

Monterey College of Law

EVIDENCE

Final Examination

Spring 2025

Judge J. O'Keefe

General Instructions:

Answer All Three Essay Questions.

Total Time Allotted: Three (3) Hours

Recommended Allocation of Time: Equal Time per Question

Question 1

Defendant Emily is on trial for embezzlement after allegedly transferring large sums of money from her employer's account into her personal account using complex financial transactions. Emily's defense is that the accounting errors were unintentional. Assume the following occurred in the jury trial of Emily. Discuss all the evidentiary issues and arguments that would likely arise in each section below, including objections, if any, and the likely trial court ruling on the admissibility of the evidence. Apply the **Federal Rules of Evidence**.

1. The prosecution calls John, Emily's co-worker. John will testify that he received an email from Emily's email account, emily@companyemail.com, a couple of months before the accounting discrepancies were discovered that stated, "I am going to have to move funds around to cover the shortfall." John deleted the email shortly after he received it and it is not produced in court.
2. The prosecution calls Taylor, a financial analyst who will explain the methods used to detect the fraudulent transactions. Taylor discusses her educational background, professional certifications as a CPA, and work experience in forensic accounting. Taylor says she is basing her opinion on her analysis of the company's financial records, Emily's bank records, and Emily's Instagram account, which shows her taking lavish vacations and wearing designer clothing that is not commensurate with her pay scale. Taylor states that in her opinion Emily improperly diverted company funds to Emily's account and is therefore guilty.
3. The defense seeks to introduce a thesis Emily wrote on the ethical implications of employee accountability in financial management to show that Emily understands ethical standards in financial management and did not intend to commit embezzlement.
4. The defense calls Lisa, who will testify about Emily's honest business practices over the past decade.

Evidence II

Final Examination

Spring 2025

Question 2

Darren is on trial for aggravated assault after allegedly attacking a rival during a bar fight. Assume the following occurred in the jury trial of Darren. Discuss all the evidentiary issues and arguments that would likely arise in each section below, including objections, if any, and the likely trial court ruling on the admissibility of the evidence. Use the **Federal Rules of Evidence**.

1. In a motion in limine, the prosecution seeks to introduce evidence of Darren's prior misdemeanor conviction for fraud, which occurred 10 years ago, and his prior felony conviction for assault, which occurred 2 years ago, to impeach his credibility if he testifies. Additionally, the prosecution argues that evidence of the prior conviction for assault establishes Darren's character for violence, which is relevant to the current charge.
2. The prosecution calls Morgan, a bartender at the bar where this incident occurred. She testifies that she saw Darren at the bar. She states, "He looked suspicious and angry before the fight broke out." Morgan also testifies that she heard David, another bar patron, say, "I saw Darren throw the first punch" immediately after the fight.
3. The defense calls Tom, who will testify that David was fired from his job for stealing and that David hates Darren and would do anything to get back at him.

Evidence II
Final Examination
Spring 2025

Question 3

Blaze is the owner of a restaurant that is in financial trouble. He starts a kitchen fire and the accelerant blowbacks on his hands causing severe burns. Blaze runs out of the closed restaurant with a gas can in his hand.

A Passerby just got off work and is driving by the restaurant. He notices a male all dressed in black running in the alleyway carrying a gas can and shaking his hands. Within moments, Passerby sees smoke and immediately calls the fire department. Passerby waits for the fire department to arrive and gives a statement to Fire Marshall Bill.

At the emergency room, when Dr. Hertz asks how the burns happened, Blaze says, "I did this by lighting the barbecue." Blaze is diagnosed and treated him for second-degree burns. The doctor's notes included the diagnosis, and that Blaze had a strong odor of gasoline emitting from his hands.

Fire Marshall Bill is an experienced arson expert. Inside the restaurant, he locates a V-shaped burn pattern indicating the presence of an accelerator poured along the kitchen floor. Also, the expert used a "sniffer" that is a specialized device designed to detect and analyze the presence of accelerants. In Bill's expert opinion, along with Passerby's statement, he concludes that the fire was intentionally set using gasoline.

A week later, Blaze goes to a consultation with Atticus, his attorney. During the meeting, Atticus tells his law clerk to join them. When Atticus asks Blaze what happened to the gas can, Blaze stated that he threw it into the river. Then Atticus tells Blaze to get rid of any clothing he wore at the scene. Blaze tells Atticus that the black clothing he wore is in his washer. Atticus tells him to destroy the clothing. Blaze complies.

Assume the following occurred in a California state court. Discuss all the evidentiary issues and arguments that would likely arise in each section below, including objections, if any and the likely trial court ruling on the admissibility of the evidence.

Answer according to California Evidence Code.

1. During the prosecution's case, Passerby testified to his observations and what he told Fire Marshall Bill.
2. Next, the prosecution calls Dr. Hertz to testify to his diagnosis, treatment and the strong odor of gasoline emitting from Blaze's hands.
3. Next, the prosecution then calls Fire Marhsall Bill to testify as an expert and that in his opinion that this was arson.
4. Finally, the prosecution calls the law clerk to testify about the whereabouts of the missing gas can and to the statements by Atticus to Blaze about the black clothing.

ANSWER OUTLINE

EVIDENCE-SPRING 2025

MCL – SLO – HYB

PROF. O'KEEFE & PROF. LIZARDO

Question 1- Judge O'Keefe

Defendant Emily is on trial for embezzlement after allegedly transferring large sums of money from her employer's account into her personal account using complex financial transactions. Emily's defense is that the accounting errors were unintentional. Assume the following occurred in the jury trial of Emily. Discuss all the evidentiary issues and arguments that would likely arise in each section below, including objections, if any, and the likely trial court ruling on the admissibility of the evidence. Apply the **Federal Rules of Evidence**.

1. The prosecution calls John, Emily's co-worker. John will testify that he received an email from Emily's email account, emily@companyemail.com, a couple of months before the accounting discrepancies were discovered that stated, "I am going to have to move funds around to cover the shortfall." John deleted the email shortly after he received it and it is not produced in court.

Relevance: Evidence is relevant if it has some tendency to prove or disprove a material fact. The email sent by Emily about her plans to transfer money is relevant to show that her acts were intentional rather than accidental.

Authentication: Authentication is the requirement that the proponent of evidence provide a basis for the fact finder to believe that the evidence is what the proponent claims it is. The rule applies to documents, records or other physical things described in testimony if offered into evidence. It also applies to references to human beings as having been seen by a witness or having spoken to a witness.

Here, John could authenticate the email, testifying he read the email, he was familiar with Emily's email account and that the email came from Emily's account.

Best Evidence Rule: The best evidence rule applies only where the contents of a writing are at issue, such as when the contents of a writing directly affects legal rights that are at issue in the case (such as a contract, a will, defamatory writings and recordings, etc.) or where the knowledge of a witness concerning a fact results from having read it in the document.

The rule does not apply if the fact to be proved exists independently of any writing, the writing is collateral to a litigated issue or in the case of summaries of voluminous records or public records.

If the best evidence rule applies, then the proponent of the evidence has to either introduce the original (in this case the note) or a duplicate (an exact copy of the note) or provide a legally justifiable excuse why they cannot produce the original or a duplicate. A duplicate is admissible to the same extent as the original unless there is a genuine issue as to the document's genuineness or It would be unfair to admit the duplicate.

If you don't have the original or a duplicate, you must convince the court that you have a satisfactory explanation for why you do not have it:

- a. The original was lost or destroyed in good faith
- b. The original is outside the jurisdiction and unobtainable
- c. The original is in the possession of the adversary, who after notice, fails to produce it

If the court is satisfied, then you can introduce any type of "secondary evidence" to prove the terms of the writing. This could include oral testimony, handwritten notes, photos, etc.

In the present case, the best evidence rule would apply. John's knowledge of the contents of the writing (the email) comes solely from reading the email. John deleted the email and, therefore cannot produce the original or a duplicate (although there may be some question as to whether it could be retrieved). The prosecutor would have to ask the court to introduce secondary evidence of the contents of the document – the oral testimony of John, in lieu of the original. If the court finds the explanation satisfactory, then the court will allow oral testimony about the contents of the writing.

Hearsay: out of court statement offered for the truth of the matter asserted.

Statement of a Party Opponent: The emails would be admissible as a statement of a party opponent. This allows for the admission of a party's own statements against them.

2. The prosecution calls Taylor, a financial analyst who will explain the methods used to detect the fraudulent transactions. Taylor discusses her educational background, professional certifications as a CPA, and work experience in forensic accounting. Taylor says she is basing her opinion on her analysis of the company's financial records, Emily's bank records, and Emily's Instagram account, which shows her taking lavish vacations and wearing designer clothing that is not commensurate with her pay scale. Taylor states that in her opinion Emily improperly diverted company funds to Emily's account and is therefore guilty.

Relevance. The expert testimony of Taylor is relevant to assist the jury in understanding how the company's funds were diverted into Emily's bank account.

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

1. The expert's scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
2. The testimony is based on sufficient facts or data;
3. The testimony is the product of reliable principles and methods; and
4. The expert has reliably applied the principles and methods to the facts of the case.

Subject Must be Appropriate for Expert Testimony. A subject is appropriate for expert testimony if an expert's opinion would assist the trier of fact. Expert testimony is appropriate in this case as it would assist the jury in understanding complex financial issues that require specialized knowledge. This is an issue beyond the experience of most jurors and it would assist the trier of fact in determining if the embezzlement occurred.

Qualifying as an Expert: A person can qualify as an expert witness by a showing of knowledge or experience. Here, Taylor has the necessary background and experience to qualify as an expert in forensic accounting.

Basis for the Expert's Opinion – the reasonable reliance test: An expert's opinion can be based on any data that experts in the field ordinarily use, but it must apply reliable principles to sufficient data related to the case.

Here Taylor is basing her opinion on her analysis of the company's financial records, Emily's bank records, and Emily's Instagram account which shows her taking lavish vacations and wearing designer clothing that is not commensurate with her pay scale. The company's financial records and Emily's bank records appear to be the type of information that other financial analysts would use and thus would meet the reasonable reliance test. It is questionable whether financial analysts would use someone's Instagram account as the basis of their opinion. If other financial analysts would not use an Instagram account, then it must be excluded as a basis for the opinion.

Expert Opinion: An expert may state an opinion or conclusion based on the facts the expert believes to be true or may answer a hypothetical question that asks the expert to make assumptions. In criminal cases, an expert's freedom to state conclusions is narrowed. An expert may not testify specifically that a defendant did or did not have a mental state that is an element of a crime

Opinion on Ultimate Factual Issue is Permitted. An expert is permitted to give an opinion on the ultimate factual issue in a case. Here, the expert would be permitted to

give an opinion as to whether Emily improperly diverted funds. The expert would not be permitted to make a legal conclusion that Emily is guilty.

3. The defense seeks to introduce a thesis Emily wrote on the ethical implications of employee accountability in financial management to show that Emily understands ethical standards in financial management and did not intend to commit embezzlement.

Relevance: The purported relevance is to show that Emily understands ethical standards in financial management and did not intend to commit embezzlement.

Hearsay: While the thesis is not hearsay as it is not being offered for its truth. It is being offered to show Emily's knowledge and intent.

403. Relevant evidence may be excluded if it's probative value is substantially outweighed by undue prejudice, confusion of the issues, ect.

The students should analyze the thesis' admissibility under the 403 standard.

4. The defense calls Lisa, who will testify about Emily's honest business practices over the past decade.

Relevance: Relevant for character evidence purposes.

Character Evidence: The general rule is that information about a person's character may not be introduced to suggest that the person did something because he or she has a propensity to do such things.

Despite the general rule that propensity evidence is not admissible, both the FRE and CEC allow a criminal defendant to introduce character evidence. Character evidence to prove a person's actions in conformity with that character is allowed in the case of a criminal defendant who introduces evidence about his or her own good character to support an inference that he or she did not commit a charged crime. If the defendant first introduces such evidence, the prosecutor is entitled to rebut that evidence to suggest that he or she is guilty.

Character evidence is admissible in a criminal trial if offered by a defendant as circumstantial evidence—through reputation or opinion evidence—to show his own character, as long as the character evidence the defendant seeks to introduce is **relevant** to the crime with which the defendant is charged.

Here, the defense is calling Lisa as a character witness. Lisa will be permitted to testify to her opinion of Emily's honesty and Emily's reputation for honesty. She will not be permitted to testify to specific acts.

Question 2 – Judge O’Keefe

Darren is on trial for aggravated assault after allegedly attacking a rival during a bar fight. Assume the following occurred in the jury trial of Darren. Discuss all the evidentiary issues and arguments that would likely arise in each section below, including objections, if any, and the likely trial court ruling on the admissibility of the evidence. Use the **Federal Rules of Evidence**.

1. In a motion in limine, the prosecution seeks to introduce evidence of Darren’s prior misdemeanor conviction for fraud, which occurred 10 years ago, and his prior felony conviction for assault, which occurred 2 years ago, to impeach his credibility if he testifies. Additionally, the prosecution argues that evidence of the prior conviction for assault establishes Darren’s character for violence, which is relevant to the current charge.

Relevance: Evidence is relevant if it has some tendency to prove or disprove a material issue. The prosecution is seeking to impeach Darren with his prior convictions. The prosecution also wants to show Darren’s propensity for violence.

Impeachment with a Prior Conviction. Impeachment is the casting of an adverse reflection on the witness’s credibility.

Impeachment: Crime Involving Dishonesty or False Statement. Under the Federal Rules, a witness’ character for truthfulness may be attacked by any crime (felony or misdemeanor) if it can be readily determined that conviction of the crime required proof or admission of an act of dishonesty or false statement. The trial court has no discretion – not even under FRE 403 to disallow impeachment by such crimes. The only time when admission of this evidence is not automatic is when a ten-year period has elapsed since the date of conviction or the witness’s release from confinement related to the conviction (whichever date is later). In that circumstance, the evidence is subject to a balancing test under Rule 609(b).

Felony Not Involving Dishonesty. A witness’ character for truthfulness may be attacked, under the Federal Rules, by any felony whether or not it involves dishonesty or a false statement. However, if the felony does not involve dishonesty or false statement, the trial court *may* exercise discretion to exclude it under one of the following standards:

Accused in a Criminal Case. If in a criminal case, the witness being impeached is the accused, the felony conviction will be admitted only if the government shows that its probative value as impeachment evidence outweighs its prejudicial effect. In this context, the prejudicial effect is the likelihood that a jury would

misuse the conviction as propensity for the person to commit a crime as opposed to the permitted use as their propensity to be untruthful in court.

Character Evidence: Using prior assault conviction for propensity. Character evidence is prohibited to prove conduct in conformity unless the defendant opens the door to his good character.

Students should analyze whether the evidence is admissible.

2. The prosecution calls Morgan, a bartender at the bar where this incident occurred. She testifies that she saw Darren at the bar. She states, "He looked suspicious and angry before the fight broke out." Morgan also testifies that she heard David, another bar patron, say, "I saw Darren throw the first punch" immediately after the fight.

Relevance: Morgan's testimony about her observation at the bar is circumstantial evidence that he was involved in the fight. David's statement, related by Morgan, is direct evidence that Darren was the initial aggressor of the fight.

Lay Witness Opinion Testimony. Lay witness testimony in the form of an opinion is limited to one that is: rationally based on the witness's perception; helpful to clearly understanding the witness's testimony or to determining a fact in issue; and not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. Maria's testimony about James looking really angry would be admitted as proper lay witness opinion testimony. The court would likely allow the characterization as suspicious as well.

Hearsay. Out of court statement offered to prove the truth of the matter asserted. David's statement is hearsay.

Excited Utterance: A statement relating to a startling event or condition made while the declarant was under the stress or excitement that it caused.

Present Sense Impression: A statement describing or explaining an event or condition made while or immediately after the declarant perceived it. David made his statement shortly after the fight.

3. The defense calls Tom, who will testify that David was fired from his job for stealing and that David hates Darren and would do anything to get back at him.

Relevance: Darren is seeking to impeach David, who identified him as the initial aggressor in the fight.

Impeachment Bad Acts Not Resulting in a Conviction. You can impeach the witness with proof that the witness has committed untruthful acts even if the acts have not

resulted in the witness' conviction if the act of misconduct is probative of truthfulness. The theory is that if the witness has been willing to commit untruthful and deceitful acts in the past, the witness may be willing to lie on the stand.

There are several important controls on the use of information about a witness' past acts that did not lead to a criminal conviction:

1. **Counsel must inquire in good faith** with some reasonable basis for believing that the witness may have committed the bad act inquired about.
2. **Extrinsic evidence is not permitted.** A specific act of misconduct offered to attack the witness's character for truthfulness can be elicited only on cross-examination of the witness. If the witness denies the act, the cross-examiner cannot refute the answer by calling other witnesses or producing other evidence. The opponent must accept the answer the witness gives. It is usually not improper for the cross-examiner, acting in good faith, to continue the cross-examination after a denial in the hope that the witness will change his answer. For example, the opponent can remind the witness of the penalties for perjury.
3. **Cannot Reference Consequences of the Bad Act.** Federal Rule 608(b) bars any reference during interrogation to consequences (like termination of employment, discipline) the witness may have suffered as a result of his prior bad act.

This impeachment evidence will not be admissible as David did not testify. Rather, his hearsay statement was relayed by Maria. Calling Tom as a witness is extrinsic evidence. You also cannot relate the consequence of the act – David being fired.

Impeachment Bias: Evidence that a witness is biased or has an interest in the outcome of a suit tends to show that the witness has a motive to lie. A witness may always be impeached by extrinsic evidence of bias or interest, provided a proper foundation is laid. Evidence that is substantively inadmissible may be admitted for impeachment purposes if relevant to show bias or interest.

Foundation. Most courts require that before a witness can be impeached by extrinsic evidence of bias or interest, he must first be asked about the facts that show bias or interest on cross-examination. If the witness on cross-examination admits the facts claimed to show bias or interest, it is within the trial judge's discretion to decide whether extrinsic evidence may be introduced as further proof of bias or interest. Even though it is shown that a witness is biased, no evidence may be introduced to show that he was justified in his bias.

Students should analyze whether the evidence is admissible.

Question 3 – Prof. Lizardo

QUESTION 3: ANSWER OUTLINE – BLAZE

Please note: Below is an issue outline only. The students are expected to use IRAC, not do an outline. The argumentation is key. Students should argue and analyze both sides of the issue. Finally, a trial court ruling or conclusion should be reached.

1. TESTIMONY OF PASSERBY

Relevance- Evidence must be both logically relevant and legally relevant to be admissible.

Logical Relevance (Tendency Test)

- Evidence is logically relevant if it has any tendency in reason to prove or disprove a material fact in dispute.
- Here, Prosecution is offering the testimony of Passerby to establish the identity of the arsonist as Blaze. Also, this is circumstantial evidence that Blaze was at the closed restaurant and that he was observed carrying a gas can and shaking his hands. This is circumstantial evidence that links Blaze as the arsonist due to time, proximity, Passerby's observations of the gas can and his call to the fire department.
- Defense may argue that the testimony is not logically relevant because there was no line up or positive identification of Blaze, so it is speculation.
- Conclusion- trial court will rule- logically relevant

Legal Relevance (Balancing Test)

- The trial judge has the discretion to exclude evidence if the probative value is substantially outweighed by the danger of unfair prejudice, confuse the jury, mislead the jury or waste the court's time.
- Argumentation
- Conclude- legally relevant

Lay Witness- Passerby's Observations

- Lay Witness must be rationally based on the perception or observation of the witness
- Helpful to court
- Passerby is a lay witness since he has firsthand knowledge of Blaze's conduct by the closed restaurant of running and carrying a gas can. Seeing the smoke causes Passerby to call the fire department.

2. TESTIMONY OF DR. HERTZ

Relevance

HEARSAY, "I did this by lighting a barbecue."

- Out- of court statement offered to prove the truth of the matter asserted.
- Exceptions:
 - Party Admission- offered against the party
 - Declaration Against Interest- Argue that Blaze would need to take 5th Am.

Note: Statement may be argued as Hearsay. However, Privileges is a key issue and should be discussed next. This statement may have logical relevancy issues since the statement sounds like an accident.

DOCTOR- PATIENT PRIVILEGE

- Protection of confidential communication between a doctor and patient for medical diagnosis or treatment. Here, Blaze is the patient seeking medical treatment for his second-degree burns.
- The observation by Dr. Hertz that a strong odor of gasoline is emitting from Blaze's hands, and the burn treatment may be protected under this privilege unless there is an exception.
- Blaze's statement on how he burned his hands (lighting a barbecue) - see Hearsay.
- The doctor's notes may be privileged unless there is an exception.
- Exception: Crime
- Argue, analyze, conclude

3. TESTIMONY OF FIRE MARSHALL BILL

Relevance- helps determine if the fire was arson and the factors leading to arson **Expert Witness:**

- Qualifications of experts: foundation includes special knowledge, training, experience, background, education
Helpful to the jury, beyond common experience
- Experts may consider eyewitness statements such as Passerby- reasonable reliance
- Fire Marshall Bill may give expert opinion this was arson due to several factors, including but not limited to: the V-shaped burn pattern of an accelerant on the

kitchen floor, the use of the "sniffer" tool, the statement of Passerby who saw a male carrying a gas can.

- **CEC Kelly Test-** Admissibility of new or novel procedures
The "sniffer" specialized device is a tool used in investigating arson.
May be subject to CEC Kelly Test- general acceptance, reasonable reliance on the sniffer
- Argue and conclude

4. TESTIMONY OF LAW CLERK

Relevance- can prove a consciousness of Blaze's guilt. However, Defense will argue Privilege.

Specific relationships that are built on trust and confidentiality protect disclosure of certain information.

HEARSAY, Throwing the gas can into the river

- Exception- Admission by Blaze, Declaration against Interest
If offered by Prosecution. See Privileges.

ATTORNEY – CLIENT PRIVILEGE

- The attorney-client privilege allows the client the right to refuse to disclose confidential legal information between the client and the attorney. The attorney has separate ethical obligations aside from the privilege. Here, Blaze is the client, and holder, Atticus, is his attorney. There is a third-party present law clerk present at the meeting.
- **“Reasonably Necessary”- Law Clerk to Attorney**
- Blaze’s admission about throwing the gas can into the river may qualify for the crime exception. However, the exception is generally limited to future crimes. Blaze did not ask his attorney to hide the gas can, just advised Atticus of his conduct in getting rid of the gas can. Furthermore, the statements by Blaze to Atticus may be argued as “consciousness of guilt.”
- Generally, the presence of the law clerk may be argued that the staffer is reasonably necessary for Atticus, the attorney, to do his work.
- However, Blaze’s statements about getting rid of evidence may be deemed admissible under the crime exception. Also, Atticus’s direction for Blaze to get rid of the clothing may be argued as falling under the crime exception. There may be ethical violations by Atticus in telling Blaze to get rid of evidence.

- Conclude

Prop 8 (Note: Prop 8 is a minor issue. It is included because recent Cal Bar essays answers have included this issue)

- In California, Prop 8 applies to criminal cases, and provides that all relevant evidence is admissible even if it is objectionable. However, Prop 8 evidence is subject to being excluded under CEC 352, if the unfair prejudice outweighs the probative value. Furthermore, Prop 8 has several exceptions.
- Evidence offered is exempt from Prop 8 because the evidence has probative value in determining the identity of the arsonist and the location of the gas can.
- Risk of unfair prejudice this appears to be outweighed by the probative value in showing that the defendant is the arsonist.

1)

Excellent Job!

Testimony of John

The Writing (Emily's Email)

Factual Relevance

Testimony is relevant if it would be more likely to prove or disprove a matter in the case than had it not been introduced. In order to be relevant, testimony must be material, probative and competent.

Here, the email is relevant as it is circumstantial evidence which showed that Emily moved around money and possibly committed embezzlement.

Legal Relevance (FRE 403)

Evidence is legally relevant if its probative value substantially outweighs its prejudicial effect.

Here, a jury would likely not be overly swayed by emotion due to the testimony involving an email. Therefore, the information is legally relevant.

Competent

A witness is competent if they have first hand knowledge of the incident and are capable of testifying to the truth.

Here, there is nothing in the fact pattern to indicate John has any issues with competency. John is a competent witness.

Lay Witness

A lay witness is anyone with first hand knowledge of an incident. A lay witness generally cannot provide opinion testimony unless it is based on their personal observations, it is helpful to the testimony, and it is not based on any specialized knowledge. As John has first hand knowledge of the incident and is not relying on expert knowledge, he is a lay witness.

Authentication

Authenticating a writing is the process of proving in court that a piece of evidence is what it purports to be.

Here, John will testify that he can authenticate the email because he had prior knowledge that Emily's email was emily@companyemail.com and that she was the only one who used the email.

Best Evidence Rule

The best evidence rule applies to any legally operative or demonstrative instrument, or if the witness gained their awareness from reading the document in issue.

Here, as John gained his awareness of Emily's statement from reading the email, there is an issue with the best evidence rule.

Best Evidence Rule Exemptions

Exemptions to the best evidence rule include if the writing was a collateral issue, a public document, a summary of voluminous records, or acknowledged by the other side.

As none of these exemptions apply here, there is still a best evidence rule issue.

Best Evidence Rule Excuses for Non-production

Several valid excuses for non-production under the best evidence rule include writings that were innocently lost or destroyed, writings in possession of a third party beyond the reach of the court, and evidence that is being withheld by the other side.

Great!
Here, John innocently deleted the email shortly after he received it as he did not know at the time that it would be legally relevant in the future.

Because John innocently deleted the email which is a valid reason for non-production, his testimony regarding the contents of the email satisfy the best evidence rule.

Hearsay

Hearsay is an out of court statement offered to prove the truth of the matter asserted.

John is testifying that Emily said something in an email. As this statement is being offered for the truth of the matter, it is hearsay.

Statement of a party opponent Hearsay exception

Statements of a party opponent are a valid exception to hearsay as the party opponent has the option to provide testimony which counters their statement.

Great!
Here, the contents of the email are statements of a party opponent as the statements were made by Emily who was a defendant in the case.

As the writing satisfies the best evidence rule and it is hearsay which falls under an exception, John's testimony would likely be allowed.

Testimony of Taylor

Factual Relevance

supra

Here, the testimony of Taylor is highly relevant as it provides the results of her detailed investigation of the financial records and social media accounts which give circumstantial evidence of Emily's guilt.

Legal Relevance (FRE 403)

supra

As this expert testimony is unlikely to cause an overly emotional reaction from the jury and is very factual in nature, it is legally relevant.

Competent

supra

As Taylor is a qualified expert in her field with no mention of any sensory deficiencies, her testimony is competent.

Expert Witness Testimony

An expert witness may give their expert opinions in court so long as the content of their testimony is proper, they were properly certified as an expert, there is a reasonable basis for their opinion, and their testimony is based on logical facts.

Reasonable basis for an opinion - The Daubert Test

The Daubert test is a holistic examination of the tests used to determine the experts opinion. Several factors are examined including the methodology of the test and how it was applied. Here, Taylor will testify to the methods used to detect the fraudulent transactions. As long as the tests are scientifically sound and based on the knowledge gained from her training as a CPA, this will satisfy the Daubert test.

Property certified as an expert

Taylor will have needed to be property certified prior to providing expert testimony. She would have had to speak to her expert certifications and educational background. Based on her expertise in accounting, Taylor would likely have had no issues certifying as an expert.

Reasonable basis for opinion

Taylor based her analysis on an examination of the companies financial records, Emily's bank records, and social media accounts. The fact pattern provides as few details such as the fact that Emily took lavish vacations. Due to the information Taylor found, there is likely a reasonable basis for her final opinion.

Testimony based on logical facts

Taylor was provided with the companies financial records and Emily's bank statements before trial. Taylor also examined Emily's social media accounts. Based on the information Taylor reviewed, her testimony was property based on the facts of this case.

Taylor's ultimate conclusion

As an expert witness, Taylor is allowed to opine on the material issues in the case but not the ultimate legal issues.

Taylor testified that in her opinion, Emily diverted funds into her own account. This is **proper** testimony as an expert witness.

Great!

Taylor also testified that she believed Emily was guilty. This is **improper** as it is the ultimate legal issue in this case.

Emily's Thesis

Factual Relevance

supra

Here, this evidence is relevant as it is (weak) circumstantial evidence which shows that Emily knows the difference between right and wrong. The evidence is therefore relevant.

Legal Relevance (FRE 403)

supra

Here, this is a writing that is unlikely to sway the emotions of a jury. The prosecution will argue that it has very little probative value as it was written when Emily was in school and has very little bearing on this case but as its prejudicial effect is so minimal, its probative value still most likely substantially outweighs its prejudicial effect.

Competent

supra

Emily wrote this thesis while she was in school and there are no issues with its competency.

Authentication

supra

Emily can testify to the authenticity of the document as she was the one who wrote it.

Best Evidence Rule

supra

As this is not a legally operative document and Emily's knowledge of the subject matter did not come from the document itself, there is no issue with the best evidence rule. Even if the best evidence rule were to apply here, it would be satisfied as Emily would likely provide a printout of the thesis which for the purposes of this evidence would be an exact duplicate.

Hearsay

supra

This document is not being used for the truth of the matter but is being offered to show Emily's state of mind. As her knowledge of ethics have to deal with her mental state and willingness to commit this crime, this falls within the state of mind hearsay exclusion. The document could also come in under the statement of a party opponent hearsay exception (supra).

As this document is (debatably) relevant and falls within a hearsay exclusion, it is likely to be allowed.

Testimony of Lisa

Factual Relevance

supra

This character evidence is relevant as it will help show that Emily was not the type who would have committed this crime.

Legal Relevance (FRE 403)

supra

As this testimony would be unlikely to elicit an overly emotional response from a jury, it is legally relevant.

Competent

supra

The fact pattern does not indicate there are any issues with Lisa's competency and her testimony is based on her personal relationship with Emily.

Lay Witness

supra

Lisa is a lay witness in this case.

Character Evidence - FRE Defendant's Character

Lisa may provide good character evidence of Lisa using specific instance evidence only. However, this will open the door for the prosecution to use reputation and opinion evidence by calling their own witness who may testify as to Lisa's bad character trait.

Impeachment

Impeachment casts a negative reflection on the veracity of a witness. It may be done through extrinsic evidence and cross examination. A witness may be impeached through contradiction, opinion (reputation for truthfulness), prior inconsistent statements, prior bad actions, prior convictions, bias, or sensory deficiencies.

Prior bad actions impeachment.

A witness may be impeached through their prior bad actions involving dishonesty or lying. The party impeaching the other cannot mention the consequences of those bad actions. Extrinsic evidence may not be used in this case.

Here, Lisa could be impeached and asked if she was aware of Emily's past embezzlement. If Lisa responded she was not aware, the prosecutor would have had to accept the answer and move on as no extrinsic evidence is allowed.

2)

Motion in Limine

Factual Relevance

Testimony is relevant if it would be more likely to prove or disprove a matter in the case than had it not been introduced. In order to be relevant, testimony must be material, probative and competent.

Here, evidence of Darren's prior convictions are highly relevant as they are proof of his bad character should he decide to testify. As they might show that he is more likely to lie during his testimony, they are relevant.

Legal Relevance (FRE 403)

Evidence is legally relevant if its probative value substantially outweighs its prejudicial effect.

Here, it is debatable if this standard is met (further analysis is below). However, should the evidence be used for impeachment purposes as to Darren's character for truthfulness and not for propensity, they would be more probative than prejudicial.

Impeachment

Impeachment casts a negative reflection on the veracity of a witness. It may be done through extrinsic evidence and cross examination. A witness may be impeached through contradiction, opinion (reputation for truthfulness), prior inconsistent statements, prior bad actions, prior convictions, bias, or sensory deficiencies.

Prior Convictions Impeachment

A witness can be impeached through evidence of their prior convictions.

Fraud Conviction

A misdemeanor can be used for impeachment as long as it has to do with lying or deceit. As his conviction was for fraud, this meets the requirement and the court would normally have no option in excluding it for purposes of impeachment. However, because the offense occurred 10 years ago, the crime is not automatically allowed in and the court must conduct a balancing test. As the defendant in this case would be the witness, the standard is that the **probative value of the evidence must outweigh its prejudicial effect**. As this crime has nothing to do with his current charges (assault) and due to the 10 year span of the crime, the court will most likely find this evidence to be too prejudicial even despite the lower standard.

Felony Conviction

Darren's felony conviction is impeachable as any felony offense can be used. The court will allow the prosecution to impeach with this offense although the court will limit what can be said (likely only allowing Darren to answer that he is a convicted felon during impeachment).

Character Evidence - FRE Defendant's Bad Character

Character evidence cannot be used to show propensity for violence but may be used to show several things besides propensity.

Here, the prosecution is trying to show that Darren has a character for violence due to his past convictions. This is an improper use of character evidence and will not be allowed.

Testimony of Morgan

Factual Relevance

supra

This testimony is factually relevant as Morgan saw Darren right before the fight. If Darren was agitated before the fight broke out, the jury might believe he was at fault.

Legal Relevance (FRE 403)

supra

This evidence is testimony only and is unlikely to elicit an overly emotional response from the jury. It is legally relevant.

Competent

supra

The fact pattern does not indicate that there was any issues with Morgan's sensory deficiencies. It is competent.

Lay Witness

A lay witness is anyone with first hand knowledge of an incident. A lay witness generally cannot provide opinion testimony unless it is based on their personal observations, it is helpful to the testimony, and it is not based on any specialized knowledge. As Morgan has first hand knowledge of the incident and is not relying on expert knowledge, she is a lay witness.

A lay witness may not typically give their opinion unless:

1. It is based on their own personal perception
2. It is helpful to understanding their testimony
3. It is not based on any specialized knowledge

Here, Morgan is giving her opinion when she testified that Darren looked suspicious and angry. This is acceptable as Morgan's basis for this opinion was based on her own perceptions (when asked for additional details, she would likely say that he was hunched over, or in an aggressive posture, or had balled fists, etc). As this does not rely on specialized knowledge and is helpful in understanding her testimony, this statement would be allowed.

Hearsay

Hearsay is an out of court statement offered to prove the truth of the matter asserted.

Here, Morgan is testifying she heard another patron say that Darren threw the first punch. As it is being used for the truth of the matter, it is hearsay.

Excited Utterance Hearsay Exception

This exception applies if an exciting incident occurred, the declarant had firsthand knowledge, the statement related to the incident and was uttered in a state of nervous excitement.

Here, an exciting event did occur (aggravated assault). David said the statement immediately after the fight, arguably while he was in a state of nervous excitement. Therefore, this statement would likely come in.

Contemporaneous Statement Hearsay Exception

This exception applies if a statement was made about an incident contemporaneously or very close in time after it occurred.

Here, the statement was made "immediately after the fight." Because of the closeness in time to the actual incident, this statement may also come in under this theory.

Confrontation clause issue

Statements made in preparation of litigation are not allowed to be used when the declarant is not in court. However, as the statement was spontaneous and not made in preparation or anticipation of trial, there is no confrontation clause issue.

Testimony of Tom

Factual Relevance

supra

This testimony is factually relevant as it is impeachment evidence against the testimony of David. If the defense shows that David is biased, it may refute his testimony.

Legal Relevance (FRE 403)

supra

This evidence is testimony only and is unlikely to elicit an overly emotional response from the jury. It is legally relevant.

Competent

supra

The fact pattern does not indicate that there was any issues with Tom's sensory deficiencies. It is competent.

Lay Witness

supra. As Tom has first hand knowledge of the incident and is not relying on expert knowledge, he is a lay witness.

Collateral Matter

The general rule is that impeachment may not be used to support a collateral matter and the prosecutor must accept the testimony of the witness. If Tom is being called as a witness to impeach the testimony of Morgan, this might not be allowed as this issue is a collateral matter.

If this testimony were allowed and Tom was allowed to testify, it might possibly fall under prior bad acts impeachment.

Prior bad actions impeachment.

A witness may be impeached through their prior bad actions involving dishonesty or lying. The party impeaching the other cannot mention the consequences of those bad actions. Extrinsic evidence may not be used in this case.

Here, Tom would say that David stole from his job but would not be allowed to testify about the consequences of those bad actions (him being fired).

Bias impeachment

A witness may be impeached with evidence of bias.

Here, Tom is trying to say that David was biased against Darren. Were this to be allowed, this evidence and could call into question the impartiality of David. For bias impeachment to be allowed, the witness must be asked on the stand about the bias. This evidence would likely not be allowed as extrinsic evidence is not allowed for bias impeachment.

3)

1.) Passerby's Testimony

Passerby's Observations

Relevance

Evidence is relevant if it has any tendency to make a fact more or less probable than without the use of that evidence.

Passerby's observations are relevant because they have the tendency to make the fact that Blaze left the scene of the burning restaurant more probable.

Lay Witness Testimony

A lay witness may provide testimony at trial if they have personal knowledge of the facts. Lay witnesses however are not able to provide testimony that relies on specialized knowledge or experience. Lay witness testimony in the form of an opinion is generally inadmissible, but may be admissible if the testimony is reasonably based on the witness's perception and the testimony aids the finder of fact in understanding disputed issues. A lay witness may testify to collective facts like sound, sanity, color, height and weight when they are in the position to reasonably perceive those facts.

Here, the lay witness testimony of Passerby is likely admissible because he did not testify to his opinion or anything else but what he had personal knowledge of. Passerby saw the fire and saw a man running, so is able to testify to both of those facts based on personal knowledge.

Competency

Competency is the witness's capacity to perceive, recollect, communicate, and understand the duty of an oath while testifying. All lay witnesses are considered to be competent unless some condition makes them incompetent to testify.

No facts suggest that Passerby is incompetent to testify so he is considered competent.

Prior ID

Evidence of a prior ID

Passerby's Statements to Bill

Relevance

Evidence is relevant if it has any tendency to make a fact more or less probable than without the use of that evidence.

Passerby's statements to Bill about the fire at the restaurant is relevant because his statement likely included what the fire looked like or when it started. This is relevant because it would provide evidence for how the fire started and when it started, which could implicate Blaze.

2.) Dr Hertz Testimony

Relevance

Evidence is relevant if it has any tendency to make a fact more or less probable than without the use of that evidence.

Dr Hertz's testimony is relevant because it has a tendency to prove that Blaze set the fire in the restaurant due to his burnt hands. Thus, the testimony is relevant.

Hearsay

A statement is considered hearsay if it is an out of court statement offered to prove the truth of the matter asserted.

Here, Dr Hertz is relating the hearsay statement of Blaze through his testimony, which would normally not be admissible unless there is a hearsay exception.

Medical Diagnosis Hearsay Exception

A statement may be admissible under the medical diagnosis hearsay exception if the statement was made for the purposes of purpose of obtaining medical treatment or diagnosis. This statement need not be to a medical professional, but anyone capable of providing or facilitating medical treatment. This statement may describe symptoms and the cause of injury, but statements of fault are not admitted.

Here, Blaze made a hearsay statement to Dr. Hertz in furtherance of getting medical treatment by telling Hertz that his hands were burned. This statement would have alerted Dr. Hertz to what needed to be treated if he hadn't noticed already, and since Dr Hertz works in the emergency room, he was capable of diagnosing and treating Blaze's injuries.

Business Records Exception

A hearsay statement may be admissible under the business records exception if the declarant had a business duty to make a report and did so while the event reported on was fresh in their memory.

The notes taken by Dr. Hertz may be admissible as a business record as Dr. Hertz likely had a duty while working in the emergency room to document incoming patients symptoms and injuries. The facts suggest that Dr. Hertz recorded that the smell of

gasoline was apparent on Blaze's hands, and that may be relevant to treatment because it would help him or another medical professional adequately treat a burn caused by gasoline rather than another substance which may react differently to medical care.

3.) Fire Marshall Bill's Expert Testimony

Relevance

Evidence is relevant if it has any tendency to make a fact more or less probable than without the use of that evidence.

Here, Bill's expert testimony is relevant to proving the prosecutions case that Blaze did set the fire in the restaurant, so it will be admissible.

Expert Witness Testimony

A party may offer the opinion testimony of an expert witness if that witness is qualified through experience, training, knowledge, or certification as an expert and provides an opinion that reasonably relies on methodology/data to help the finder of fact determine relevant disputed issues.

Here, the facts suggest that Bill is an experienced arson expert, so it can be inferred that he is qualified through his experience, training, knowledge or certifications.

Subject Matter

Expert witness testimony is not the appropriate method to provide opinion testimony that a lay witness could reasonably provide. Expert witnesses may only provide evidence that relies on their specialized knowledge or experience.

Here, Bill is using the specialized device known as a sniffer, along with his experience to form his opinion. Since a lay witness would not normally have access to a sniffer or be able to provide the testimony Bill would about arson, the subject matter of Bill's testimony is appropriate.

Basis of Expert Witness Testimony

Expert witnesses may base their opinion on information provided to them during the trial and information that they have learned during their education or training to become an expert. Under California rules, expert witnesses may not relate hearsay or otherwise inadmissible evidence when testifying to the basis of their opinion.

Here, Bill is basing his opinion testimony off of his use of the sniffer, his experience, and Passerby's statement. No facts suggest that passerby's statement is hearsay or that the use of the sniffer is inadmissible, so the basis of Bill's opinion testimony is sound.

Kelly/Frye Test

When an expert witness is providing opinion testimony about scientific evidence, their methodology and data are subject to the Kelly Frye Test. If the methods and data used by the expert witness is not generally accepted within the expert's field, they will not be admissible because they are not sufficiently established.

Here, the facts suggest that the sniffer device used by Bill is designed to detect and analyze the presence of accelerants. The prosecution will make the argument that since Bill is an experienced arson expert, he would have chosen a device commonly used by experts with a knowledge of how arson occurs. Since arson is a crime involving the purposeful burning of structures, accelerants are commonly used by criminals to set those fires. The prosecution will further argue that since accelerants are commonly used, the

methodology and devices used by Bill are also commonly used by other arson experts to solve crimes, thus satisfying the Kelly Frye Test.

4.) Law Clerk's Testimony

Relevance

Evidence is relevant if it has any tendency to make a fact more or less probable than without the use of that evidence.

The law clerk's testimony is relevant because it has the tendency to make the fact that Blaze was guilty of the fire and that he destroyed the evidence more probable than not. As such, it is relevant.

Attorney Client Privilege

Attorney Client Privilege protects confidential communications between an attorney and client. For a communication to be confidential, the communication must be in physical privacy and there must be an intent on the part of the privilege holder (the client) to keep the information secret. Normally, the presence of third parties makes a communication not confidential, but those working on an attorney's staff who are necessary to providing legal service do not invalidate confidentiality. Attorney Client Privilege only applies when there is a valid attorney client relationship and to communications relevant to the provision of legal service or advice. Attorney Client Privilege does not apply when the the communications between a client and attorney constitute criminal activity under the crime-tort exception.

Here, attorney client privilege does not apply to any of the conversations or interactions Blaze had with Atticus and the law clerk. While the communications were confidential and not invalidated by the presence of the law clerk, the communications were either lies

or made for the purpose of destroying evidence (the black clothes). As such, Blaze can not compel the law clerk to not testify to what occurred during the consultation with Atticus because none of the information exchanged was protected by privilege.

END OF EXAM