

EVIDENCE  
Final Examination  
Spring 2021  
Professors Davenport, Lizardo & Starr

INSTRUCTIONS:

There are three (3) questions in this examination.  
You will be given four (4) hours to complete the examination.

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QUESTION 1

Burns is being charged with arson. He is being represented by Attorney Hyde.

The prosecution's theory was that Burns burned down his failing business to get the insurance proceeds. The fire was started with gasoline and Burns owns a red Ferrari that was seen leaving the area right before the fire started.

Before the arson, Burns was in the garage with his wife, Wilma. Burns popped open the Ferrari trunk and showed Wilma several gasoline cans and said, "I figured out a way to solve our financial problems." Wilma did not want to have anything to do with his plans.

Nosey, a neighbor, overheard the Burns' conversation because the garage door was wide open. Nosey has known Burns and Wilma for eleven years.

While at his business, Burns called Hyde and told him, "I really messed up! Some gasoline spilled on my clothes and I am nauseated from inhaling the gas fumes!" Hyde tells Burns to go to the emergency room and tell the doctor that he inhaled fumes from barbecuing. Hyde was using his office speaker phone while talking to Burns. Dexter, Hyde's driver was in the lunchroom and overheard the conversation.

At the emergency room, Dr. Pyro diagnosed the injury as gasoline fume inhalation. Oxygen therapy was given.

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

**Answer according to California law.**

1. The prosecution calls, Wilma who voluntarily testified about her husband's statement and him showing her gasoline cans located in the Ferrari trunk. At the time of trial, Wilma had filed for divorce.
2. Next, the prosecution presents Nosey, a neighbor, who testified that he saw the red Ferrari and overheard Burns tell Wilma, "I figured out a way to solve our financial problems."
3. Next, the prosecution calls Dexter, the driver for Attorney Hyde, who testified regarding Hyde's conversation with Burns.
4. Finally, the prosecution presents Dr. Pyro who testified he treated Burns for gasoline fumes inhalation.

## EVIDENCE

Final Examination

Spring 2021

Professors Davenport, Lizardo & Starr

### QUESTION 2

Darlene is prosecuted for battery with serious bodily injury in the criminal case of People of the State of X vs. Darlene.

On February 1, 2020, Darlene was working as a waitress at Pizza Palace. She waited on Victor, a patron of the Pizza Palace and the alleged victim in the case. The prosecution's theory of the case is that Darlene pushed Victor off his barstool after he complained about her poor service, causing him to fall and suffer serious bodily injury, a concussion, as a result of the fall. The Defense theory of the case is that Victor became intoxicated while waiting for his food. Darlene asked him to leave, Victor became belligerent and fell off his barstool sustaining injuries.

Assume the following occurred in the jury trial of Darlene. 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. **The State of X has adopted the Federal Rules of Evidence.**

1. Victor testifies that he was waiting for his food for over an hour. When he complained, Darlene yelled, "I'll show you good service!" and forcefully pushed him off his barstool. Victor was taken to the hospital and the treating physician told him he sustained a concussion.
2. On cross-examination of Victor, defense counsel asks Victor the following, whether Victor filed a \$5 million lawsuit against Pizza Palace after the incident?
3. Next, the prosecution calls Dr. Vallum to the stand. Dr. Vallum will testify that he has been a licensed medical doctor for 20 years. He is Victor's primary care physician. Dr. Vallum testifies to Victor's injuries. Dr. Vallum is asked by the prosecution to state an opinion as to the cause of Victor's injuries. Dr. Vallum states that the injury Victor sustained could only have resulted from being pushed off a barstool. His opinion is based on an experiment that Dr. Vallum conducted with grapefruits where he rolled some grapefruits off a barstool and forcefully pushed other grapefruits off the same barstool. Dr. Vallum testifies that there was significantly more trauma to the grapefruits he forcefully pushed off the stool than those that rolled off the stool, which is consistent with the injuries Victor sustained. The defense objects.
4. After the prosecution rests, the defense calls Pizza Palace's head security officer, Wendy. Wendy is required to investigate incidents and write reports regarding those incidents by Pizza Palace. Wendy testifies that she reviewed the video surveillance inside of the Pizza Parlor on the night of the incident. She saw Victor fall off his bar stool. She didn't know how to save the surveillance video and by the time she was able to contact the manufacture of the surveillance system, the surveillance video was erased because it records over itself every 24 hours.

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### Question 3

The following facts gave rise to two trials: a federal criminal trial and a federal civil trial.

When Victoria Vinik turned 15 years old, her parents gifted her an iPhone. She soon met a man on the SnapChat social media network. His name was Donny. Donny, who was 25, told Victoria he was a software engineer in Hollywood and worked on major movies. Soon, the messages became sexual in nature, despite her age, and Victoria agreed to meet with Donny. They planned for Donny to drive to Bakersfield and pick her up and take her to Los Angeles to meet movie stars and “party.” She planned to tell her parents, Paul and Sue Vinik, she was at a sleepover with her friend, Freda. The plan initially worked. Victoria got permission to stay at Freda’s house and Donny picked her up on Friday night. On Saturday morning, however, the Viniks realized something was wrong when Victoria’s Find My Friends application showed her traveling south on Interstate 5 out of town. The Viniks could not get a hold of Victoria or Freda, so they logged onto her computer and found messages between Donny and Victoria and realized what had happened. The Viniks immediately called police.

Two days later, police located Victoria’s body in a ditch on the side of the road on Interstate 5. A medical examiner determined that Victoria had been forcibly raped and then strangled to death. Police found Donny later the same day and arrested him, later linking the rape to Donny through DNA. The United States Attorney’s office prosecuted Donny for sex with a minor, rape, and for Victoria’s murder. The Viniks sued in Federal court for torts, including sexual assault and a statutory wrongful death claim that requires intent to kill.

The following proffers were made during the federal criminal trial with appropriate notice:

- 1) SGT William of the Las Vegas Police Department testified that Donny had been arrested six years earlier for sexual assault of a girl, age 13, in a Barnes and Noble bathroom in Las Vegas, for which Donny was later charged and convicted for sexual assault and child molestation.
- 2) Detective Smith of the Los Angeles Police Department testified that, upon a valid search of Donny’s cell phone, he located hundreds of depictions of child pornography with the victims depicted ranging from apparent ages of 12 to 16.

The following proffer was made at the civil trial with appropriate notice:

- 3) In order to prove the killing was accidental, Donny’s attorney called Detective Bart of the Bakersfield Police Department. Bart testified from memory that Victoria’s diary bragged of numerous sexual encounters with teenage boys in which she asked them to “choke her.” The diary itself had been destroyed when a typographical error by police administrative staff caused it to be shredded as duplicate paperwork.

Discuss potential objections and responses to objections to the above proffers under the **Federal Rules of Evidence**. Do not address hearsay.

ANSWER OUTLINE-EVIDENCE Final Examination-Spr21-Davenport, Lizardo & Starr

**QUESTION 1 -ANSWER OUTLINE FOR BURNS – S.Lizardo**

\*\*\* **PLEASE NOTE:** Arguments may have a different point of view. Okay so long as logical, used the rules and critical thinking.

**1. WILMA'S TESTIMONY- HUSBAND'S STATEMENTS AND SHOWING HER GAS CANS**

**PROP 8**

Prop 8 applies to criminal cases, in California and provides that all relevant evidence is admissible even if it is objectionable. However, Prop 8 evidence is subject to the being excluded under CEC 352, if the unfair prejudice outweighs the probative value. Furthermore, Prop 8 has several exemptions.

**RELEVANCY DISCUSSED IN OTHER SECTIONS**

**SPOUSAL TESTIMONIAL PRIVILEGE**

-One spouse cannot be compelled to testify against another spouse in a criminal proceeding. It can only be invoked by the spouse-witness and can only be claimed during marriage.

- Here, Wilma is volunteering to testify against her spouse. The testifying spouse may testify against a spouse in **any proceeding**. Wilma is the holder of the privilege. The privilege to claim is only during marriage but can cover confidential communications before marriage.

-Waiver of the privilege by Wilma, the holder spouse

-Exception- crime (arson)

**MARITAL COMMUNICATIONS PRIVILEGE**

-The privilege protects confidential spousal communications and survives if the marriage ends by death or divorce.

-Burns and Wilma are legally married at the time of Burns' statement. However, Wilma has filed for divorce when she testified.

-Effect of pending divorce- the privilege would survive divorce, however, parties still married at time of the testimony.

-Presumption of confidential communication in certain relationships. Wilma's observation of the gasoline cans in the trunk of the red Ferrari would not be protected since it is not a communication but an observation.

- Nosey's testimony (possible eavesdropper) will be discussed below-

**2. NOSEY'S TESTIMONY – the Neighbor (Eavesdropper)**

**RELEVANCE-** evidence must be both logically and legally relevant to be admissible.

**Logical Relevance- Tendency Test**

Evidence is logically relevant if it tends to make the existence of a disputed fact of consequence to the determination of the action more or less probable than it would be without the evidence.

Prosecution is offering Nosey's testimony to establish that the red Ferrari belongs to Burns and that Burns statement to Wilma, "I figured out a way to solve our financial

problems," may show motive or consciousness of guilt. Since Nosey did not see the gasoline cans in the car trunk, he cannot testify to that.

#### **PERSONAL KNOWLEDGE /WITNESS COMPETENCY**

Since Nosey has known Burns and Wilma for eleven years, he is familiar with their voices and what they look like. He can authenticate the voices.

#### **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. The jury most likely will not be confused not will the testimony be a waste of time.

#### **Hearsay- Overhearing of Burns' statement to Wife**

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted and is inadmissible unless an exception applies. Here, the original declarant is Burns who told his wife "I figured out a way to solve our financial problems." The one repeating the statement is Nosey.

#### **Hearsay Exceptions:**

##### **Admission by Party Opponent-**

- A statement is no inadmissible when offered against the declarant (Burns) in a case where the original declarant is a party.
- Burns is the defendant in a criminal case.
- Party who is offering the testimony of the arsonist is the prosecution.

#### **State of Mind**

- Declarant's (Burns) then existing physical or mental condition or state of mind.
- Discussion of Burns statement to Wilma about financial solution.

#### **Declaration Against Interest**

- Burns will be deemed unavailable if he takes the Fifth Amendment. The statement is against his interests since he is talking about solving financial problems.

#### **NOSEY AS EAVESDROPER- PRIVILEGE**

(Refer to spousal privilege and martial confidential privilege definitions stated above.)

- Voluntary disclosure to third parties waives the privilege. At common law, an eavesdropper could testify, however, the modern trend is contra.
  - Burns and Wilma were in their garage with the door standing wide-open. Nosey who has known the couple for eleven years was not known to be listening.
- Trial court may allow Nosey's testimony since crime/fraud may defeat privilege.

#### **Motive**

Prosecution may argue that Burns overheard statement may intend to establish that Burns financial troubles was the purpose behind the arson. As Motive, this is not hearsay, as it is not for the truth of the matter asserted. Under Motive, the court is likely to allow the statement in however, there may be a limiting instruction given.

### **3. DEXTER'S TESTIMONY, THE DRIVER**

**RELEVANCE-** evidence must be both logically relevant and legally relevant to be admissible.

#### **Logical Relevance**

-Evidence is logically relevant if it tends to make the existence of a disputed fact of consequence to the determination of the action more or less probable than it would be without the evidence.

-Prosecution is offering Dexter's testimony to establish consciousness of guilt and an admission of guilt because Burns said, "I really messed up."

### Legal Relevance

-Trial judge has the discretion to exclude evidence if the probative value is substantially outweighed by the danger of unfair prejudice.

### HEARSAY

-Hearsay is an out- of- court statement offered to prove the truth of the matter asserted and is inadmissible unless an exception applies.

-What Dexter overheard Burns and Hyde say were an out- of- court statements offered to prove arson elements because fire can be started by gasoline.

### SPONTANEOUS STATEMENT EXCEPTION—Dexter repeating the Burns-Hyde conversation

A statement that is otherwise hearsay be admissible as an exception if the statement made while the declarant (Burns) was under the stress of a startling or stressful event and the statement must concern the immediate facts of the stressful event.

- "I really messed up! Some gasoline spilled on my clothes and I am nauseated from inhaling the gas fumes!" may be a spontaneous statement exception since it may be argued that Burns may still be under the stress of crime. However, this exception is not likely to prevail if the event, the arson has had a significant lapse of time.

Exception does not apply.

(NOTE: The call of the question was for CEC, not FRE Excited Utterance.)

### ADMISSION BY PARTY

-A statement is not inadmissible when offered against the declarant in a case where he is a party.

- Burns is the defendant in a criminal case, he is a party.

-Party who is offering the arsonist's testimony is the prosecution. The parties are on separate sides.

-Since Burns made the statements by calling Hyde, they are Admissions by a Party Opponent and will be admitted into evidence unless privilege applies.

### STATE OF MIND

-Statement of declarant's then existing physical or mental condition or state of mind.

-Discussion of statements by Burns to Hyde and Hyde's statement about barbecuing.

### CONTEMPORANEOUS STATEMENTS

-A statement that is otherwise hearsay will be admissible as an exception if the statement made by the declarant is explaining his conduct while the declarant is engaged in that conduct.

- Dexter is repeating Burns and Hyde's statements concerning the messed -up remark. He is not explaining his own conduct.

- Exception does not apply.

### PRIVILEGE

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

#### **ATTORNEY – CLIENT PRIVILEGE – DRIVER DEXTER**

-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.

-Hyde is Burns' attorney and is having a confidential client communication with Burns. The driver, Dexter, is overhearing the conversation.

#### **Third Party's Presence - Eavesdropper or Reasonably Necessary**

-Burns' admission about "I really messed up. Some gasoline spilled on my clothes and I am nauseated", may qualify for the crime or fraud exception. However, the exception is generally limited to future crimes.

-Then, Hyde advised Burns to seek medical help but tell the doctor he was barbecuing. Furthermore, the statements Burns to Hyde may be considered "consciousness of guilt."

-The third-party presence of driver Dexter would defeat the privilege and his overhearing the Hyde-Burns' statements are admissible unless Dexter as Hyde's driver is deemed a reasonably necessary party to the attorney-client privilege.

#### **4. DR. PYRO'S TESTIMONY**

**RELEVANCY-** see rules above.

Dr. Pyro's testimony is logically relevant because the crime is arson and the doctor treated Burns for gasoline fume inhalation. There can be a reasonable inference that the gas fume inhalation occurred during the preparation for the arson.

The defense will argue that the doctor's testimony is too prejudicial and not probative. The jury may weigh the doctor's testimony more because he is a doctor and not a layman. Also, the testimony is speculative. However, after balancing the interests, the trial court will admit the testimony.

#### **PHYSICIAN – PATIENT PRIVILEGE**

A physician-patient relationship is protected from disclosure if the patient's confidential communication was for the purpose of diagnosis or treatment. The holder of the privilege is the patient, Burns, since he was treated for gasoline fume inhalation.

Is the doctor now covered under the umbrella of the attorney-client privilege? If the physician was contacted for the purpose of a pending litigation, there may be an extension of the attorney-client privilege. Although Attorney Hyde told Burns what to say to the doctor (the barbecuing lie) there are no facts supporting that the doctor knew of the ruse or believed the patient was lying on the advice of his attorney.

#### **EXCEPTION: CRIME OR FRAUD**

Recognized exception to disclosure if crime or fraud (arson).

#### **HEARSAY- EXCEPTION- STATEMENTS FOR MEDICAL TREATMENT**

Hearsay defined above. Statements for medical diagnosis or treatment may be admissible if made for the purpose of medical treatment.

Here, the diagnosis was made based upon a lie, the barbecuing. However, a trial court may exclude based on the gas fume inhalation diagnosis being too prejudicial since the crime is arson.

2021 Spring Semester Evidence Final Exam  
Professor Davenport

Darlene is Prosecuted for battery with serious bodily injury in the criminal case of People of the State of X vs. Darlene.

On February 1, 2020, Darlene was working as a waitress at Pizza Palace. She waited on Victor, a patron of the Pizza Palace and the alleged victim in the case. The Prosecution's theory of the case is that Darlene pushed Victor off of his barstool after he complained about her poor service, causing him to fall and suffer serious bodily injury (a concussion), as a result of the fall. The Defense theory of the case is that Victor became intoxicated while waiting for his food. Darlene asked him to leave, Victor became belligerent and fell off his barstool sustaining injuries.

Assume the following occurred in the jury trial of Darlene. 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. **The State of X has adopted the Federal Rules of Evidence.**

1. Victor testifies that he was waiting for his food for over an hour. When he complained, Darlene yelled, "I'll show you good service!" and forcefully pushed him off of his barstool. Victor was taken to the hospital and the treating physician told him he sustained a concussion.

**Relevance.** Evidence is relevant if it has some tendency to prove or disprove a fact of consequence in the case. Victor's testimony is relevant because it establishes the elements of the crime of which Darlene is charged – that there was an unlawful touching which resulted in serious bodily injury.

**Personal Knowledge.** Victor can testify to what he personally observed during his testimony.

**Hearsay.** Hearsay is an out of court statement offered for the truth of the matter asserted.

**Victor testifying to Darlene's out of court statement.**

There is no hearsay issue here because the statement is not being offered for the truth of the matter asserted – that Darlene provided Victor with good service. Even if the evidence was offered for its truth, under the federal rules it would still be considered non-hearsay as a statement of a party opponent.

**Victor testifying that the doctor told him he had a concussion.**

This is hearsay – it is an out of court statement being offered for the truth of the matter asserted – that Victor had a concussion. There is no hearsay exception that applies.

### **Lay Witness Opinion Testimony.**

Federal Rule 701. Opinion Testimony by Lay Witnesses. If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness's perception;
- (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

David's statement that he received a concussion would also be impermissible lay witness opinion testimony because whether he suffered a concussion is based on specialized knowledge.

2. On cross-examination of Victor, defense counsel asks Victor the following:
  - a. Whether he was convicted of a felony offense for perjury 22 years ago?

**Relevance** – The defense attorney's questions are relevant to case an adverse reflection on the credibility of Victor as a witness.

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

**Impeachment with Conviction of a Crime.** Under certain circumstances a witness may be impeached by proof of conviction of a crime. Under the Federal Rules, the crime must be a crime involving dishonesty or false statement (misdemeanor or felony) or a felony conviction. If the crime is one of dishonesty or false statement, the court has no discretion to exclude it, even under FRE 403. If the crime is a felony not involving dishonesty, then the court may exercise its discretion to exclude it. Where the witness is someone other than the accused in a criminal case, the court will determine if the probative value is substantially outweighed by its prejudicial effect.

There is one caveat, there is a presumption against admitting convictions occurring more than 10 years after the date of conviction or release on the crime, whichever is later. However, under Rule 609(b) the judge may admit such evidence for impeachment if the proponent of the evidence gave the other party advance notice that he intended to use the conviction and if the judge decides that the probative value of the conviction substantially outweighs its prejudicial effect.

Possibly admissible. The conviction is for a crime that goes to truthfulness 609(a)(2), but the conviction is more than 10 years old.
  - b. Victor filed a \$5 million lawsuit against Pizza Palace after the incident?

**Relevance** – The defense attorney's questions are relevant to case an adverse reflection on the credibility of Victor as a witness.

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

**Bias or Interest.** 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.

3. Next, the prosecution calls Dr. Vallum to the stand. Dr. Vallum will testify that he has been a licensed medical doctor for 20 years. He is Victor's primary care physician. Dr. Vallum testifies to Victor's injuries. Dr. Vallum is asked by the prosecution to state an opinion as to the cause of Victor's injuries. Dr. Vallum states that the injury Victor sustained could only have resulted from being pushed off a barstool. His opinion is based on an experiment that Dr. Vallum conducted with grapefruits where he rolled some grapefruits off a barstool and forcefully pushed other grapefruits off of the same barstool. Dr. Vallum testifies that there was significantly more trauma to the grapefruits he forcefully pushed off the stool than those that rolled off the stool, which is consistent with the injuries Victor sustained. The defense objects.

**Relevance.** Evidence is relevant if it has some tendency to prove or disprove a fact of consequence in the case. Here the doctor's testimony goes to the element of whether Victor sustained serious bodily injury and the cause of that injury.

#### **Expert Opinion Testimony**

The federal rules allow expert opinion testimony where jurors lack the knowledge or skill to draw the proper inferences from the underlying data. FRE 702 authorizes such testimony.

#### **Rule 702. Testimony by Expert Witnesses**

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:

- (a) 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;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

### **Qualifications as an Expert.**

The expert appears qualified to testify as a witness. He has been a medical doctor for 20 years.

### **Statement on Ultimate Issue**

An expert is permitted to state an opinion on an ultimate issue in a case with the exception of issues of mental state in criminal cases. Here, if otherwise permissible, the expert could opine as to the existence of serious bodily injury and the cause of that injury.

### **Reliability of the Expert Opinion:**

Even if a person is qualified as an expert, his or her testimony must satisfy another requirement in order to be admissible. The testimony must have a certain degree of reliability. When scientific testimony is offered, the court must first make an assessment of whether the testimony is based on scientifically valid reasoning or methodology, and whether the testimony can be applied properly to the issue at hand. The court provided guidance as to various considerations the trial court may review in determining admissibility, including:

1. Whether a theory or technique can be and has been tested
2. Whether the theory or technique has been subject to both peer review and publication
3. The known or potential error rate of the method
4. The existence and maintenance of standards controlling its operation
5. Whether it has attracted widespread acceptance within the relevant scientific community

The students should state these factors and conclude why this evidence would not pass the Daubert test.

4. After the Prosecution rests, the defense calls Pizza Palace's head security officer, Wendy. Wendy is required to investigate incidents and write reports regarding those incidents by Pizza Palace. Wendy testifies that she reviewed the video surveillance inside of the Pizza Parlor on the night of the incident. She saw Victor fall off his bar stool. She didn't know how to save the surveillance video and by the time she was able to contact the manufacture of the surveillance system, the surveillance video was erased because it records over itself every 24 hours.

**Relevance.** Evidence is relevant if it proves or disproves a fact of consequence in the case. Wendy's testimony is relevant because it supports the defense theory of the case that Victor fell, thus negating the elements of unlawful touching of which Darlene was charged.

**Best evidence rule** - The best evidence rule expresses a preference for originals because of the possibility of inaccuracy in approximating the contents of a writing and the belief that oral testimony based on memory presents a greater risk of error than oral testimony in other situations

The best evidence rule applies where the writing is a legally operative or dispositive instrument or where the knowledge of a witness concerning a fact results from having read or seen it in the document. When the best evidence rule applies, the rule expresses a preference for an original or a duplicate (an exact copy of the original) unless there is a genuine question raised about the original's authenticity. If the proponent cannot produce the original, he may offer secondary evidence of its contents if there is a satisfactory excuse provided justifying the admissibility of secondary evidence. such as loss or destruction.

Admissibility of Secondary Evidence. Here, Wendy's knowledge of the incident comes from watching it on the surveillance video, so the best evidence rule would apply. If the proponent of the writing cannot produce the original in court, secondary evidence of its contents will be admitted if a satisfactory explanation is given for the non-production. This includes loss or destruction of the original if it was lost or destroyed in good faith.

Thus, secondary evidence in the form of the Wendy's testimony would not violate the best evidence rule as long as the court found that the evidence was destroyed accidentally and not in bad faith.

**Lay witness opinion testimony** - Opinions by lay witnesses are generally inadmissible. However, there are many cases where, from the nature of the subject matter, no better evidence can be obtained. Lay witness opinion testimony is permissible when:

1. It is rationally based on the perception of the witness
2. Helpful to a clear understanding of her testimony or to the determination of a fact in issue; and
3. Not based on scientific, technical or other specialized knowledge.

Here, mom's opinion that Dan was not sane at the time of the commission of this offense is based on her personal observation. She states that she observed him speaking to himself as if he was responding to voices that were not present. He told her he was a special agent fighting aliens. It is helpful to a clear understanding of her testimony and a fact in issue. Dan's mother is in a unique position to assess his mental state based on her knowledge of Dan.

1. Next, Dan's attorney calls Dr. X, a licensed psychologist who has practiced in the field for 20 years. Dr. X testifies that Dan was suffering from schizophrenia at the time of the incident. She further testifies that schizophrenia can result in

delusional thinking and that Dan experienced delusions about being a secret government agent at the time of the offense. On cross examination by the Prosecution, Dr. X testifies that she has never personally treated Dan. She states that her opinion is based on her review of Dan's medical records, an interview with Dan's mother, and an astrological reading she conducted.

**Expert Testimony** – Expert testimony is admissible if the subject matter is scientific, technical or other specialized knowledge would help the trier of fact understand the evidence or determine a fact in issue. The evidence must be relevant and the methodology must be reliable.

**The opinion must be supported by a proper factual basis.** The factual basis must consist of facts that are of a kind that are reasonably relied upon by experts in the field.

The astrological reading is not of a type that would be reasonably relied upon by psychologists and should be excluded as a basis of Dr. X's opinion. If Dr. X could not come to the same conclusion without the astrological reading as a basis for her opinion, her opinion should be stricken.

The interview with Dan's mother and medical records are the types of information that are relied upon by other psychologists. Under the California case, *People v. Sanchez*, if an expert testifies to case-specific out of court statements to explain the basis of his or her opinion, those statements are considered by the jury for their truth, thus rendering them hearsay. Thus, the expert's reliance on those statements must be admitted through an applicable hearsay exception or witness. Dan's mother testified, so any case-specific facts Dr. X testified to based on the interview with Dan's mother would be permissible if those statements were testified to by Dan's mother.

The medical records would need to fall within a hearsay exception or the author of those records would need to be called as a witness for Dr. X to relate case-specific facts contained within the records. If Dr. X states that she generally relied upon the records, but did not relate case-specific information, such reliance would be reasonable.

### QUESTION 3 – H.STARR

Proffer 1:

- Donny Should Object to Relevance (logical relevance):
  - o The proffer tends to show that Donny had a motive to befriend and lure Victoria. Students may also point out that propensity is another basis for relevance due to the application of 413
- Donny should object as improper character evidence
  - o Under a simple character analysis, the proffer is a prior act apparently being used to prove an act in conformity therewith
  - o Prior to discussing applicable statutes or exceptions, the objection would be sustained, however...
    - MIAMI COP exceptions
      - Prosecution should argue that the prior assault falls under an exception, such as:
        - o Intent – Likely permissible
        - o Common scheme or plan – Harder argument
        - o Absence of mistake – Likely permissible
        - o Motive – Likely permissible
        - o Identity – Not likely permissible
      - Conclusion: Based on the number of potential applicable exceptions, the evidence would likely come in under a standard exception, however, there are also specific statutory provisions
- Prosecution should respond that evidence is permissible under FRE 413
  - o Because the instant prosecution is a criminal case involving sexual assault, the prior sexual assault is admissible under 413. Appropriate notice is assumed by the facts, and the indication that the crime is rape/sexual assault is enough to determine that it is applicable.
    - Conclusion: Likely admissible under FRE 413
- Prosecution could also respond that evidence is permissible under FRE 414
  - o While the victim in the instant case is a minor, she does not fall under the definition of a “child” within FRE 414. So FRE 414 would not apply to the instant case, despite the fact that the prior case likely des fall under the definition because the prior victim was 13
    - Conclusion: Likely inadmissible under 414
- Donny should object under 403 (legal relevance)
  - o The typical argument of unfair prejudice is not really applicable because rule 413 allows consideration of such offenses. Moreover, passions and prejudices won’t carry much weight either, since the underlying accusation is already of the same variety and still worse. However, waste of time and confusion of the issues are still viable argument.
    - Conclusion: 403 objection will fail

### Proffer 2:

- Donny Should Object to Relevance (logical relevance):
  - o The proffer tends to show that Donny had a motive to befriend and lure Victoria.
- Donny should object as improper character evidence
  - o Under a simple character analysis, the proffer is a prior act apparently being used to prove an act in conformity therewith
  - o Prior to discussing applicable exceptions, the objection would be sustained, however...
    - MIAMI COP exceptions
      - Prosecution should argue that the prior assault falls under an exception, such as:
        - o Intent – Likely permissible
        - o Common scheme or plan – Harder argument
        - o Absence of mistake – Harder argument
        - o Motive – Likely permissible
        - o Identity – Not likely permissible
      - Conclusion: Based on the number of potential applicable exceptions, the evidence would likely come in under a standard exception, however, there are also specific statutory provisions subject to 403
- Prosecution could attempt to respond under 413
  - o Because child possession of pornography is not a situation involving a prior sexual assault, that statute would not likely apply.
    - Conclusion: Section 413 does not apply
- Prosecution could attempt to respond under 414
  - o As noted above, the victim in the instant case is not a child based on the definition supplied by the rule. Nor does the behavior cited fit the statute.
    - Conclusion: Section 414 does not apply
- Donny should object under 403
  - o Unlike the prior proffer, where there were specific statutory provisions applicable, this one relied pretty much entirely on MIAMI COP bases and is a different types of behavior. The number of victims in a large number of depictions combined with the lack of any apparent personal involvement ups the prejudicial effect while lowering the probative value. Moreover, the jury would likely be subjected to the depictions, causing consumption of time and confusing the issues.
    - Conclusion: It would vary by judge, so any conclusion stemming from a reasonable analysis will do.

### Proffer 3

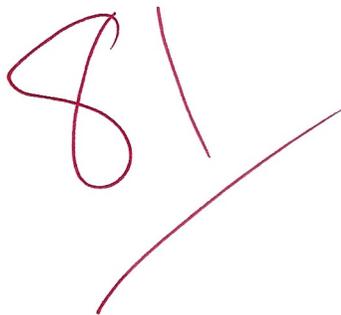
- Viniks could object to Relevance

- o According to the proffer, the defense is seeking to use the proffer to demonstrate that the killing was accidental. It also suggests the rape was perhaps not forcible, but consensual in manner consistent with the victim's writings.
    - Conclusion: relevant
- Viniks could object to character
  - o Under a typical character objection, the People would argue that this suggests that the victim had a propensity to act in a certain way.
    - Conclusion: Under standard analysis, sustained
- Donny should respond;
  - o MIAMI COP Exceptions:
    - Intent (or lack thereof)
    - Motive
    - Accident
      - Conclusion: character objection overruled
- Viniks should object under 412
  - o Rule 412 prohibits use of sexual predisposition or past sexual behavior in both civil and criminal cases, with exceptions in both. The only exceptions that matter here are those in civil cases.
    - Without discussing exceptions, this objection should be sustained since this is evidence of the victim's prior sexual conduct.
- Donny should respond
  - o The prior sexual behavior of the victim may be admitted if the probative value substantially outweighs the danger of harm to the victim and of unfair prejudice to any party. Reputation may only be brought up if the victim places it in controversy
    - Students would be within reason to conclude that the defense enunciated use of the evidence is of sufficient probative value since the victim can suffer no actual harm due to her death and because the party is not unfairly prejudiced, since the evidence goes directly to an elements of the claim (intent to kill).
- Viniks should object under Best Evidence Rule
  - o Since the defense is seeking to admit secondary evidence of the diary, the best evidence rule, without exceptions, would bar the testimony.
    - Conclusion: Without exceptions, sustained.
- Donny should respond that an exception applies:
  - o All originals are destroyed without bad faith by Donny
  - o The original cannot be obtained by legal process
  - o The party that had control had control of the original and was put on notice
    - Conclusion: Overruled

1)

*State v. Burns*- Criminal Case/CEC Governs

**Question #1: Testimony of Wilma, Wife**



**RELEVANCE**

**Logical Relevancy**

Evidence having any tendency to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence.

Here, Wilma's (W) testimony that Burns (B) had gasoline in the his red Ferrari trunk and combined with his statement that he "figured out a way to solve our financial problems," has the tendency to prove that B had the gasoline used to start the fire and is the owner of the red Ferrari that was seen leaving the area right before the fire started.

Therefore, the trial court is likely to find the her testimony logically relevant.

**Legal Relevancy**

Balances the probative value of the evidence against the danger of unfair prejudice, confusion of the issues, misleading the jury or undue consumption of time. If prejudice is substantially greater than the probative value of the evidence, the court will exclude the evidence.

Here, W's testimony is highly probative with low probability of unfair prejudice.

Thus, the trial court is likely to find W's testimony legally relevant.

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## PROPOSITION 8

Holds that all relevant evidence, even if it would be barred under traditional rule of evidence, is admissible. There are nine exceptions to prop. 8, including but not limited to hearsay, privileges, and constitutional rights.

Under prop 8, all relevant evidence here such as the testimony of the prosecution witnesses (pending the court finds relevant), will be admissible unless an exception applies.

## COMPETENCY OF WITNESS

Generally, witnesses are presumed to be competent until the contrary is demonstrated. A witness must understand the duty to tell the truth, have personal knowledge, and be capable of expressing themselves understandably.

Here, the facts do not indicate any reason W would be disqualified. She has personal knowledge of the incident. Therefore, the court will likely find her a competent witness.

## HEARSAY

An out-of-court statement offered to prove the truth of the matter asserted. Hearsay is inadmissible unless an exception or exemption applies.

Here, W has been called by the prosecution and will testify to the statement B told her "I figured out a way to solve our financial problems.". This statement is hearsay because it is out of court and speaks to the truth of the matter asserted. The declarant, B, is the defendant. The statement will be inadmissible unless an exception applies.

## Declarants State of Mind

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*under CEC, state of mind is HS & may be an Exception.*

Statements by a declarant that serve as circumstantial evidence of the declarants state of mind are not hearsay.

Here, the prosecution will argue that the statement is not hearsay because it speaks to the B's state of mind. B was having financial problems and was looking for a way out. The statement, combined with his action of showing W the gasoline in his trunk, gives a reasonable inference that he was planning on using the gasoline to start a fire and obtain insurance money that would "solve their financial problems." The defense will argue that the statement is not conclusive that he was planning on starting a fire and can argue that *(B took another job mowing lawns)* which is why he had the gasoline in his trunk. The second job was his way to solve their financial problem. The court may find D's argument unlikely but that is for the trier of fact to determine.

### Party Admissions

Any statement made by a party and offered against that party is admissible.

Here, the prosecution will assert the statement should be admissible because the declarant (B) is a party and the prosecution, the opposing party, is offering the statement.

Thus, the statement is likely to be admissible under this exception.

### PRIVILEGES

#### Spousal Immunity Privilege

Permits ones spouse to refuse to testify against defendant spouse as a witness in a criminal case. The witness spouse alone holds the privilege and may choose to waive the privilege, regardless of the defendants spouse objection.

Here, W is the holder of the privilege as the witness spouse. W cannot be called or compelled to testify but can waive her privilege, even if B objects. No exceptions apply in this case. W has volunteered to testify, thus waiving her privilege.

Thus, the spousal privilege will not apply.

### **Confidential Marital Communications**

Protects confidential communication made during marriage. Both spouses can claim the privilege not to disclose and to prevent the other spouse from disclosing communication made in private between the parties.

Here, both W and B both hold the privilege not to disclose communication that was intended to be private. The goal of the privilege is to protect marital harmony. Unlike spousal privilege, B can prevent W from testifying to the statement if he intended it to be private and since he is the defendant, he is unlikely to waive that privilege. Since they were married at the time of the statement, the communication is protected. Even though they are going through a divorce, the divorce is not final and the statement was said during the marriage. W will be unable to testify to what B told her. However, W will be able to testify to what she saw, so she will be able to testify to W showing her the gasoline cans in his trunk.

Thus, the privilege will protect B's statement but W will be able to testify to her seeing the gasoline cans.

**Conclusion:** W's testimony will be admissible under the hearsay exceptions but will be barred if B invokes his privileges. However, W will be able to testify to what she viewed during the time. *What about crime/fraud exception?*

### **Question #2: Testimony of Nosey, Neighbor**

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## **RELEVANCE**

### **Logical Relevancy**

Evidence having any tendency to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence.

Here, Nosey (N) testimony has the tendency to prove that B drives a red Ferrari and support W's testimony that B did say he found a way to solve their financial problems. N has known both parties for eleven years and is likely to know what B was implying when he made that statement.

Therefore, the court is likely to find N's testimony logically relevant.

### **Legal Relevancy**

Balances the probative value of the evidence against the danger of unfair prejudice, confusion of the issues, misleading the jury or undue consumption of time. If prejudice is substantially greater than the probative value of the evidence, the court will exclude the evidence.

Here, N's testimony is not likely to be highly prejudicial and the court is likely to find it legally relevant

## **COMPETENCY OF WITNESS**

Generally, witnesses are presumed to be competent until the contrary is demonstrated. A witness must understand the duty to tell the truth, have personal knowledge, and be capable of expressing themselves understandably.

The facts do not state any indication that N is an incompetent witness and the court is likely find him competent to testify.

## OPINION TESTIMONY

### Lay Opinion

Opinion based on common experience. Opinion by lay witnesses are generally inadmissible, except when based on personal knowledge, clarity to material fact, and not based on scientific/technical knowledge.

Here, the prosecution will claim N's testimony is based on his personal knowledge of what he knows about his neighbors over the last eleven years and will provide clarity to a material fact, which is what B meant when he said he found a way to solve their financial problems. His testimony is not based on scientific knowledge, only personal that he has gained from being their neighbor, which he will be able to share what he sees on a daily basis.

*wouldn't this be speculation?  
would not be a prosecution  
argument? If so - limiting  
instruction -*

### HEARSAY

An out-of-court statement offered to prove the truth of the matter asserted. Hearsay is inadmissible unless an exception or exemption applies.

Here, B is the declarant and the testimony is hearsay because it is out of court and used for the truth of the matter asserted.

### Declarants State of Mind (*See Supra*)

### Party Admissions (*See Supra*)

**Conclusion:** Since hearsay (and nonhearsay) exception apply, N's testimony is likely to be found admissible

**Question #3: Testimony of Dexter, Driver**

**RELEVANCE**

**Logical Relevancy**

Evidence having any tendency to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence.

Here, Dexter (D) testimony has the tendency to prove that B is guilty of arson because he called his lawyer right after, was excited and told him he messed up by spilling gasoline on his clothing. People who spill gasoline on their clothes don't generally call their lawyer for help afterwards unless their act is criminal.

Thus the court is likely to find D's testimony logically relevant.

**Legal Relevancy**

Balances the probative value of the evidence against the danger of unfair prejudice, confusion of the issues, misleading the jury or undue consumption of time. If prejudice is substantially greater than the probative value of the evidence, the court will exclude the evidence.

Here, D's statement is unlikely to draw an emotional response from the jury, thus unlikely to be unfair prejudice.

Thus, the court is likely to find D's testimony legally relevant.

**COMPETENCY OF WITNESS**

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Generally, witnesses are presumed to be competent until the contrary is demonstrated. A witness must understand the duty to tell the truth, have personal knowledge, and be capable of expressing themselves understandably.

No facts state D has any barriers to testifying. Since he is capable of driving (senses in tact), he will likely be competent to testify to what he heard. Thus the court will find him a competent witness.

## **HEARSAY**

An out-of-court statement offered to prove the truth of the matter asserted. Hearsay is inadmissible unless an exception or exemption applies.

Here, there are two statements that may be hearsay. First, B's statement to his attorney Hyde (H), stating that he messed up by spilling gasoline on his clothes and was nauseated from the fumes. This declarant is B and is hearsay. The second statement is when H tells B to go to the emergency room and tell the doctor he inhaled fumes from barbecue. In that statement, H is the declarant. Both statements speak are being used to show that B started the fire and will be inadmissible unless an exception applies.

Hearsay Exceptions

**Declarants State of Mind (nonhearsay) (See Supra)**

**Party Admissions (See Supra)**

**Contemporaneous Statement**

A statement describing or explaining an event or condition while the declarant concurrently perceiving the event or immediately thereafter.

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Here, the prosecution will argue that B called H right after he started the fire. B was explaining that he messed up by spilling gasoline on his clothes and he was ill from the gas fumes. The prosecution will want this statement in because it puts B at the scene and since they know he drives a red Ferrari, the supports that it was B who started the fire. Additionally, the prosecution also know that the fire was started with gasoline and since B has gasoline on his clothes and ill from the gas fumes, this also links him to the crime. The defense will claim attorney-client privilege (to be discussed below).

### Spontaneous Statement

Statement made by declarant while under stress or excitement of startling event.

Here, the prosecution will argue that B made the statement right after the startling event of starting the fire. He was under stress because he was feeling ill from the effects of his action. The defense will argue that too much time had passed and B was ill because he inhaled fumes from a bbq, not a fire he started.

### Present State of Mind

Out-of-court statements are admissible to prove the declarants then-existing state of mind, emotion, sensation, physical condition, or the (declarant's future intent) to perform a particular act when that act is a material issue. *can't be both present state of mind & future. Do you mean addkstr?*

Here, prosecution may argue that B's statements are proof of his then existing state of mind and physical condition. He was excited and in panic because he spilled gasoline on himself. Instead of calling his wife or 911, he called his lawyer for advice. They will argue he called his lawyer because he started the fire. B will argue he called his lawyer by accident but he was in such a panic he told him what happened and the lawyer sent him to the emergency room.

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The court is likely to find that the hearsay exceptions apply

## PRIVILEGES

### Attorney-Client Privilege

Provides that a client has a right to prevent him and his lawyer from disclosing any confidential <sup>legal</sup> communication between them relating to the professional relationship.

Here, B is the holder of the privilege. The issue here is that the driver overheard the conversation because the H had his client on speakerphone. Under the A/C privilege, a unnecessary third party waives the privilege. The prosecution will argue that the driver is an unnecessary third party, and the privileged has been waived. However, B will argue that D was an eavesdropper, and the ruling on whether D can testify what he heard will differ ~~based on jurisdiction~~. Modernly, he would not be able to testify because it was the attorney who was negligent by having his client on speakerphone in front of his driver. B intended his conversation to be private and therefore, he will likely be able to invoke his A/C privilege unless an exception applies, which none are present based on the pattern.

**Conclusion:** D's testimony is likely to be inadmissible due to A/C privilege.

### Question #4: Testimony of Dr. Pyro, ER Doctor

## RELEVANCE

### Logical Relevancy

Evidence having any tendency to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence.

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Here, Dr. P's testimony has the tendency to prove that B visited the hospital seeking treatment for gasoline fumes inhalation, providing the tendency to prove that he inhaled gasoline when he stated the fires.

Thus the court is likely to find the doctors testimony logically relevant

### **Legal Relevancy**

Balances the probative value of the evidence against the danger of unfair prejudice, confusion of the issues, misleading the jury or undue consumption of time. If prejudice is substantially greater than the probative value of the evidence, the court will exclude the evidence.

Here, there is no indication of undue prejudice and the court is likely to find the doctors testimony legally relevant.

### **COMPETENCY OF WITNESS**

Generally, witnesses are presumed to be competent until the contrary is demonstrated. A witness must understand the duty to tell the truth, have personal knowledge, and be capable of expressing themselves understandably.

Court is likely to find doctor competent.

### **PRIVILEGES**

#### **Physician-Patient Privilege**

The physician-patient privilege protects confidential communication between a doctor and patient for the purpose of medical diagnosis or treatment.

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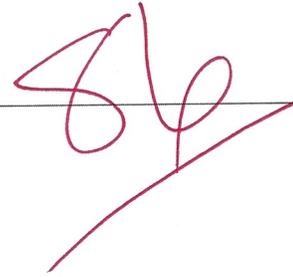
Here, CA recognizes the physician-patient privilege. The defense will argue that since B went to the doctor seeking medical treatment, the privilege applies. Additionally, since his medical is not the issue, he should be protected. The prosecution will argue that his attorney sent him to the doctor and that means the privilege should not apply.

However, the attorney sent B to the hospital for medical treatment, not for purposes of litigation, therefore the court is likely to find the privilege applies. *What about crime/fraud Exception?*

**Conclusion:** Since the doctor/patient privilege applies, it is unlikely Dr. P will be able to testify.

*HS exemption - medical treatment, etc.*

**END OF EXAM**



2)

## **Federal Rules of Evidence**

Introduced in 1975, and based on evidence codes already existing in two states, including California, the Federal Rules of Evidence (FRE) control in federal court.

State X has adopted the Federal Rules of Evidence, or an identical evidence code. Therefore the federal rules of evidence will be referenced throughout in place of State X's rules.

### **1. Victor's Testimony**

#### **Relevance**

Only evidence that is both logically and legally relevant is admissible.

#### ***Logical Relevance***

Evidence is logically relevant if it tends to prove or disprove some material fact at issue in the case, or if it tends to support a reasonable inference as to some material fact.

Victor's testimony that he waited for over an hour for his food, that Darlene yelled "I'll show you good service" when he complained, and that she pushed him off the bar stool after which he was taken to the hospital and told by the treating physician that he had a concussion all tends to prove various aspects of the prosecution's case against Darlene for battery with serious bodily injury. It provides context, shows Darlene's state of mind and intent, and describes both the seriousness of the injury he sustained and how it was caused.

Therefore, Victor's testimony is logically relevant.

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### ***Legal Relevance***

Evidence is legally relevant, or competent, if it does not violate any exclusionary rule and, under FRE 403, its probative value is not substantially outweighed by the risk of undue prejudice, confusion of the jury, or concerns of judicial inefficiency.

Victor's testimony is highly probative because it is a firsthand account of the alleged crime. It would be very difficult for Darlene to argue that it is unfairly prejudicial. Additionally, the testimony is likely to be reasonably efficient and is unlikely to confuse the jury. Because some of the testimony is hearsay, it may violate exclusionary rules if a valid exception or exemption does not apply.

Victor's testimony, hearsay issues aside, is legally relevant.

### **Competency**

All witnesses are presumed competent to testify provided they have personal knowledge (proof of which may come from the testimony itself) and declare that they will testify truthfully.

There are no facts to suggest that Victor is incompetent to testify. Even though he has a concussion, the judge will likely still permit him to testify provided he can still understand the duty to tell the truth and is able to testify accurately. However, if Darlene can prove that Victor has suffered memory problems due to the concussion, she may be able to throw his competency into question.

Unless Darlene can show by a preponderance of the evidence that Victor is incapable of relating his personal knowledge truthfully, he will be found competent to testify.

### **Hearsay**

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Hearsay is an out of court statement introduced to prove the truth of the matter asserted. Because statements made out of the present court tend to lack sufficient indicia of reliability, hearsay is generally inadmissible unless a valid exception applies.

Victor's testimony that Darlene yelled at him "I'll show you good service" and the diagnosis of concussion by the treating physician at the hospital are both hearsay because they depend on statements made out of court. If the prosecution wishes to use them for the truth of the matter asserted, that Darlene was going to show Victor good service and that Victor had a concussion, then valid hearsay exemptions or exceptions will need to be provided for each.

### *Non Truth Purpose*

Otherwise inadmissible hearsay may be introduced for a non-truth purpose, e.g. to show the declarant's state of mind or emotion circumstantially or because the words have independent legal significance.

The prosecution will likely argue that Darlene's statement "I'll show you good service" is nonsensical for the truth of the matter asserted, but highly relevant as circumstantial evidence of Darlene's state of mind before she pushed Victor off the bar stool. Therefore, they may wish to introduce it for a non-truth purpose.

Darlene's words may also constitute a threat or assault if she spoke them in a way that Victor understood and reasonably believed to mean that she was planning to commit a battery against him with present ability to do so. If so, they have independent legal significance as a verbal act and may be introduced for a second non-truth purpose.

### *Exemption: Party Opponent Admission*

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Under the FRE, a statement made by a party and offered against him is not hearsay, even if the statement was not against the party's interest at the time it was made.

Darlene's statement "I'll show you good service" is being offered against her penal interest. Provided that a sufficiency of evidence exists to support a reasonable belief that Darlene made the statement, then it is not hearsay and may be admitted against her.

***Exception: Statement Against Interest***

A statement made against a party's known penal interest is admissible hearsay, provided there is some additional corroborating circumstances.

Darlene will argue that she didn't know that she would be charged with battery against Victor when she told him she would show him good service, therefore she did not know that the statement was against her penal interest. Additionally, there are no corroborating circumstances in the facts, e.g. another waitress who also overheard the statement. Therefore it is unlikely that this exception applies.

*Are you assuming D is unavailable due to 5th A?*

***Exception: Excited Utterance/ Present Sense Impression***

A statement made either under the stress of a startling event or while/immediately after perceiving an event or condition that describes that event and/or the declarant's response to it is admissible hearsay.

Darlene was not under the stress of a startling event when she made the statement because she had not yet pushed Victor off the bar stool. She was not describing the event or condition. Therefore these exceptions to not apply.

***Exception: Medical Diagnosis or Treatment***

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Statements made for the purpose of medical diagnosis or treatment are admissible hearsay.

The treating physician told Victor he had a concussion. That out-of-court statement is admissible under the medical diagnosis or treatment hearsay exception because Victor was seeking medical diagnosis and treatment at the hospital when it was made.

### Conclusion

Victor's testimony is relevant to the charge of battery with serious bodily injury. Some of the testimony, regarding Darlene and the physician, is hearsay but valid exemptions and exceptions apply. Therefore, all of Victor's testimony is admissible.

## 2. Cross-Examination of Victor

### Right to Confront: Crawford Issues

The Sixth Amendment guarantees a defendant's right to confront an adverse witness in most cases, which right can only be exercised by the ability to cross examine.

The defense has a right and a duty to cross-examine Victor regarding his testimony against Darlene. They may inquire about any material (non-collateral) issue that is discussed during the prosecution's direct examination.

### Impeachment

The credibility of a witness may be undermined by evidence that casts an adverse reflection on their veracity. Modernly, any party may impeach, including the party who called the witness. During cross-examination, impeachment testimony may be elicited directly from the witness. Once a proper foundation has been laid, extrinsic evidence may also be introduced in certain cases.

In addition to undermining the direct testimony, the defense can also attempt to cast aspersions on Victor's testimony by impeaching him. If the jury believes, e.g. that Victor has a motive to lie or is generally known to be untruthful, it is likely they will give less weight to his testimony against Darlene.

### **Bias or Interest**

Evidence that the witness is biased or has an interest in the outcome of the case tends to undermine credibility and show a motive to lie.

The defense wants to introduce questions about Victor's \$5 million civil law suit against Pizza Palace because it goes to show that Victor may have a pecuniary motive in seeing Darlene convicted. Since Victor is suing Pizza Palace regarding the actions of its employee, the exoneration of Darlene at the criminal trial would likely provide a defense to Pizza Palace. Even though civil liability may still exist even if a criminal conviction is not made, due largely to the differing burdens of persuasion (preponderance vs. beyond a reasonable doubt), Victor's civil case will become much more difficult if Darlene is acquitted.

Arguably, depending on State X's tort laws, Victor's civil case could also be more difficult if Darlene is found guilty because an employer is rarely responsible for his agent's intentional battery unless plaintiff can prove actual negligence, e.g. failure to do a background check or improper hiring practices. Regardless, the defense is permitted to ask Victor about his Pizza Palace lawsuit in order to introduce evidence of an improper motive or bias. Victor must first be asked about the law suit. If he denies it, extrinsic evidence may be introduced, even if it would be otherwise inadmissible.

### **Conclusion**

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The defense may cross examine Victor about his civil suit against Pizza Palance. If he refuses to answer or doesn't tell the truth, they may introduce extrinsic evidence to impeach him.

### 3. Dr. Vallum's Testimony

#### Relevance

Only evidence that is both logically and legally relevant is admissible.

#### *Logical Relevance*

Evidence is logically relevant if it tends to prove or disprove some material fact at issue in the case, or if it tends to support a reasonable inference as to some material fact.

Dr. Vallum's testimony tends to show that Darlene's act of pushing Victor off the stool caused his injury. Therefore it is logically relevant.

#### *Legal Relevance*

Evidence is legally relevant, or competent, if it does not violate any exclusionary rule and, under FRE 403, its probative value is not substantially outweighed by the risk of undue prejudice, confusion of the jury, or concerns of judicial inefficiency.

Darlene will argue that Dr. Vallum's testimony is ridiculous and wastes the court's time because rolling grapefruits is not a reasonable method for determining the cause of the injury. However there are no facts to suggest that the probative value of the testimony is outweighed substantially, so the court will likely find the evidence legally relevant and postpone the analysis of the questionable scientific methods to its consideration of the expert witness testimony.

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## Expert Opinion Testimony

Generally, opinion testimony is inadmissible unless the court is sure it is necessary or helpful to the jury. Under FRE 702, a qualified expert may present an opinion or conclusion on matters sufficiently beyond common experience if the evidence is relevant, reliable, reasonably probable, and supported by a factual basis. Under the Federal Rules, the foundation for expert testimony must be provided on request, but does not have to be given before the witness testifies.

### *Qualification of the Witness*

A witness may be asked about his experience, training, knowledge, skills, etc. Following presentation of the expert, the opposing party has the opportunity to voir dire the expert regarding those qualifications.

Dr. Vallum is a licensed medical doctor who has been practicing for 20 years. He likely attended medical school. Additionally, he is Victor's primary care physician so he also has special knowledge about Victor himself. Therefore Dr. Vallum is a qualified expert on primary care. The defense may argue that Dr. Vallum is not sufficiently expert in the field of head injuries. It is up to the judge to decide whether the expert is qualified and he will likely rule in Dr. Vallum's favor, but the jury will consider the defense arguments when deciding what weight to give Dr. Vallum's testimony.

### *Factual Basis*

The opinion must be grounded in facts perceived by, personally known to, or made known to the expert at or before the hearing, of a type reasonably relied on by other experts in the field. Hypothetical questions may be used to introduce factual scenarios and otherwise inadmissible evidence may be relied on, usually with a limiting instruction to the jury.

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Dr. Vallum's opinion as to the cause of Victor's injuries is based on an experiment conducted with grapefruits. Because his technique is novel, the court will likely require an additional analysis in addition to the usual factual basis.

### Daubert Factors for Scientific Reliability

Under the Federal rules, the Frye test for new scientific tests and procedures, which once asked whether the technique or procedure was generally accepted in the expert's field, has been augmented by the Daubert Factors. These include whether the technique has been tested, subjected to peer review/publication, what its error rate is, and what standards are used for controlling its operation in addition to the question of general acceptance in the scientific community.

Dr. Vallum's testimony is based on experiments rolling grapefruits off of the same bar stool that Victor was sitting on. He claims that the trauma to the grapefruits matches Victor's injury. The defense will likely succeed in their objection unless the prosecution can show sufficient scientific reliability in Dr. Vallum's methods, e.g. by peer review and publication or by details about the error rate and standards of operation for the grapefruit tests.

### *Opinion on Ultimate Issue*

Modernly, an expert witness is permitted to testify regarding an ultimate issue in the case, but cannot usurp the jury's role by making a final factual determination as to an element of the case.

Dr. Vallum testified that Victor's injury could only have been sustained from being pushed off a bar stool. This testimony is regarding an ultimate issue -- causation of the injury -- and likely goes too far in stating that the injury was caused by falling off that particular bar stool and could only have been so caused. It would be more appropriate for

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Dr. Vallum to testify that Victor's injury is consistent with falling off the bar stool and leave the ultimate conclusion to the jury.

Since causation is an element of battery, the jury must find beyond a reasonable doubt that Darlene caused Victor's injury by pushing him. Therefore it is impermissible for Dr. Vallum to make that conclusion for them.

### **Conclusion**

Dr. Vallum's expert testimony is relevant to causation, but likely barred because it does not have sufficient scientific reliability.

## **4. Wendy's Testimony**

### **Relevance**

Only evidence that is both logically and legally relevant is admissible.

#### ***Logical Relevance***

Evidence is logically relevant if it tends to prove or disprove some material fact at issue in the case, or if it tends to support a reasonable inference as to some material fact.

Wendy's testimony about the surveillance video tends to show that Victor did indeed fall off the bar stool, which supports a reasonable inference that he sustained a concussion when he did so. Therefore it is logically relevant.

#### ***Legal Relevance***

Evidence is legally relevant, or competent, if it does not violate any exclusionary rule and, under FRE 403, its probative value is not substantially outweighed by the risk of undue prejudice, confusion of the jury, or concerns of judicial inefficiency.

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Wendy's testimony may be barred by the Best Evidence Rule. Otherwise, it is highly probative since it provides corroboration to Victor's statements and is not prejudicial to Darlene because it is simply a recounting of Victor falling off the chair.

### **Best Evidence Rule**

Under the FRE, an original document (including a video recording) must be produced to prove its contents when the document is legally operative or dispositive or when the witness's knowledge of a fact results from having seen the document. Secondary evidence is only admissible if the original unavailable and a satisfactory explanation for its absence is laid, including loss or destruction.

Wendy's testimony about Victor falling off the stool is informed by what she saw on the surveillance video, therefore the Best Evidence Rule applies. The prosecution must either produce the original video recording or they must show why it cannot be produced. Wendy didn't know how to keep the video from being overwritten 24 hours later by security system. She attempted to contact the manufacturer, but wasn't able to reach them in time.

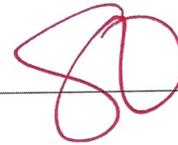
Because the video was destroyed by *good faith* no fault of the prosecution, and because Wendy made reasonable efforts to prevent it from being destroyed, it is likely that secondary evidence of the video in the form of Wendy's testimony will be permitted.

### **Conclusion**

Wendy's testimony is relevant and will be admissible secondary evidence of the destroyed surveillance video.

**END OF EXAM**

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3)

**CRIMINAL TRIAL:**

**1) SGT WILLIAM OF THE LAS VEGAS POLICE DEPARTMENT TESTIFIED THAT DONNY HAD BEEN ARRESTED SIX YEARS EARLIER FOR SEXUAL ASSAULT OF A GIRL, AGE 13, IN A BARNES AND NOBLE BATHROOM IN LAS VEGAS, FOR WHICH DONNY WAS LATER CHARGED AND CONVICTED FOR SEXUAL ASSAULT AND CHILD MOLESTATION**

RELEVANCE All relevant evidence is admissible. Relevance is determined by the Balancing test and the Tendency test.

LOGICAL RELEVANCY (TENDENCY TEST) Does the evidence tend to prove or disprove a material fact of consequence? Evidence is logically relevant if it has a tendency to prove or disprove any disputed fact that is of consequence in the determination of the cause of action. Generally, the evidence must relate to the time, event, or person involved in the present litigation, otherwise, it is not relevant.

Here, the evidence being offered by Sgt William that Donny had been arrested and convicted six years earlier for a sexual assault of a minor would tend to prove that Donny has an inclination to act inappropriately with underage girls, which is a material fact that is in dispute.

LEGAL RELEVANCY (BALANCING TEST) Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury or undue consumption of time?

Here, there is a prejudicial effect present, as the crime that Donny was convicted of is one that disturbs the general public, however the probative value outweighs the prejudicial effect that is present. There is a high probative value, because the evidence being offered tends to prove a material fact to the case that is in dispute. There is no fear of unfair prejudice, confusion of issues, misleading the jury, or undue consumption of time, therefore the evidence should be considered legally relevant.

Logical and legal relevancy have both been met, the evidence should be considered relevant.

**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.

Here, the evidence being offered by Sgt William regarding the prior conviction of Donny for sexual assault of a minor, would not be introduced to suggest that the Donny has a propensity to commit assaults on minor girls.

**SPECIFIC ACTS OF MISCONDUCT GENERALLY INADMISSIBLE** Generally, extrinsic evidence of other crimes is inadmissible if such evidence is offered solely to establish a criminal disposition.

**ADMISSIBLE IF INDEPENDENTLY RELEVANT** Evidence of other crimes or misconduct are admissible if these acts are relevant to some other issue other than the defendant's character or disposition to commit the crime charged.

Here, the evidence of Sgt William's testimony regarding Donny would be relevant under another issue, being, prior acts of sexual assault.

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**PRIOR ACTS OF SEXUAL ASSAULT** Evidence of a defendant's prior acts of sexual assault is admissible in a case where the defendant is accused of committing an act of sexual assault.

Here, the defendant is being accused of sex with a minor, rape, and the murder of Victoria. Because the defendant is being accused of committing an act of sexual assault, the evidence being offered by Sgt William should be considered admissible.

**IMPEACHMENT - CREDIBILITY** A witness may be impeached extrinsically by calling other witnesses that prove impeaching facts. discrediting, disparaging or a contradiction of witness testimony. Calling into question witness credibility. The witness on the stand is necessary.

Here, because Sgt William is on the stand, and not Donny, impeachment is not a proper discussion.

In conclusion, the testimony being offered by Sgt William should be considered admissible.

**2) DETECTIVE SMITH OF THE LAPD TESTIFIED THAT, UPON A VALID SEARCH OF DONN'Y CELL PHONE, HE LOCATED HUNDREDS OF DEPICTIONS OF CHILD PORNOGRAPHY WITH THE VICTIMS DEPICTED RANGING FROM APPARENT AGES OF 12 TO 16**

**RELEVANCE/ LOGICAL & LEGAL RELEVANCY** (see rule statements supra)

Here, the evidence being offered by Detective Smith of the depictions of child pornography on the phone of Donny would have a tendency to prove that Donny

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enjoyed viewing underage girls naked. This would have a tendency to prove a material fact that is in dispute, and therefore should be considered logically relevant. There is a high probative value, because the evidence being offered tends to prove a material fact to the case that is in dispute. There is a risk of some prejudice, as the photos contain content that would make the general public upset, but the probative value outweighs the prejudice that is present. There is no fear of unfair prejudice, confusion of issues, misleading the jury, or undue consumption of time, therefore the evidence should be considered legally relevant. Logical and legal relevancy have both been met, the evidence should be considered relevant.

WRITINGS Extremely broad (ex. handwriting, words, symbols, video recordings, photos).

Here, the photos on the phone that belonged to Donny would be considered a writing.

AUTHENTICATION Personal knowledge/ recognition of a document. Before a writing or any secondary evidence of its content may be received in evidence, the writing must be authenticated by proof showing that the writing is what the proponent claims it is.

Here, Detective Smith would have to authenticate the photos of the child pornography on the phone of Donny. He would be the best person to authenticate the photos because he personally viewed the photos, and would have experience as a detective to what the photos represent.

BEST EVIDENCE RULE requires an original writing, recording or photograph to prove its contents. Duplicates may be admissible unless in dispute. Secondary evidence of the writing, such as oral testimony regarding the writing's contents is permitted only after it has been shown that the original is unavailable for some reason other than serious

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misconduct of the proponent. The court prefers an original document rather than secondary evidence.

Here, the best evidence would be the actual photos on the phone that belongs to Donny. Here, there are no facts to support that the original writing is unavailable, therefore, the original phone/ photos must be produced according to the best evidence rule.

**CIVIL TRIAL:**

**3) IN ORDER TO PROVE THE KILLING WAS ACCIDENTAL, DONNY'S ATTORNEY CALLED DETECTIVE BART OF THE BAKERSFIELD PD. BART TESTIFIED FROM MEMORY THAT VICTORIA'S DIARY BRAGGED OF NUMEROUS SEXUAL ENCOUNTERS WITH TEENAGE BOYS IN WHICH SHE ASKED THEM TO "CHOKE HER." THE DIARY ITSELF HAD BEEN DESTROYED WHEN A TYPOGRAPHICAL ERROR BY POLICE ADMINISTRATIVE STAFF CAUSED IT TO BE SHREDDED AS DUPLICATE PAPERWORK.**

RELEVANCE/ LOGICAL & LEGAL RELEVANCY (see rule statements supra)

Here, the evidence being offered by the attorney of Donny would have a tendency to prove that the killing of Victoria was accidental, which is a material fact that is in dispute. Therefore the evidence should be considered logically relevant. There is a high probative value, because the evidence being offered tends to prove a material fact to the case that is in dispute. There is no fear of unfair prejudice, confusion of issues, misleading the jury, or undue consumption of time, therefore the evidence should be considered legally relevant. Logical and legal relevancy have both been met, the evidence should be considered relevant.

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WRITINGS Extremely broad (ex. handwriting, words, symbols, video recordings, photos).

Here, the diary of Victoria would be considered a writing, as Victoria's handwriting was in the diary.

AUTHENTICATION Personal knowledge/ recognition of a document. Before a writing or any secondary evidence of its content may be received in evidence, the writing must be authenticated by proof showing that the writing is what the proponent claims it is.

Here, the best way to authenticate the diary would be Victoria herself, however, Victoria is unavailable because she is deceased at the time that the evidence is being offered. If the actual diary was available, a handwriting expert would have been able to authenticate the diary. However the facts also state that the diary has been destroyed, therefore the best way to authenticate what the diary stated would be through Detective Bart who was able to remember what the diary stated as he saw the diary before it was destroyed.

BEST EVIDENCE RULE requires an original writing, recording or photograph to prove its contents. Duplicates may be admissible unless in dispute. Secondary evidence of the writing, such as oral testimony regarding the writing's contents is permitted only after it has been shown that the original is unavailable for some reason other than serious misconduct of the proponent.

Here, because the original diary is unavailable due to the "typographical error by police administrative staff" causing the diary to be shredded, the secondary evidence provided by the Detective should be considered admissible.

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**RAPE CASES - VICTIM'S PAST BEHAVIOR INADMISSIBLE** in a civil proceeding involving sexual misconduct, evidence being offered regarding the sexual preference of the victim is generally inadmissible.

Here, the causes of action in the civil suit against Donny include sexual assault and statutory wrongful death. Because it is a civil proceeding involving sexual misconduct, the evidence from the diary that is being offered to prove a sexual preference of the victim (Victoria) should be considered inadmissible.

**LIMITING INSTRUCTION** given by a judge to a jury, tells jury appropriate purpose for which evidence may be considered.

Here, the defense will argue that they do not want the information regarding the diary to be admitted in relation to the victim's sexual preferences, but rather to strictly show that the killing of Victoria was accidental. The judge should instruct the jury as to this information.

In conclusion, the evidence being offered regarding the testimony should be considered inadmissible for the purpose of demonstrating Victoria's sexual preferences, but may be found admissible for the purpose of showing that the killing of Victoria was accidental.

**END OF EXAM**

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