be overruled.

Second, this question is a multiple question calling for multiple answers which may confuse the jury, and is properly objectionable.

Third, this question may be objected to as calling for impermissible character evidence of prior specific bad acts by P. Generally, no evidence of specific bad acts may be used to prove conduct in conformity therewith. However, since this evidence is being used to show the effect on D's mental state and provocation, it is highly relevant and permissible

evidence. The court may allow the testimony if defense counsel breaks up the question so as not to be multiple and confusing.

9. The second part of this answer, "...and when he came after me…" is unresponsive and objectionable. It fails to answer the question about whether or not P agrees that he had his differences with D. This part of the answer is also objectionable as providing an unresponsive narrative.

Finally, the testimony that D had a "lethal weapon" is objectionable as lacking foundation. First of all, there has been no evidence which would show that P had any capacity to testify as to the lethalness or not of a weapon. He has not been qualified as an expert in guns nor even as a skilled lay witness with any gun experience at all. The response should be limited to his testimony as to "No, we always got along well," and the rest of the testimony should be struck and the jury may be instructed to disregard upon a proper motion by P's attorney.