

San Luis Obispo College of Law

EVIDENCE

Final Examination

Spring 2024

Prof. S. Lizardo

General Instructions:

Answer All Three Essay Questions.

Total Time Allotted: Three (3) Hours

Recommended Allocation of Time: Equal Time per Question

SLO
Evidence
Spring 2024
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QUESTION 1

Slasher was charged in a California state court with the attempted murder of Von, his business manager. Slasher was in his driveway when he stabbed Von in the ribs with a knife. Slasher yelled, "Thief, I know you took my money!" Von bled profusely but survived his injuries. Von was unavailable to testify.

Nosey, age 95, was a neighbor who lives across the street. He saw Slasher stab Von and heard Slasher's accusation. Immediately, Nosey called 911. He has known both Slasher and Von for six years.

When Slasher saw Nosey, he panicked, and called Ashton, his attorney. Ashton advised him that she was on a speaker phone with Quinn, the jury consultant for the law firm. Slasher said, "I just stabbed Von and his blood is all over my clothes! He had gun, it was self-defense!" Ashton told Slasher to come over to the office. When Slasher arrived at the office, Ashton was in her office with Quinn. Ashton directed Quinn to get rid of the bloody clothes and get Slasher new ones. Quinn complied. At trial, Slasher did not testify.

Detective Dodd arrived at the crime scene and lawfully seized the knife from the driveway and a receipt inside the house for the purchase of a knife from a nearby sporting goods store.

At the sporting goods store, the detective interviewed the manager. The manager verified the receipt and stated that he had personally sold the knife to Slasher two hours before the crime to Slasher. The manager was a retired US Army military knife expert. He described the purchased knife as a military-style (Kabar) 5.8" fixed blade with a hilt, (guard). Also, the manager stated that he believed that Slasher was trying to murder Von because the hilt on the knife was for the purpose of keeping the hand from slipping onto the blade during a stabbing attack.

The prosecution called the following witnesses below in the case-in chief.

Answer according to California law. Assuming all appropriate objections were timely made, should the court have admitted:

1. Nosey's testimony? Discuss.
2. Detective Dodd's testimony? Discuss.
3. Quinn's testimony? Discuss.
4. The manager's testimony as a percipient witness and expert. Discuss.

Question 2

Pete was injured at Rock Wall Adventure Park (RWAP) after falling off a 20 foot-tall rock climbing wall. Pete has sued RWAP for damages claiming that RWAP acted negligently in securing his harness before he began climbing on RWAP's rock wall. In defense, RWAP will seek to establish that careless conduct by Pete played a major role in the incident because Pete removed a part of his safety harness to take a selfie at the top of the wall which caused Pete's fall and injuries.

Assume the following occurred in the jury trial of Pete v. RWAP. 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. In the Plaintiff's case in chief, Pete testifies that he was using the safety harness properly when the harness suddenly slipped causing him to fall and become injured. He denies improperly removing the harness. On cross-examination, RWAP asks Pete if he was once fired from working as a security guard because he was caught stealing merchandise from a warehouse. RWAP seeks to introduce Pete's termination letter saying he was fired for stealing. Pete objects.
2. Pete next calls Edgar Mountain. Mountain will testify that after he graduated high school, he spent the next 30 years traveling the world mountain climbing. He has personally used the harness used by RWAP hundreds of times and has seen hundreds of other people use the harness. In his experience, the harness will only slip if not secured properly. Additionally, he spoke to Wanda, another RWAP patron, who was present the day Pete fell. Wanda told Mountain that the RWAP employee who put Pete's harness on did not secure it properly. Mountain's opinion is that RWAP's failure to secure the harness resulted in Pete's fall.
3. In the defense case in chief, the defense introduces the incident report of Matt, the manager of RWAP. The incident report says the following:

I (Matt) did not personally see Pete's fall. Five minutes after the accident, I interviewed Bob, another patron at RWAP. Bob said he "saw the whole thing and that Pete unsecured the top part of the safety harness so that he could take a selfie." A day later, I interviewed Ted, the employee who secured the harness. He said he secured it properly and Pete unsecured the top part of the harness so he could reach his arm out to take a selfie.

4. RWAP calls Matt, the RWAP supervisor, to the stand. Matt testifies that he saw Pete on the date of the fall and Pete had a very distinctive tattoo of a dinosaur skateboarding on his neck and was wearing a hot-pink T-shirt that said, "I'm with Stupid." Matt then seeks to introduce a Snapshot he took from a Facebook page entitled "Crazy Fails." Matt often looks at that Facebook page because he finds it humorous as it shows people getting hurt doing stupid things. The Snapshot depicts the torso of someone falling from a rock-climbing wall. You cannot see the person's face, but the person has a very distinctive neck tattoo of dinosaur skateboarding and a hot-pink T-shirt that says, "I'm with stupid." Matt testifies the tattoo and T-shirt are identical to Pete's. The photo does not have a date or time stamp and Matt testifies on cross-examination that Facebook was not contacted to directly provide the image to RWAP. Pete objects.

Question 3

Tom is accused of committing a burglary at a local jewelry store. He has been arrested and charged with the crime. Assume the following occurred in the jury trial of Tom. 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. The prosecution seeks to call Tom's attorney, Alex, to the stand to testify about a conversation between Tom and Alex. Upon objection, the prosecution gives the following offer of proof: A prosecution investigator, Ivan, saw Tom and his attorney Alex, sitting at a table in a restaurant at lunch. The investigator sat at a table next to them and overheard their conversation. During the conversation, Tom told Alex that he was involved in the jewelry burglary.

2. Tom's wife, Sarah, is called to testify as a witness for the prosecution. The prosecution seeks to elicit the following testimony from Sarah:
 - Sarah witnessed Tom leaving the house late at night with a bag of tools and returned a few hours later with jewelry.
 - Tom confided in Sarah about their financial struggles and his plans to commit the burglary.The defense objects.

3. On cross-examination, the defense asks Sarah:
 - Isn't it true that you told Tom you are going to divorce him because you discovered he was cheating on you?
 - Isn't it true that you have a misdemeanor conviction for embezzlement that occurred last year?

Evidence – SLO - MCL - HYB-Sec2

Spring 2024

Prof. Lizardo & Judge O'Keefe

ANSWER OUTLINE

Q1 (Prof. Lizardo)

SUMMARY ANSWER OUTLINE- Slasher

Please note students may offer different outcomes or rules. This summary is intended to highlight the major issues and rules. Not all the hearsay exceptions need to be addressed. The main ones are spontaneous statement, admission by party and state of mind. Some issues are in summary form only.

1. Testimony of Nosey

As per CEC 350, only relevant evidence is admissible.

Logical Relevance/ CEC 250 Tendency Test-

Evidence is logically relevant if there is a tendency to prove or disprove any disputed fact that is of consequence in the determination of the action. Here, Nosey is a percipient witness Slasher stabbing Von and hearing the accusation that Von is a thief. Also, he called 911 since he recognized Von needed medical help.

Here, the attempted murder consists of the defendant (Slasher) taking at least one direct but ineffective step toward killing another person, (Von.) A direct step requires more than planning or preparation. The stabbing may be argued by the prosecution as a direct step. However, the defense may argue that there was no intention to kill, and that Slasher was only angry at Von stealing from him. Therefore, the defense may request a lesser included jury instruction.

Thus, the court may rule Nosey's testimony is logically relevant and admissible.

Legal Relevance/Balancing Test CEC 352- the trial court has discretion to exclude evidence if the probative value is substantially outweighed by the danger of unfair prejudice.

The probative value of Nosey's testimony greatly outweighs any unfair prejudice. It does not seem likely Nosey's testimony would confuse, mislead or be a substantial danger of undue prejudice or a waste of time for a jury.

Thus, the trial court will rule the eyewitness testimony as legally relevant and admissible.

Witness Competency Age 92 – for a witness to be competent to testify, under CEC it states that all people are qualified unless there is a disqualification due to: perception, memory, or the witness does not understand the "truth" or cannot communicate. In short, witnesses must have the capacity to observe, recollect, communicate, and affirm to be truthful.

Here, even though Nosey is age 92, it does not appear Nosey has any issues that affected his memory or communication skills. His testimony is relevant because he is a percipient witness. Therefore, his competency is not compromised, and he may testify regarding the stabbing. Also, he has known both Slasher and Von for six years, so he is familiar with them and their voices.

Hearsay- "Thief, I know you took my money!"

Defined as an out-of-court statement offered to prove the truth of the matter asserted. This is offered for the truth of the matter and how the stabbing occurred is inadmissible unless there is an exception. Below are some exceptions.

Spontaneous Statement Exception

Defined as a statement by the declarant that describes, explains, or narrates an act or event that happened when the declarant was under the stress of excitement of an event.

Here, the original declarant is Slasher, so Nosey is repeating the accusation in court. Here, Nosey has known both Slasher and Von for six years, so he can identify both.

The trial court will rule the statement is a spontaneous statement and admissible.

Admission Exception

Under CEC, an admission is a statement of a party offered against the party. It does not need to involve guilt or liability. Here, the statement is being offered by the prosecution against Slasher.

Contemporaneous Statement Exception

Requires a statement to describe or explain an event as it is occurring. It is like the spontaneous statement exception but does not involve a stressful event.

The trial court will rule the statement is a contemporaneous statement and is admissible.

State of Mind Exception

Requires the statement by a declarant's (Slasher's) then existing state of mind, emotion or physical sensation may be admissible.

Here, Slasher is exclaiming to Von that he is a thief. It does not appear that Slasher had time to concoct a story,

The trial court will rule this exception applies and the statement is admissible including how the stabbing happened and may go into the reasons for the attack.

Declaration against Interest- if argued, student needs to reasonably assume that Slasher is not available since unavailability is required. The facts state that Slasher did not testify.)

MIMIC - used by Prosecution.

It may be argued that the prosecution may use MIMIC, for motive. Slasher's statement overheard by Nosey, "Thief, I know you took my money!" may be argued as the motive for the stabbing. However, if Nosey testifies based on what he overheard, the trial court may not allow the prosecution to use MIMIC.

2. Detective Dodd's Testimony

(Note: there should be no discussion on any Fourth Amendment search and seizure issues because the facts stated the knife was lawfully seized along with the receipt)

Logical Relevancy- tendency test

Legal Relevancy- balancing test

Writing- The Receipt

Under CEC, the definition of a "writing" is broad and includes, but is not limited to handwriting, typewriting, electronic mail, or other forms of communication.

Here, the receipt is a writing under CEC. The receipt is for a knife and may be relevant as to what instrument, (knife) was used in the attack on Von.

Authentication

This provides that the proponent must provide sufficient information that the item is what it purports to be, the receipt for the knife.

Here, Dodd located the store manager who had personal knowledge since the receipt was from the sporting goods store and he sold the knife.

Therefore, this satisfies the sufficiency test. Therefore, the store manager can verify the receipt and authenticate.

Secondary Evidence Rule

Under the CEC, the Secondary Evidence Rule is applied when the contents of a writing are in issue. Writings may include documents, photos, or recordings. At times, copies may be used if it is a reproduction of the original writing.

Here, the receipt is original document. There has been compliance with the rule and the receipt is admissible.

The Knife

Since Detective Dodd lawfully seized the knife from the driveway, he can lay the foundation for chain of custody. Once the foundation is properly laid, the knife may be admitted into evidence. May need to tie up chain of custody with the manager.

3. Quinn's Testimony- Slasher's statement, "I stabbed Von and his blood is all over my clothes!" and statement, "It was self-defense! He had a gun!"

Logical Relevancy- defined above.

Legal Relevancy- defined above

Hearsay - rule above. *State of Mind exception, Admission and Spontaneous Statement, See above exceptions under call #1.*

Admission on second statement: "He (Von) had a gun- it was self-defense." This statement may be very probative to a defense theory of self-defense. The detective's locating the gun in Von's car may be corroboration.

Attorney- Client Privilege: Jury Consultant

The attorney-client privilege allows the client the right to refuse to disclose confidential legal advice between the client and the attorney. The attorney has separate ethical obligations aside from the privilege.

Here, Ashton is Slasher's attorney, and the call may be confidential client communication with her client. Slasher is the holder of the privilege.

However, the attorney tells Slasher that Quinn, her jury consultant is on the speaker phone, so it may be argued that there was a waiver unless the jury consultant is considered a reasonably necessary party.

Reasonably Necessary"- Jury Consultant- Third Party's Presence

Slasher's admission about stabbing Von and having blood on his clothes may not be a confidential legal communication since someone else is present, the jury consultant.

Ashton advising Slasher to come over and asking Quinn to take the bloody clothes and get Slasher new clothes may be argued as being part of a cover up of the crime. Furthermore, the statements by Slasher to Ashton may be argued as "consciousness of guilt."

The third-party presence of Quinn, the jury may defeat the privilege unless he is termed an **eavesdropper** or **reasonably necessary** to Ashton's meeting with Slasher. This eavesdropper argument is not likely to prevail.

Exception to Privilege: Crime/Fraud

Under CEC, an attorney may not be assisting in a crime or fraud. Quinn's compliance with Ashton's request, serves as actively assisting in the cover up of an attempted murder and may involve accomplice liability. Since Quinn may be part of the attorney's team, he is covered by the privilege, however, since there may be a cover-up, this will not be protected.

(Note: OK if students argue otherwise, so long as logical. Also, there is no Fifth Amendment violation since Slasher did not testify)

4. Manager's Testimony (outline only)

- Logical Relevance
- Legal Relevance
- Percipient Witness: to the receipt and selling of the knife.
- Expert Testimony-

Qualify first for special knowledge, training, and experience. Also needed- helpful to jury.

Manager is US Army retired and familiar with special knives. He had the expertise from the military.

Ok on knowledge of knives since he served in the military and was a weapons expert. Ok to describe the knife and the blade length at 5.8." and a fixed blade.

Not allowed- expert opining on guilt.

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Answer Q2 (O'Keefe)

Relevance: Evidence is relevant if it has some tendency to prove or disprove a fact at issue.

Pete's testimony is relevant because it helps establish his claim of negligence against RWAP. RWAP's question regarding Pete's termination for stealing is relevant for impeachment.

Competence: Under the Federal Rules all witnesses are presumed to be competent unless otherwise stated by the rules. Competence requires that the witness have firsthand knowledge and the witness must declare he will testify truthfully.

Pete is testifying from his personal knowledge. There is nothing to indicate that he is not a competent witness.

Impeachment: Impeachment is the casting of an adverse reflection on the veracity of a witness.

Impeachment with Prior Bad Acts. Witnesses may be impeached by prior bad acts that have not resulted in a conviction. A prior bad act that has not resulted in conviction must be probative of untruthfulness or deceit to be admissible as impeachment. Counsel must inquire in good faith, cannot reference any consequences of the bad act (such as being fired for theft), and is limited to the witness's answer (cannot introduce extrinsic evidence).

Analysis: Pete may be asked on cross-examination about stealing from his former employer. RWAP cannot reference his termination due to the theft. Extrinsic evidence in the form of Pete's termination documentation is not permitted.

- 1. Pete next calls Edgar Mountain. Mountain will testify that after he graduated high school, he spent the next 30 years traveling the world mountain climbing. He has personally used the harness used by RWAP hundreds of times and has seen hundreds of other people use the harness. In his experience, the harness will only slip if not secured properly. Additionally, he spoke to Wanda, another RWAP patron, who was present the day Pete fell. Wanda told Mountain that the RWAP employee who put Pete's harness on did not secure it properly. Mountain's opinion is that RWAPs failure to secure the harness resulted in Pete's fall.*

Relevance: Pete is calling Mountain as an expert witness to help establish his negligence claim.

Expert Witnesses: A witness may testify as an expert if the subject matter of their testimony is beyond the common knowledge of a lay witness, the witness must be qualified as an expert, the expert possesses reasonable probability regarding his opinion, and the opinion is supported by the proper factual basis. The opinion may embrace the ultimate factual issue except for the defendant's mental state in a criminal case.

Analysis:

The subject matter is appropriate for expert testimony as the issue of whether such a harness could slip is beyond the common knowledge of a lay witness.

Mountain is qualified to be an expert. What qualifications an expert needs depends on the issue on which the witness is presented. Here, Mountain has extensive experience mountain climbing with the type of harness that is at issue in this case. He has also seen numerous other individuals use the harness. Although he does not have advanced degrees, this is not required in this situation.

The expert possesses a reasonable probability regarding his opinion.

The opinion must be supported by the proper factual basis. This can include personal observation, facts made known to the expert at trial, and facts made known to the expert outside of court. Mountain's opinion is based on his own personal experience with the harness as well as the statement of Wanda.

Personal experience – this is an appropriate basis for Mountain's testimony as long as other experts in the field reasonably rely upon this type of personal knowledge and its probative value is not substantially outweighed by its prejudicial effect. This would be permissible.

Wanda's Statement – Under the Federal Rules, case-related statements (hearsay) can be related by the expert to the jury, not for their truth, but for the basis of the expert's opinion. The opposing party may object if it is not the type of information upon which other experts in the field reasonably rely or if the statement's probative value is substantially outweighed by its prejudicial effect. Students can argue either way as long as they discuss whether other experts in the field would rely on such statements and whether its probative value substantially outweighs its prejudicial effect. Dan should ask for a limiting instruction indicating that the statement is not offered for its truth, but rather for the basis of the expert's opinion.

The expert's opinion may embrace the ultimate factual (not legal) issue except in a criminal case where mental state constitutes an element of the crime or defense. Mountain's opinion that the harness would not slip unless it wasn't properly secured is appropriate even though that is the ultimate factual issue in the case.

3. *In the defense case in chief, the defense introduces the incident report of Matt, the manager of RWAP. The incident report says the following:*

I (Matt) did not personally see Pete's fall. Five minutes after the accident, I interviewed Bob, another patron at RWAP. Bob said he "saw the whole thing and that Pete unsecured the top part of the safety harness so that he could take a selfie." A day later, I interviewed Ted, the employee who secured the harness. He said he secured it properly and Pete unsecured the top part of the harness so he could reach his arm out to take a selfie.

Relevance. The defendant seeks to introduce Matt's report to establish a complete defense or contributory negligence.

Hearsay: Out-of-court statement offered for the truth of the matter asserted

Business Records: RWAP will introduce the report through the business record exception. To do so, the RWAP must establish

1. *The declarant had a business duty to report the information*

2. *The declarant had personal knowledge of the facts or events reported*
3. *The written report was prepared close in time to the events contained in the report while it was still fresh in the declarant's memory*
4. *It was a routine practice of the business to prepare such reports*
5. *The report was made in the regular course of business.*

Analysis: Matt had a business duty to report the information as the Manager of RWAP. The report was written close in time to the events contained in the report. Students should address whether the report was made in the regular course of business or made in anticipation of litigation. Reports made in the ordinary course of business qualify as business records. Reports made in anticipation of litigation are excluded. Students can argue this either way.

Multiple levels of hearsay: Matt's report includes statements made by Bob and Ted.

Bob: Bob's words would be hearsay if introduced to support the idea that Pete had unsecured the harness prior to his fall. (OOC statement offered for TOMS).

Present sense impression exception: For the present sense impression exception to the hearsay rule to apply, the statement must describe or explain an event or condition and be made while or immediately after the declarant perceives it. Here, Bob's statement occurred five minutes after the initial incident, so the issue is one of timing. Students may argue it either way.

Ted: Ted is an employee of RWAP so he has a business duty to report to RWAP. Because he has a business duty and personal knowledge, his statement would come within the business record exception if all other elements are met.

4. *RWAP calls Matt, the RWAP supervisor, to the stand. Matt testifies that he saw Pete on the date of the fall and Pete had a very distinctive tattoo of a dinosaur skateboarding on his neck and was wearing a hot-pink T-shirt that said, "I'm with Stupid." Matt then seeks to introduce a Snapshot he took from a Facebook page entitled "Crazy Fails." Matt often looks at that Facebook page because he finds it humorous as it shows people getting hurt doing stupid things. The Snapshot depicts the torso of someone falling from a rock-climbing wall. You cannot see the person's face, but the person has a very distinctive neck tattoo of dinosaur skateboarding and a hot-pink T-shirt that says, "I'm with stupid." Matt testifies the tattoo and T-shirt are identical to Pete's. The photo does not have a date or time stamp and Matt testifies on cross-examination that Facebook was not contacted to directly provide the image to RWAP. Pete objects.*

Relevance: To bolster RWAP's claim that Pete unsecured his harness to take a selfie.

Authentication: 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 or offered into evidence. It also applies to references to human beings as having been seen by a witness or having spoken to a witness.

RWAP is seeking to authenticate the Facebook photo by showing that Pete had a very distinctive tattoo and was wearing the same T-shirt in the photo as he was wearing during the fall. Pete argues that there is insufficient evidence to authenticate the photo as it is unknown when the photo was taken, by whom the photo was taken, and who is in the photo.

ANSWER - Q3 (O'Keefe)

*Tom is accused of committing a burglary at a local jewelry store. He has been arrested and charged with the crime. Assume the following occurred in the jury trial of Tom. 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. The prosecution seeks to call Tom's attorney, Alex, to the stand to testify about a conversation between Tom and Alex. Upon objection, the prosecution gives the following offer of proof: A prosecution investigator, Ivan, saw Tom and his attorney Alex, sitting at a table in a restaurant at lunch. The investigator sat at a table next to them and overheard their conversation. During the conversation, Tom told Alex that he was involved in the jewelry burglary.*

***Relevance:** Evidence is relevant if it has some tendency to prove or disprove a fact of consequence. The evidence is relevant because the defendant is confessing to the crime.*

***Offer of Proof:** An offer of Proof is an explanation made by an attorney to a judge during trial to show why a question which has been objected to as immaterial or irrelevant will lead to evidence of value to proving the case of the lawyer's client.*

***Hearsay:** Out of court statement offered for the truth of the matter asserted. Tom and Alex's statement's, if offered for their truth, would be hearsay.*

***Tom's Statement:** Statement of a Party Opponent: This exemption from the hearsay definition permits the proponent to introduce a statement when "the statement is offered against a party and is ... the party's own statement, in either an individual or representative capacity ..." Tom is the party opponent of the Prosecution and the statement would be admissible.*

***Alex's Statement:** Can be offered for a non-hearsay purpose, effect on the listener, to give context to Tom's statement.*

***Attorney-Client Privilege:** The attorney-client privilege applies if the holder of the privilege is or sought to become a client, the person to whom the communication was made is a member of the bar (or their representative), the communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing an opinion on law, legal services, or assistance in a legal proceeding and is not for the purpose of committing a crime or tort and has been claimed and not waived by the client.*

Tom has hired Alex to be his attorney and he is discussing with Alex the crime with which he is charged for the purposes of legal representation.

***Eavesdroppers:** A privilege based on confidential communications is not abrogated because the communication is overheard by someone whose presence is unknown to the parties. The privilege*

would still apply to the parties to the confidential communication. However, there is some question as to whether the eavesdropper can testify. The traditional view is that the eavesdropper may testify to what he has overheard. A significant number of modern cases assert that if the holder of the privilege was not negligent, there is no waiver of the privilege and the eavesdropper is prohibited from testifying.

Analysis: Alex could not be compelled to testify to the communication. There is a question as to whether Ivan could be called. I did not provide the students with much information about how the communication was overheard. They could argue it either way.

2. Tom's wife, Sarah, is called to testify as a witness for the prosecution. The prosecution seeks to elicit the following testimony from Sarah:

- Sarah witnessed Tom leaving the house late at night with a bag of tools and returned a few hours later with jewelry.
- Tom confided in Sarah about their financial struggles and his plans to commit the burglary.

The defense objects.

Relevance: The evidence is relevant to show that Tom committed the jewelry burglary based on his own admissions and Sara's observations of Tom which support the inference that he committed the crime.

Spousal Immunity Privilege: A defendant's spouse has a privilege to refuse to testify at the trial of his or her spouse.

Privilege belongs to witness spouse. Only the witness-spouse may invoke the privilege against adverse spousal testimony. Thus, one spouse may testify against the other in criminal cases, with or without the consent of the party spouse, but the witness-spouse may not be compelled to testify, nor may she be foreclosed from testifying

Immunity may be asserted only during the marriage. It terminates upon divorce or annulment. If the marriage exists, the privilege can be asserted even as to matters that took place before the marriage.

Spousal Communication Privilege: In any civil or criminal case, either spouse, whether or not a party, has a privilege to refuse to disclose, and to prevent another from

disclosing, a confidential communication made between the spouses while they were married. The rationale is to encourage open communication and trust and confidence between spouses.

Both spouses hold the privilege. Either can refuse to disclose the communication or prevent any other person from disclosing the confidential communication.

Elements of the privilege:

1. Marital relationship. The communication must be made during a valid marriage. Divorce will not terminate the privilege retroactively, but communications after divorce are not privileged.

2. Reliance on intimacy. Routine exchanges of a business nature, abusive language and misconduct directed to the spouse are not privileged. If the communication was made in the known presence of a stranger, it is not privileged. The confidential communication does not need to be spoken but may be made by conduct intended as a communication.

Nonapplicability of the privileges. *Neither the spousal immunity nor the confidential marital communications privilege applies in actions between the spouses or in cases involving crimes against the testifying spouse or in actions between the spouses' children (ex: assault and battery, incest, bigamy, child abuse, ect)*

Analysis: *Tom and Sara are validly married, so both privileges would potentially apply. If Sara does not invoke the spousal immunity privilege, she will be able to testify to non-confidential communications or observations made during the marriage.*

Sarah witnessed Tom leaving the house late at night with a bag of tools and returned a few hours later with jewelry. Assuming Sara does not invoke the spousal immunity privilege, she will be permitted to testify to her observations as they are not confidential communications within the meaning of the privilege.

Tom confided in Sara about their financial struggles and his plans to commit the burglary. There may be some question as to whether Sara can testify to conversations about financial struggles as routine discussions about business matters are not considered confidential communications. Tom would be able to prohibit Sara from testifying about his plans to commit the burglary if the conversation was confidential and relied upon the intimacy of their marriage.

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

Statement of a Party Opponent: *Tom's statements to Sara are out of court statements offered for their truth. However, they would fall within the statement of a party opponent exemption from the hearsay definition as Tom is the party opponent of the prosecution.*

3. *On cross-examination, the defense asks Sarah:*

- *Isn't it true that you told Tom you are going to divorce him because you discovered he was cheating on you?*
- *Isn't it true that you have a misdemeanor conviction for embezzlement that occurred last year?*

Relevance: *The questions are relevant to impeach Sara by showing bias and prior conviction of a crime involving dishonesty.*

Impeachment by 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.*

Here, Sarah may be biased against Tom if she believes he has cheated on her and thus, she may have a bias against him. This is a proper method of impeachment.

Impeachment for a Prior Crime Involving Dishonesty: *Under the Federal Rules, a witness' character for truthfulness may be attacked (or impeached) 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. Embezzlement would qualify as a crime involving dishonesty. 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' 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).

Sarah's conviction occurred last year, so it would be permissible to impeach her with this conviction. The court must allow the impeachment, as it has no discretion to exclude it.

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CALIFORNIA PROP 8

All relevant evidence is admissible in criminal cases. Hearsay is exempt from Proposition 8.

Here, the case is in a California court and the charge is attempted murder. This is a California criminal case, thus Prop 8 applies.

1. NOSEY'S TESTIMONY

RELEVANCE

Only relevant evidence is admissible.

LOGICAL RELEVANCE--A TENDENCY TEST

Evidence is logically relevant when it has a tendency to prove or disprove a material fact at issue in the case.

Here, Nosey's testimony about Slasher's statement "Thief, I know you took my money!" and that he saw Slasher stab Von has a tendency to prove that Slasher both stabbed Von and acted in self defense. The identity of the person that stabbed Von is an element of the criminal attempted murder case, and the defendant's affirmative defense is a material issue in the case. Thus it is logically relevant.

LEGAL RELEVANCE--A BALANCING TEST

Evidence is legally relevant when the court makes a discretionary determination that the probative value is substantially outweighed by the prejudicial effect, measured by factors such as an undue waste of time, confusing the issues, or misleading the jury.

Here, Nosey's testimony about Slasher's statement "Thief, I know you took my money!" and that he saw Slasher stab Von is highly probative and critical to the case as both an identification of the perpetrator and the defendant's defense. It will not waste undue time or mislead the jury or confuse the issues because Nosey's statements will be brief and clear as to what he saw. Thus it is logically relevant. However, prosecution will object on the grounds that Slasher's statement is hearsay (see analysis below).

HEARSAY

Hearsay is an out of court statement, made by the declarant, offered to prove the truth of the matter in the statement. Hearsay is inadmissible unless an exception applies.

Here, Slasher's statement "Thief, I know you took my money!" is a statement made by declarant, Slasher, outside of these court proceedings. It is being offered for its truth, that Slasher acted in self defense. Thus it is a hearsay statement.

EXCEPTION, SPONTANEOUS STATEMENT, CEC

Statements made during a startling or exciting or stressful event, made at the time of the event, are a CEC exception to the hearsay rule.

Here, Declarant Slasher made the ~~statement~~ right after he stabbed Von. Stabbing another human is a stressful event. Thus this falls under the hearsay exception for spontaneous statement and is admissible.

There are other H.S. exceptions:

- State of mind
- Admission
- Contemp stat

WITNESS COMPETENCY

A witness with personal knowledge that pledges he will testify truthfully is competent to testify. *& can communicate*

Here, Nosey is a percipient witness neighbor. He saw the stabbing and has personal knowledge of the incident. He can identify the perpetrator and victim because he knows them for 6 years. Opposing counsel can argue through impeachment that Nosey's age--95--might make him not as credible as a witness depending on his eyesight. Nosey is a competent witness and his testimony will be admissible.

CONCLUSION

Nosey's testimony is admissible.

2. DETECTIVE TODD TESTIMONY

RELEVANCE

Only relevant evidence is admissible.

LOGICAL RELEVANCE--A TENDENCY TEST

Evidence is logically relevant when it has a tendency to prove or disprove a material fact at issue in the case.

Here, Detective Dodd's testimony has a tendency to establish the instrumentality of the knife attack on Von and that the knife was purchased by Slasher, through the receipt found at Von's home. Thus it is logically relevant.

LEGAL RELEVANCE--A BALANCING TEST

Evidence is legally relevant when the court makes a discretionary determination that the probative value is substantially outweighed by the prejudicial effect, measured by factors such as an undue waste of time, confusing the issues, or misleading the jury.

Here, the court will balance the probative value of Detective's testimony against the prejudicial effect. Dodd's testimony is highly probative because the knife will have Von's blood on it and was used in the attack. The receipt is highly probative of ownership of the knife. These pieces of evidence are critical elements of the prosecution's case against Von. They will not waste time and will not confuse the jury. ON balance the court will rule the testimony is admissible.

PHYSICAL EVIDENCE, RECEIPT AND KNIFE

AUTHENTICATION--A SUFFICIENCY TEST

Any evidence that is not testimony must be properly authenticated to be admissible. Authentication is the offering of sufficient proof that the evidence is what the proponent claims it is. Direct evidence, such as physical objects may be authenticated by testimony, admissions, or by chain of custody.

Here, Detective Dodd will testify that he located the knife at the scene. The knife will have Von's blood on it and will be tested to confirm that it is the blood of the victim. Assuming the proper chain of custody is maintained and stored properly in police evidence, Detective can testify to his personal knowledge of locating the knife and then that it was properly held in police custody. Thus the knife will be properly authenticated and admitted.

Regarding the receipt, Detective will testify that he located the receipt at the defendant's home and that he further verified the purchase with the sporting goods store manager. Thus the receipt is properly authenticated and will be admitted.

missed:
• writing - receipt discussion
• fully discuss

3. QUINN, JURY CONSULTANT, TESTIMONY

RELEVANCE

Only relevant evidence is admissible.

LOGICAL RELEVANCE--A TENDENCY TEST

Evidence is logically relevant when it has a tendency to prove or disprove a material fact at issue in the case.

Here, Quinn will testify to hearing Slasher's statement "I just stabbed Von and his blood is all over my clothes! He had a gun, it was self-defense!" This has a tendency to prove that Defendant did stab the victim. Thus it is logically relevant.

LEGAL RELEVANCE--A BALANCING TEST

Evidence is legally relevant when the court makes a discretionary determination that the probative value is substantially outweighed by the prejudicial effect, measured by factors such as an undue waste of time, confusing the issues, or misleading the jury.

Here, the court will balance the probative value of Quinn testifying to Slasher's statement to the attorney ("I just stabbed Von and his blood is all over my clothes! He had a gun, it was self-defense!") against the prejudicial effect on the Defendant. Defendant's statement is highly probative to what happened during the incident in which he stabbed Von and unlikely to waste time. The jury might be confused by the admission that Slasher stabbed Von, but acted in self defense but it is not overly prejudicial. Thus, on balance the court

will rule Quinn's testimony is logically and legally relevant. However, Defense will object on the grounds of inadmissible hearsay.

HEARSAY

Hearsay is an out of court statement, made by the declarant, offered to prove the truth of the matter in the statement. Hearsay is inadmissible unless an exception applies.

Here, Slasher, the declarant's statement "I just stabbed Von and his blood is all over my clothes! He had a gun, it was self-defense!" was made at the time of the incident, which is out of court. It is being offered by prosecution to prove that Slasher admitted to stabbing Von. Thus it is hearsay.

EXCEPTION, DIRECT ADMISSION by a PARTY

According to CEC, *Any* statements made by a party (not necessarily a bad statement or confession, but any statement), offered against them by an opposing party, are a hearsay exception and are admissible for their truth. The are admissible because ^{the law} ~~we want~~ to hold people accountable for the things they say.

Here, Slasher's statement "I just stabbed Von and his blood is all over my clothes!" is a statement by a party in the criminal case because Slasher is the defendant. It is being offered for its truth by prosecution, through earwitness Quinn's testimony. Thus it is admissible under the hearsay exception for party admission.

PRIVILEGES, Attorney-Client

Attorney client privilege protects confidential communications between attorney and client for the purposes of legal advice and representation.

Here, Slasher was talking to his attorney for the purposes of legal representation. This is a confidential communication. However, Slasher waived that privilege when he continued talking in the presence of a nonessential third party, Quinn. Slasher was notified by the attorney that he was on speaker phone and that Quinn was there. Quinn is jury consultant. He is not necessary for the type of legal advice that Slasher was seeking because there was no trial yet. Thus, Slasher waived the atty client privilege and Quinn may testify to whatever was said in his presence.

*what about crime / Fraud
Exception?*

FIFTH AMENDMENT PRIVILEGE, QUINN

The Fifth amendment hold that a persona cannot be compelled to make incriminating statement about themselves.

Here, Quinn got rid of bloody clothes, which would be destruction of evidence in an attempted murder case. However, Quinn can assert his Fifth Amendment privilege against self incrimination and not testify to his actions.

4. MANAGER'S TESTIMONY AS PERCIPIENT WITNESS and EXPERT

RELEVANCE

Only relevant evidence is admissible.

LOGICAL RELEVANCE--A TENDENCY TEST

Evidence is logically relevant when it has a tendency to prove or disprove a material fact at issue in the case.

Here, manager's testimony has a tendency to prove that Slasher did purchase the knife used in the attempted murder case of Von. His testimony as an expert regarding the type

of knife purchased and special features of the knife has a tendency to prove that Slasher intended serious harm to anyone he stabbed. Thus it is logically relevant.

LEGAL RELEVANCE--A BALANCING TEST

Evidence is legally relevant when the court makes a discretionary determination that the probative value is substantially outweighed by the prejudicial effect, measured by factors such as an undue waste of time, confusing the issues, or misleading the jury.

Here, the court will balance the probative value of Manager's testimony against the prejudicial effect on the defendant. The manager's identification of Slasher as the person that bought the special knife is highly probative on establishing the Slasher owned the knife that injured Von. It will not waste time or confuse the jury because it is a piece of physical evidence used as a weapon. Defense will argue that the expert testimony on the special features of the knife being extra good at stabbing people with the blade guard for the user is highly prejudicial because the jury may place an undue weight on the expert testimony. On balance, the court will rule that the evidence is legally relevant and admissible.

PERCIPIENT WITNESS

A percipient witness may testify to anything he experiences with his senses.

Here, the Manager has personal knowledge of the sale of the knife to Slasher because he personally sold it to Slasher. Thus he may testify to what he perceived in the sales transaction with Slasher.

EXPERT WITNESSES

Expert witnesses may be helpful to the trier of fact, be qualified as an expert through specialized knowledge, training, or skill, testimony based on sufficient facts or data, and testimony be derived from reliable scientific methods. Experts may not make legal conclusions.

Here, the Manager can be qualified as an expert through his past military qualification as a military knife expert. His opinion that the knife is good for stabbing because of the blade guard feature is based upon his past military expertise special training and applied reliably to the shape and special features of the knife that was used to stab Von.

KELLY TEST

No new procedures in identifying special knives, thus Kelly Test/Hearing is not applicable.

CONCLUSION

The manager's testimony on the ID of the knife buyer is admissible. The testimony as an expert on knives is admissible but only regarding the type of knife used and specialized typical uses of that knife.

*overall - very good
missed some issues*

END OF EXAM

2)



1. Pete's Testimony

Admissibility

All evidence must be relevant in order to be admissible.

Relevance

Evidence must be both logically and legally relevant in order to be admissible.

Logical relevance is known as the tendency test. Evidence that tends to prove or disprove a material fact in dispute is logically relevant. Here, Pete's testimony tends to prove or disprove whether Pete was at fault or RWAP is at fault for Pete's injuries. Pete's testimony is logically relevant.

Legal relevance is known as the balancing test, it must have a higher probative value than a prejudicial effect to be legally relevant. *Include court balances factors*
Here, Pete's testimony has a high probative value because he is the plaintiff who was injured and has personal knowledge. Pete's testimony also has a low prejudicial effect because it does not waste the court's time, mislead the jury or confuse the jury.

Thus, Pete's testimony is both logically and legally relevant.

Percipient Witness

A percipient witness is someone who has personal knowledge of the act or event and perceived the act or event with their own senses. Pete has knowledge of how he was secured into the harness and how he sustained his injuries. Pete's testimony will likely be admissible.

Character Evidence

Evidence of a person's opinion, reputation or specific acts is character evidence. Character evidence is usually inadmissible unless an exception applies.

RWAP's question about Pete's termination letter speaks to Pete's character because it shows he was fired for stealing. RWAP may offer the letter to show Pete has a propensity for dishonesty. This is generally inadmissible and is not relevant to the current case.

Exception: Impeachment

(Evidence of character) may be used to impeach a witness' credibility.

Here, RWAP can offer the termination letter to impeach Pete's credibility because Pete took the stand and testified. The letter will show that Pete may not be an honest person and can lower his credibility with the jury. The court will likely admit the letter for impeachment purposes.

Pete can object to RWAP's question about being fired for stealing by invoking his 5th amendment right against self incrimination. The court will likely not allow self incriminating testimony from Pete.

No!
This is a civil case - not a criminal one

2. Edgar Mountain

Admissibility

All evidence must be relevant in order to be admissible.

Relevance

Evidence must be both logically and legally relevant in order to be admissible.

Logical relevance is known as the tendency test. Evidence that tends to prove or disprove a material fact in dispute is logically relevant. Here, Edgar is an experienced climber has knowledge about the harness that Pete used, this can help prove or disprove whether the harness was used properly. Mountain's testimony is logically relevant.

Legal relevance is known as the balancing test, it must have a higher probative value than a prejudicial effect to be legally relevant.

Here, Mountain's testimony has a high probative value because Mountain has over 30 years of experience climbing. Mountain's testimony also has a low prejudicial effect because it does not waste the court's time, mislead the jury or confuse the jury. Mountain's testimony is legally relevant.

Thus, Mountain's testimony is both logically and legally relevant.

Expert Opinion

Experts may provide opinion if they are properly qualified on the subject matter, the subject matter is outside common knowledge and their opinion is helpful to a trier of fact.

Here, Mountain is a Mountain climber with over 30 years of experience climbing all over the world. Plaintiff's counsel will have to lay foundation to establish the manager as an expert. Mountain's testimony may assist the jury in understanding of how a harness should be secured, what can go wrong, and what possibly led to Pete's injury. Experts are not allowed to give legal conclusions so Mountain may not be able to conclude whether RWAP was negligent. RWAP will also get a chance to voir dire Mountain on his qualifications only and may present their own expert to rebut the Mountain's opinion.

Mountain's Expert testimony About Wanda:

Hearsay

Hearsay is an out of court statement offered for the truth of the matter asserted. Hearsay is generally inadmissible unless an exception applies.

Here Mountain is testifying about what Wanda, a RWAP customer, told him. Wanda's statement "that the RWAP employee who put Pete's harness on did not secure it properly." was made out of court. If Pete wishes to include this to show RWAP was negligent it is being offered to prove the truth of the matter asserted and is hearsay. This will be inadmissible unless an exception applies.

Although Mountain is an expert he did not form this opinion himself and did not make this statement himself.

Exceptions:

None. Wanda's statement and opinion is inadmissible hearsay. Pete would have to call her as a witness so she can testify as to what she saw the day Pete fell.

Wanda's statement is inadmissible hearsay and the court will likely not admit it.

3. The Incident Report

Admissibility

All evidence must be relevant in order to be admissible.

Relevance

Evidence must be both logically and legally relevant in order to be admissible.

Logical relevance is known as the tendency test. Evidence that tends to prove or disprove a material fact in dispute is logically relevant. Here, the incident report tends to prove or

disprove how Pete's injury happened, when the injury occurred, and how RWAP learned about the injury. It is logically relevant

Legal relevance is known as the balancing test, it must have a higher probative value than a prejudicial effect to be legally relevant.

Here, incident report is highly probative because it contains details of Pete's injuries, it has a low prejudicial effect because it does not mislead the jury or waste the court's time.

Thus, The incident report is both logically and legally relevant.

Hearsay

Hearsay is an out of court statement offered for the truth of the matter asserted. Hearsay is generally inadmissible unless an exemption applies. The incident report contains multiple statements made out of court by Matt, Bob and Ted.

Matt's statements: "I did not personally see Pete's fall." This statement was made outside of court, if RWAP seeks to admit this to prove they are not negligent it is offered for the truth of the matter asserted.

Non-Hearsay Admissions - FRE

Under the FRE, admissions are not hearsay.

RWAP may use this statement as an authorized admission.

Authorized Admissions

Authorized admissions are made by employees under the scope and duty of their employment and are either authorized expressly or implied to make the admission. Here, Matt was employed as manager at the time he made this admission in the incident report.

It can be implied that RWAP authorized him to make the admission because as store manager it is his duty to make an incident report when an injury is reported. it will likely be admissible.

Bob's Statement (Layered Hearsay) Matt is saying that five minutes after the incident Bob said he "Saw the whole thing and that Pete was unsecured at the top part of the safety harness so he could take a selfie." This statement was made by Bob, outside of court and if RWAP offers this to prove Pete unsecured his harness, it is offered for the truth of the matter asserted and is hearsay.

Missed Present Sense Impression

No exception applies and this is inadmissible hearsay.

Bob is not available for cross-examination and Pete can object this violates his right to confront witnesses (6th amendment confrontation clause).

Ted's Statement (Layered Hearsay) Matt is saying that The day after the incident Ted said he "he secured the harness properly and Pete unsecured the top part of the harness so he could reach his arm out to take a selfie." This statement was made outside of court and is being offered to prove the truth of the matter asserted, that Pete unsecured his harness. This statement is inadmissible as hearsay unless an exemption applies.

Non-Hearsay Admissions - FRE

Under the FRE, admissions are not hearsay.

RWAP may use this statement as an authorized admission. Authorized admissions are made by employees under the scope and duty of their employment and are either authorized expressly or implied to make the admission. Here, Ted was employed by RWAP at the time he made this admission in the incident report. It can be implied that RWAP authorized him to make the admission because the store manager was

interviewing Ted about Pete's incident and it is Ted's duty to provide details for incident report when an injury is reported.

Ted's statement in Matt's Incident report will likely be admissible.

Business Records Exemption *Exemption*

Business records are records created in the regular course of business, at or near the time of the act or event. A custodian of records must be available to discuss the method of preparation. *or other qualified staff member*

Here the incident report is a record that was created as a regular response to an injury at the RWAP. Matt, the manager of RWAP created the report and can testify about how the report was prepared and how the reports are kept after they are created.

The report will likely be admissible.

Writings

A writing is any tangible or fixed form of media intended to communicate something.

Here, the incident report is a tangible form of communication containing details of Pete's injury. The incident report must be authenticated before being offered as evidence.

Authentication

All writings must be authenticated before being admitted into evidence. There are several ways to authenticate a writing.

A witness with knowledge.

Here, Matt can authenticate the incident report if he testifies as a witness. Matt prepared the incident report and has firsthand knowledge of the report's details.

Best Evidence Rule:

Under the FRE, the original document must be provided if the proponent has control and custody of the document to prove its contents.

Here, the defense will have to provide the original incident report.

4. Matt's Testimony

Admissibility

All evidence must be relevant in order to be admissible.

Relevance

Evidence must be both logically and legally relevant in order to be admissible.

Logical relevance is known as the tendency test. Evidence that tends to prove or disprove a material fact in dispute is logically relevant. Here, Matt is testifying about whether Pete was injured. This is logically relevant because it tends to prove or disprove Pete's injuries and contributory negligence.

Legal relevance is known as the balancing test, it must have a higher probative value than a prejudicial effect to be legally relevant.

Here, Matt's testimony has a high probative value because he saw Pete the day Pete fell. Matt's testimony also has a low prejudicial effect because it does not waste the court's time, mislead the jury or confuse the jury.

Thus, Matt's testimony is both logically and legally relevant.

Writings

A writing is any tangible or fixed form of media intended to communicate something.

Here, the facebook snapshot is a tangible form of communication containing details of Pete's injury. The snapshot must be authenticated before being offered as evidence.

Authentication

All writings must be authenticated before being admitted into evidence. There are several ways to authenticate a writing.

A witness with knowledge

Matt has knowledge of Pete's distinct neck tattoo and the shirt he was wearing when he was injured. Matt also has personal knowledge of the snapshot he found on the Crazy Fails" Facebook page because he took the snapshot himself.

Chain of custody

Matt can also speak to the chain of custody of the snapshot because he took the snapshot himself.

Pete's objects because Facebook did not provide the image to RWAP.

Best evidence rule:

Best evidence rule where an original copy of a writing must be provided if the original is in the custody or control of the proponent and the content of the writing is in dispute.

The court will likely sustain Pete's objection because the snapshot is not the original image.

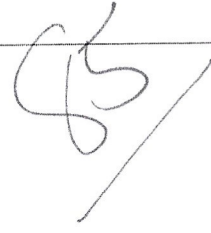
Hearsay

An out of court statement offered for the truth of the matter asserted.

The words on Pete's shirt are a statement made outside of court. The words on Pete's shirt read "I am Stupid." If RWAP wishes to introduce this to show Pete was at fault for his injury this is for the truth of the matter asserted and is not admissible as hearsay unless an exemption applies.

RWAP may seek to use this for identity purposes along with the distinct neck tattoo. Then the statement on Pete's shirt will be offered for a non-truth purpose and the court will likely allow the statement to be admitted for this non-truth purpose.

END OF EXAM



3)

1. Tom's attorney

Admissibility

All evidence must be relevant in order to be admissible.

Relevance

Evidence must be both logically and legally relevant in order to be admissible.

Logical relevance is known as the tendency test. Evidence that tends to prove or disprove a material fact in dispute is logically relevant. Here, Alex can testify about the conversation he had with Tom which tends to prove or disprove whether Tom burglarized the jewelry store. Alex's testimony is logically relevant.

Legal relevance is known as the balancing test, it must have a higher probative value than a prejudicial effect to be legally relevant. *include court balances*
Here, Alex's testimony is highly probative and has a low prejudicial effect because it does not waste the court's time, mislead the jury or confuse the jury.

Thus, Alex's testimony is both logically and legally relevant.

Hearsay

Hearsay is an out of court statement offered for the truth of the matter asserted. Hearsay is generally inadmissible unless an ^{exception or} exemption applies.

Here, Alex will testify about his conversation with Tom, who is accused of burglary of a jewelry store. In conversation Tom told Alex that "he was involved in the jewelry

burglary." Tom made these statements out of court and if prosecution seeks to offer this for the truth of the matter asserted it is hearsay. However, Party admissions are not hearsay under the FRE.

Non-Hs - Party opponent - Exemption FRE

Tom is the defendant in this case and his admission can be admitted as a non hearsay party admission. *must be offered against Tom, here, it is.*

Privileges

Attorney-Client Privilege

Confidential communication between a client and their attorney made in the course of receiving legal services/ legal advice. *are protected from disclosure.*

Here, Alex is the attorney and Tom is the client. Tom is the holder of the attorney client privilege and can claim this privilege to prevent Alex from testifying.

The communication Tom made to his attorney must be confidential. Here, Ivan is the prosecution's investigator and overheard Tom's statements to Alex. Ivan is an eavesdropper and therefore has breached confidentiality between Alex and Tom. Tom and Alex did not take reasonable steps to ensure their communication was confidential because Tom told Alex he participated in the burglary over lunch at a restaurant. It is unclear whether Tom and Alex were just having lunch or whether Tom was seeking legal advice from his attorney. In any case, confidentiality was breached and the privilege has been waiyed as a result.

Alex may also have an exemption and be allowed testify about the communication.

Exception: Crime Fraud

Where a crime or fraud has been committed the confidential communication may be disclosed.

Alex would be allowed to testify because a crime was committed by Tom.

Alex's testimony will likely be admissible.

2. Tom's wife Sarah

Admissibility

All evidence must be relevant in order to be admissible.

Relevance

Evidence must be both logically and legally relevant in order to be admissible.

Logical relevance is known as the tendency test. Evidence that tends to prove or disprove a material fact in dispute is logically relevant. Here, Sarah's testimony tends to prove or disprove whether Tom was home when the burglary took place and whether he had plans to commit the burglary. Sarah's testimony is logically relevant.

Legal relevance is known as the balancing test, it must have a higher probative value than a prejudicial effect to be legally relevant.

Here, Sarah's testimony has a high probative value and a low prejudicial effect because it does not waste the court's time, mislead the jury or confuse the jury. *include court balances factors*

Thus, Sarah's testimony is both logically and legally relevant.

Percipient Witness

A percipient witness is someone who has personal knowledge of the act or event and perceived the act or event with their own senses.

Here Sarah is an eyewitness, she saw Tom leaving the house late at night with tools and returning with jewelry a few hours later. Sarah saw this and has personal knowledge of this event.

The court will likely allow Sarah's testimony about Tom leaving the house.

Privileges

Spousal Testimonial Privilege

The spousal testimonial privilege prevents a witness from being forced to testify against their spouse.

Here, Sarah and Tom are married, and prosecution has called Sarah to testify against her spouse Tom. Sarah is the holder of the privilege and can claim this privilege. By agreeing to take the stand, Sarah has waived her privilege not to testify against her spouse Tom.

The court will likely allow Sarah's testimony.

Marital Communications Privilege

Communications made confidentially between spouses while they are married are privileged.

Here Sarah and Tom are married, and prosecution has called Sarah as a witness to testify about confidential communications made between Sarah and Tom. Tom confided in Sarah that he had financial trouble and planned to commit a burglary. The communication was made confidentially. Both Sarah and Tom are holders of this

privilege and can claim this privilege. This communication is protected from disclosure unless there is a waiver or an exception to this privilege.

Tom objects, claiming his privilege. There are no facts to support there was an inadvertent disclosure or a waiver on Tom's part.

Sarah has not waived her privilege but an exception applies.

Crime Fraud

Where a crime or fraud has been committed the confidential communication may be disclosed.

Sarah is allowed to disclose the confidential communication because Tom is on trial for burglary and the communication relates to Tom committing the burglary.

revised: HS/nm - FRE HS under FRE - Party opponent stmt is nm-HS

3. Cross Examination of Sarah by the Defense

After a witness has been examined on direct, the opposing party may cross-examine the witness on areas brought up on direct examination.

a) Divorce Question

Here, the defense seeks to ask Sarah, "Isn't it true that you told Tom you are going to divorce him because you discovered he was cheating on you?"

Admissibility

All evidence must be relevant in order to be admissible.

Relevance

Evidence must be both logically and legally relevant in order to be admissible.

Logical relevance is known as the tendency test. Evidence that tends to prove or disprove a material fact in dispute is logically relevant. Here, the question asked by defense does not tend to prove or disprove whether Tom burglarized the jewelry store. This line of questioning tends to impeach the witness or show bias. This is logically relevant to impeach Sarah's credibility.

Legal relevance is known as the balancing test, it must have a higher probative value than a prejudicial effect to be legally relevant.

Here, the question asked by defense has a higher prejudicial effect than its probative value because it is a waste of the court's time, and may confuse or mislead the jury about the burglary. However it has a high probative value to show the witness has a bias to testify negatively about Tom.

Thus, the question is is logically and legally relevant for bias or motive.

Impeachment : Bias

Any party may impeach any witness even their own, to attack credibility, show bias or other motive.

The defense may wish to impeach Sarah's credibility by asking her about wanting to divorce Tom, or by showing she is biased to testify against Tom because she has been cheated on. The court will likely overrule the defense's objection because Sarah is Tom Spouse and was testifying as his wife and can be impeached. Also the defense cannot object to their own line of questioning. If the prosecution objects to defense's cross

examination the court is likely to overrule their objection because a witness may be impeached on credibility or bias.

b) Misdemeanor Conviction - prior bad acts

Here, the prosecution *Not the defense asked this* seeks to ask Sarah, "Isn't it true that you have a misdemeanor conviction for embezzlement that occurred last year?"

Admissibility

All evidence must be relevant in order to be admissible.

Relevance

Evidence must be both logically and legally relevant in order to be admissible.

Logical relevance is known as the tendency test. Evidence that tends to prove or disprove a material fact in dispute is logically relevant. Here, the question asked by prosecution does not tend to prove or disprove whether Tom burglarized the jewelry store. This line of questioning tends to impeach the witness or show bias. This is logically relevant to impeach Sarah's credibility.

Legal relevance is known as the balancing test, it must have a higher probative value than a prejudicial effect to be legally relevant.

Here, the question asked by prosecution *No, defense* has a higher prejudicial effect than its probative value because it is a waste of the court's time, and may confuse or mislead the jury about the burglary. However it has a high probative value to attack Sarah's credibility.

Thus, the question is is logically and legally relevant.

Prior Bad Acts

Prior bad acts may include felony or misdemeanor convictions that occurred ten years prior. Prior bad acts may be used as character evidence or to impeach a witness.

Here, The defense has questioned Sarah about a misdemeanor for embezzlement that occurred last year. The crime of embezzlement involves dishonesty. Defense likely wishes to attack Sarah's credibility by trying to illicit testimony about a prior bad act.

The court will likely allow this line of questioning from defense ^{even} if prosecution objects.

END OF EXAM

overall - very good
- Did mix up Prosecution & Defense call #2 at times
- missed an issue