

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.

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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.

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 does 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 arguments.
 - 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)

1. Burns (B) should object to Wilma's (W) testimony under relevance.

Evidence is relevant if it has any tendency to make the existence of a fact of consequence more or less probable. In California, the fact must be in dispute. Prop. 8 gives the presumption that all relevant evidence is admissible subject to a 352 balancing test.

Testimony that B 1) showed W several gasoline cans, gasoline is often used to ignite fires, 2) the gasoline cans were in the trunk of a Ferrari, suggests that B has a lavish lifestyle 3) then stating, "I figured out a way to solve our financial problems," suggests that if the Ferrari were to burn B may potentially collect the insurance money, suggesting that B is unable to support his lavish lifestyle, makes it more probable that B did commit the crime.

Thus, the court will likely overrule the objection.

B should object to W's testimony under hearsay.

Hearsay is an out of court statement made by a declarant and offered for the truth of the matter asserted (TMA) .An out of court statement is a statement made off of the stand and outside of the courtroom. A declarant is a person, not an animal or machine. Nonverbal conduct intended as an assertion may also qualify as hearsay if it was intended as a communication to someone else.

B made the statement to W while in their garage, not in this courtroom. B is the declarant because he is not an animal or a machine. The prosecution presumably called W to the stand to admit the evidence for the TMA that B committed arson. The act of opening the trunk to show W the gasoline cans was intended as a communication to W to burn the car. For these reasons, the evidence is hearsay.

Thus, the court will sustain the objection at this time.

Prosecution should counter B's hearsay objection to W's testimony under an admission by a **party opponent exception**.

Under CEC 1221, a hearsay statement made by a party in an individual or representative capacity is admissible for TMA as a hearsay exception when used by the proffering party against the party who made the statement.

The prosecution is proffering B's statement in a criminal case against B.

Thus, the court will likely overrule B's hearsay objection.

B should object to W's testimony under the **adverse testimonial privilege (ATP)**.

California recognizes the ATP. The privilege protects a spouse, if married at the time of the trial, from testifying against their spouse. The privilege is held by the testifying spouse and can be waived. The privilege expires upon divorce or annulment.

Although W had filed for divorce, the facts do not suggest that the divorce was final. However, W, as the testifying spouse holds the privilege. W waived the privilege when she voluntarily testified. Therefore, B cannot assert this privilege.

Thus, the court will likely overrule B's objection.

B should object to W's testimony under **marital confidential communication privilege**.

Either spouse may exclude the testimony of their spouse under the marital confidential communications privilege. The privilege occurs when either spouse extends words that are intended as a confidential communication to the other spouse during a valid marriage. The privilege applies to either a civil or criminal case. The confidential communications are privileged for all time, unless an exception applies. The presence of a third party during the marital communication may destroy the privilege.

Although B and W were in a valid marriage during the communication, if they intended the communication to be confidential they should have shut the garage door so they wouldn't be

overheard. Since B willingly left the door open while discussing his plan it can be argued that the communication was not confidential.

Thus, the court will likely overrule B's objection.

B should object to W's testimony under **352**.

Under CEC 352, it is within the court's discretion to exclude evidence if its probative value is substantially outweighed by the potential of causing unfair prejudice, confusing the issues, misleading the jury. The prejudicial effect can be caused by such evidence inflaming the passions and prejudices of the jury causing them to misuse the evidence against the defendant.

W's testimony is highly probative. The prejudicial effect of the testimony is not likely to consume much time or inflame the passions and prejudices of the jury, confuse the issues, or mislead the jury.

The court will likely overrule B's objection.

2. B should object to Nosey's (N) testimony under **relevance**.

Evidence is relevant if it has any tendency to make the existence of a fact of consequence more or less probable. In California, the fact must be in dispute. Prop. 8 gives the presumption that all relevant evidence is admissible subject to a 352 balancing test.

Testimony that N 1) saw the red Ferrari, Ferrari's are expensive and tends to show that B and W have a lavish lifestyle they may not be able to maintain, 2) that he overheard what B said to W, tends to show that B & W were having financial problems makes it more probable that B did commit the crime. Additionally, N has known B and W for eleven years. Neighbors tend to know things about each other more than the average stranger since they live in close proximity to each other. N's testimony could potentially provide more information to things he has personally witnessed over the years that may be helpful in the assessing the present case.

Thus, the court will likely overrule the objection.

B should object to N under **hearsay**.

Hearsay is an out of court statement made by a declarant and offered for the truth of the matter asserted (TMA). An out of court statement is a statement made off of the stand and outside of the courtroom. A declarant is a person, not an animal or machine.

B made the statement to W while in their garage, not in this courtroom. B is the declarant because he is not an animal or a machine. The prosecution presumably called N to the stand to admit the evidence for the TMA that B committed arson. T

Thus, the court will sustain the objection at this time.

Prosecution should counter B's hearsay objection to N's testimony under an admission by a **party opponent exception**.

Under CEC 1221, a hearsay statement made by a party in an individual or representative capacity is admissible for TMA as a hearsay exception when used by the proffering party against the party who made the statement.

The prosecution is proffering B's statement in a criminal case against B.

Thus, the court will likely overrule B's hearsay objection.

B should object to W's testimony under **352**.

Under CEC 352, it is within the court's discretion to exclude evidence if its probative value is substantially outweighed by the potential of causing unfair prejudice, confusing the issues, misleading the jury. The prejudicial effect can be caused by such evidence inflaming the passions and prejudices of the jury causing them to misuse the evidence against the defendant.

N's testimony is highly probative. The prejudicial effect of the testimony is not likely to consume much time or inflame the passions and prejudices of the jury, confuse the issues, or mislead the jury.

The court will likely overrule B's objection.

3. Burns (B) should object to Dexter's (D) testimony under **relevance**.

Evidence is relevant if it has any tendency to make the existence of a fact of consequence more or less probable. In California, the fact must be in dispute. Prop. 8 gives the presumption that all relevant evidence is admissible subject to a 352 balancing test.

Testimony that B told Hyde (H) that "he (B) messed up!" tends to show that B knows he did something wrong. That B spilled gas on his clothes, tends to show that 1) B was using gasoline and 2) since he got it on his clothes it was either poured or spilled from the gas can. The use of gasoline is commonly associated with igniting fires. Also, since B spilled the gas and became nauseated tends to show 1) that he's a sloppy arsonist and this may be B's first time using gas to ignite something, 2) although the facts do not specify, it may be inferred that the fire was set in the garage where there is insufficient ventilation, hence B became nauseated from inhaling the gas fumes. Also, this brings into question as to why B would think to call his attorney first for a medical issue. It tends to suggest that B is close with H, perhaps B has a history of not being an angel and frequently needs the assistance of his attorney. All of which tends to make it more probable that B committed the crime.

Thus, the court will likely overrule the objection.

B should object to D's testimony under **hearsay**.

Hearsay is an out of court statement made by a declarant and offered for the truth of the matter asserted (TMA). An out of court statement is a statement made off of the stand and outside of the courtroom. A declarant is a person, not an animal or machine.

B made the statement to W while in their garage, not in this courtroom. B is the declarant because he is not an animal or a machine. The prosecution presumably called D to the stand to admit the evidence for the TMA that B committed arson.

Thus, the court will sustain the objection at this time.

Prosecution should counter B's hearsay objection to D's testimony under an admission by a **party opponent exception**.

Under CEC 1221, a hearsay statement made by a party in an individual or representative capacity is admissible for TMA as a hearsay exception when used by the proffering party against the party who made the statement.

The prosecution is proffering B's statement in a criminal case against B.

Thus, the court will likely overrule B's hearsay objection.

B should object that his conversation is privileged under the **attorney-client confidential communication**.

A confidential communication between a client and their attorney for the purpose of seeking legal advice or representation is privileged. The privilege extends to the attorney's employees and representatives hired to assist the attorney with information, analysis, or interpretation. However, this may be dependant upon the reason and necessity for the non-attorney services. The client holds the privilege.

Although B contacted H, the facts do not suggest that he was contacting H for legal advice or representation. B does not mention that he committed a crime to which he may need representation, only that he spilled gas on his clothes and is nauseated. For all D knew, B was calling H because they were friends and he needed medical help. Additionally, although D is an employee of H, he is not there to assist H in legal matters, only to drive him around. Also, generally a person is able to tell when they are on a speaker phone since the sound is distinctly different than when on a regular call. If B was concerned about his call being overheard he should have asked H whether he was on a speaker phone and if he was to take him off the speaker. Therefore, this was not a privileged conversation and if it were, it appears that B waived his privilege.

Thus, the court will likely overrule B's objection.

B. should object under 352.

4 Burns (B) should object to Pyro's (P) testimony under relevance.

Evidence is relevant if it has any tendency to make the existence of a fact of consequence more or less probable. In California, the fact must be in dispute. Prop. 8 gives the presumption that all relevant evidence is admissible subject to a 352 balancing test.

P's testimony tends to show that B was treated for gas fumes inhalation, which suggests B was using gas in an area that was not well ventilated, such as a garage. This is highly probative since the facts of the case indicate that B's Ferrari was in the garage, where he had the gas.

Thus, the court will likely overrule the objection.

B should object to P's testimony under hearsay.

Hearsay is an out of court statement made by a declarant and offered for the truth of the matter asserted (TMA). An out of court statement is a statement made off of the stand and outside of the courtroom. A declarant is a person, not an animal or machine. Nonverbal conduct intended as an assertion may also qualify as hearsay if it was intended as a communication to someone else. Writings are also considered statements.

The medical records are statements, created by the declarant, the doctor/ medical staff. The records would indicate the reason B was at the hospital.

Thus, the court will sustain the objection at this time.

Prosecution should counter B's objection under a hearsay exception.

Records of reg. conducted business activities fall under a hearsay exception. Records qualify if they are the sort that a business usually keeps, the person has personal knowledge, the report is prepared close in time to the event contained in the report will still fresh in the declarant's memory.

Medical records would likely fall within the exception for business records.

The court will likely overrule B's objection.

B should object under Doctor/Patient Privilege

CA recognizes a Doctor/Patient Privilege with the patient consults a Dr. for medical treatment or diagnosis and the communication was pertinent to the diagnosis or treatment. However, there is no privilege in a criminal proceeding.

Since B is involved in a criminal proceeding there is no privilege.

The court will likely overrule B's objection.

B. should object under **352**.

END OF EXAM

2)

Darlene should object to Victor's testimony under relevance

Under the Federal Rules of Evidence evidence is relevant if it has any tendency to prove or disprove a fact of consequence in the matter j

In this case, Victor's testimony that he had been waiting for his food for an hour and that he complained about the long wait establishes that there were words exchanged between Victor and Darlene which shows that there was a point of contention between Darlene and Victor and the fact that there was tension between the two has at least some tendency to prove that Darlene pushed Victor. In addition, the fact that Victor was treated for a concussion tends to establish that he did fall and hit his head which has at least some tendency to show that Darlene pushed Victor.

The judge should overrule Darlene's objection

Darlene should object to Victor's testimony that she yelled at him as hearsay

Hearsay exists when an out of court statement made by a declarant is offered into evidence to prove the truth of the matter asserted.

In this case, Darlene's statement was not made in a court house but at the restaurant which would make it an out of court statement. Further, Darlene is a declarant because she is a person and not an animal or machine and it is being offered to prove that Darlene was upset that Victor complained about her service which led her to push him. j

Unless there is an applicable exception, the objection would likely be sustained.

The prosecution would likely respond that that the statement is not hearsay

A statement is not hearsay if it was made by a party opponent and is being offered against the party opponent.

In this case, Darlene is being charged with battery in a criminal proceeding which would make her a party opponent. Further, the statement that Darlene would show Victor good service is one that was made by her and is being offered against her in the battery case which the prosecution would likely argue makes her statement not hearsay

The judge should overrule Darlene's objection

Darlene should object to Victor's testimony that the doctor told him he had a concussion

Hearsay exists when an out of court statement made by a declarant is offered into evidence to prove the truth of the matter asserted.

In this case, the statement that the treating physician made was made during the course of treating Victor and was not made during any trial related proceeding making it an out of court statement. The doctor making the statement at the time of treating Victor is not an animal or a machine and would properly be identified as the declarant. Finally, the statement is being offered to prove that Victor sustained a concussion making it a statement offered to prove the truth of the matter asserted.

Absent an applicable hearsay exception, the trial judge should sustain Darlene's objection;

The prosecution should argue that the statement falls under Rule 803(4)

A statement made for the purposes or, and is pertinent to a medical diagnosis, and describes a patient's medical history either past or present falls under an exception to the hearsay rule.

In this case, Victor's doctor's statement was made during the course of pertinent medical treatment and described Victor's present medical history. Since the statement was pertinent to the diagnosis of Victor and described his current medical history, i.e., that he had suffered a concussion it would fall under the medical diagnosis exception.

Given the medical diagnosis exception the judge would likely overrule Darlene's objection

Darlene should object under 403

Relevant evidence may still be excluded if its probative value is substantially outweighed by its prejudicial effect

In this case, Victor's lawyer would likely argue that his testimony is highly prejudicial because it would confuse the issue for the jury and has little probative value. The issue in this case is about whether Darlene pushed Victor and not whether how long Victor waited for his food or whether Darlene was upset that Victor waited for his food. To allow the jury to convict her based upon that alone would be an egregious error and miscarriage of justice. The prosecution would likely contend that the testimony goes to Darlene's state of mind and show that she had a motive to push Victor. While this would be a close call the judge would likely allow it into evidence because the question of weight is one that a jury should make and not one the judge should decide

Darlene's objection would probably be overruled.

Victor could, but ultimately should not, object on the ground of relevance

Under the Federal Rules of Evidence evidence is relevant if it has any tendency to prove or disprove a fact of consequence in the matter.

In this case, the fact that Victor filed a lawsuit against the pizza place tends to establish that Victor believes he has an intentional torts case against the pizza place and that they are liable. If Victor thought he had a civil case against Darlene it would tend to establish that Victor believed that Darlene pushed him which has at least some tendency to prove that she did make contact with him.

While the prosecution could make this objection it would likely be overruled and has the potential to help their case.

Darlene should object to Dr. Vallum's testimony as improper expert opinion

In federal court expert testimony is considered to be proper if it satisfies the Daubert test which requires that (1) whether their methodology has been tested; (2) whether it has been peer reviewed; (3) the know potential for error; (4) the existence of standards for controlling the methodology; and (5) it's general acceptance

In this case, the use of a grapefruit and different forces being applied to them appears to be a method specific to this doctor. There is little indication that this method is one that has been tested or peer reviewed. Further there is no indication that the rate of error is known or has been calculated and the doctor does not provide any testimony as to the standards utilized in controlling his test. Lastly, there is no indication either way that the method is one that is used widely in the medical community. Without more information to establish these facts, it would be difficult for the court to determine that the factors of the Daubert test have been adequately satisfied.

The judge should sustain the objection

The prosecution could object under the Best Evidence Rule

The best evidence rule is an exclusionary rule that does not allow a witness to testify to the contents of a writing that cannot be properly authenticated unless the evidence is not under the control of the proffering party and could not be procured through other reasonable means or is destroyed through no fault of their own.

In this case, the video in question was destroyed when it was recorded over through no fault of the defense. Further, there was no possible way for the defense to procure it through any other reasonable means because it was not within their control and no court process could produce a video that no longer exists. Since the video was not destroyed due to any fault of the defense, the judge would likely overrule the objection.

END OF EXAM

3)

QUESTION 1

The defense should object to Sgt. William's testimony as irrelevant.

Relevant evidence is evidence having any tendency to make a fact more or less probable, and the fact is of consequence.

Sgt. William's testimony is relevant as it tends to show that Donny has previously been in trouble for sexual assault of a young girl.

The evidence will not be excluded as being irrelevant.

The defense should object to Sgt. William's testimony of character evidence.

There are three methods of character evidence (CE) used for proving a person's character: reputation, opinion, and specific acts. The purpose for the CE, and whether the case is civil or criminal, in this case, criminal, determines which, if any, can be admitted. FRE rules state that character evidence can be admitted in cases based on sexual assault or child molestation.

In a criminal case only the defendant can open the door to evidence of a pertinent character trait about them. But there are exceptions to this general rule. Here, because this case has to do with sexual assault and child molestation, the prosecution can be the first to offer character propensity evidence of the criminal defendant.

Here, Sgt. William was able to offer testimony that Donny had just six years earlier been charged and convicted of sexual assault and child molestation. Because a character trait must always be pertinent to the case in a criminal trial, the testimony by Sgt. William's will be permitted.

The objection will be overruled.

The defense should object to Sgt. William's testimony of character evidence of specific acts (MIAMICOP).

While CE of other bad acts is generally not admissible to show conduct in conformity therewith, such specific acts evidence may be admissible: Motive to commit the crime; intent; absence of mistake; identity of the perpetrator; common plan or scheme; opportunity to commit the crime; preparation to commit the crime.

Here, Sgt. William's testimony is shows the jury that Donny's history shows that this current charge is sufficiently unique and similar to the previous crimes we know Donny committed. As a result, this can be used to identify the defendant and reveal his similar plan.

The testimony to Donny's specific acts will be admitted into evidence.

The defense should object to Sgt. William's testimony as being unfairly prejudicial.

FRE 403 says that relevant evidence can be made inadmissible if the probative value is substantially outweighed by the prejudicial effect. The prejudicial effect can analyzed through a variety of factors including: danger of unfair prejudice, confusing the law, misleading the jury, undue delay, or wasting time.

Here, there the testimony of Sgt. William's is highly probative because it connect Donny with a past sexual assault and child molestation conviction, which is what he is currently being charged with, and the danger of using this testimony does not rise to the level of being so substantial as to outweigh the probative value of the statement.

The court would likely overrule the objection and admit the testimony.

QUESTION 2

The defense should object to Detective Smith's testimony as irrelevant.

Relevant evidence is evidence having any tendency to make a fact more or less probable, and the fact is of consequence.

Detective Smith's testimony is relevant as it tends to show that Donny has a desire of young children, in the age range of the victim, Victoria, who was 15 at the time of her sexual assault.

The evidence will not be excluded as being irrelevant.

The defense should object to Detective Smith's testimony of character evidence.

There are three methods of character evidence (CE) used for proving a person's character: reputation, opinion, and specific acts. The purpose for the CE, and whether the case is civil or criminal, in this case, criminal, determines which, if any, can be admitted. FRE rules state that character evidence can be admitted in cases based on sexual assault or child molestation.

In a criminal case only the defendant can open the door to evidence of a pertinent character trait about them. But there are exceptions to this general rule. Here, because this case has to do with sexual assault and child molestation, the prosecution can be the first to offer character propensity evidence of the criminal defendant.

Here, Detective Smith is able to offer testimony that Donny had hundreds of images of child pornography, however, this was not a prior conviction.

The objection will be sustained.

The defense should object to Detective Smith's testimony of character evidence of specific acts (MIAMICOP).

While CE of other bad acts is generally not admissible to show conduct in conformity therewith, such specific acts evidence may be admissible: Motive to commit the crime; intent; absence of mistake; identity of the perpetrator; common plan or scheme; opportunity to commit the crime; preparation to commit the crime.

Here, Detective Smith's testimony is shows the jury having photographs of child pornography show that is correlates with Donny's history of sexual assault and child molestation shows that this current charge is sufficiently unique and similar to the previous crimes we know Donny committed. As a result, it will be argued that this can be used to identify the defendant and reveal his similar plan.

The testimony to Donny's specific acts as to the child pornography on his phone may not be admitted into evidence.

The defense should object to Detective Smith's testimony as to the contents of child pornography on Donny's as not properly authenticated.

Authentication is proof that the item is what the proponent claims it to be. All evidence (other than testimony) must be authenticated as genuine in order to be admitted. A video can be authenticated by a variety of way include admissions, eye witness testimony, circumstantial evidence.

Here, the chain of custody is established because Detective Smith was investigating the phone. He can identify the items and contents of the phone.

The court would likely rule that the photographs were properly authenticated.

The defense should object to Detective Smith's testimony as to the contents of Donny's phone.

The Best Evidence Rule is used to prove the contents of items such as a writing, photos, x-rays, or recordings. If the original, or photocopy, is unavailable, oral testimony will be allowed.

Here, the facts do not say if the photographs from Donny's phone were available or not. If they were not, Detective Smith would be able to testify to the contents on the phone.

The court would likely overrule the objection and admit the BER testimony.

The defense should object to Detective Smith's testimony as being unfairly prejudicial.

FRE 403 says that relevant evidence can be made inadmissible if the probative value is substantially outweighed by the prejudicial effect. The prejudicial effect can be analyzed through a variety of factors including: danger of unfair prejudice, confusing the law, misleading the jury, undue delay, or wasting time.

Here, there the testimony of Detective Smith's is highly probative because it connects Donny with a past sexual assault and child molestation conviction, which is what he is currently being charged with, and the danger of using this testimony does not rise to the level of being so substantial as to outweigh the probative value of the statement.

The court would likely overrule the objection and admit the testimony.

QUESTION 3

The plaintiff should object to Detective Bart's character evidence testimony.

In a civil case, CE is generally not admissible to prove conduct in conformity therewith/with that character trait on a particular occasion.

However, rape and sexual assault cases have special rules known as rape shield provisions which generally disallow evidence of rape or sexual assault victim's past sexual conduct.

The Plaintiff must put her reputation in issue for reputation evidence to be admitted. Although Victoria is not the person bringing this civil action forward, her parents will object to this.

The court should not permit this testimony.

The plaintiff should object to Detective Bart's testimony as to the contents of Victoria's diary as not properly authenticated.

Authentication is proof that the item is what the proponent claims it to be. All evidence (other than testimony) must be authenticated as genuine in order to be admitted. A video can be authenticated by a variety of way include admissions, eye witness testimony, circumstantial evidence.

Here, the chain of custody is established because Detective Bart was investigating the diary. He can identify the items and contents of the diary. But due to the contents, and as a victim of sexual assault and child molestation, this may not be permitted.

The court might rule that the diary was properly authenticated.

The plaintiff should object to Detective Bart's testimony as to the contents of Victoria's diary.

The Best Evidence Rule is used to prove the contents of items such as a writing, photos, x-rays, or recordings. If the original, or photocopy, is unavailable, oral testimony will be allowed.

Here, because Victoria's diary was accidentally destroyed, the Detective can speak to its contents; however, due to the contents, and as a victim of sexual assault and child molestation, this may not be permitted.

The court would likely not permit the testimony.

The plaintiff should object to Detective Bart's testimony as being unfairly prejudicial.

FRE 403 says that relevant evidence can be made inadmissible if the probative value is substantially outweighed by the prejudicial effect. The prejudicial effect can analyzed through a variety of factors including: danger of unfair prejudice, confusing the law, misleading the jury, undue delay, or wasting time.

Here, the testimony of Detective Bart is highly probative because reputation, opinion, and specific acts evidence are only admissible if the probative value substantially outweighs the danger of unfair prejudice.

The court would likely not admit the testimony.

END OF EXAM