

EVIDENCE

Final Examination

Spring 2025

Prof. S. Lizardo

General Instructions:

Answer All Three Essay Questions.

Total Time Allotted: Three (3) Hours

Recommended Allocation of Time: Equal Time per Question

Evidence II
Final Examination
Spring 2025

Question 1

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

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

Evidence II

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Question 2

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

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

Evidence II
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Question 3

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

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

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

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

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

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

Answer according to California Evidence Code.

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

ANSWER OUTLINE

EVIDENCE-SPRING 2025

MCL – SLO – HYB

PROF. O'KEEFE & PROF. LIZARDO

Question 1- Judge O'Keefe

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Relevance: Relevant for character evidence purposes.

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

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

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

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

Question 2 – Judge O’Keefe

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

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

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

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

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

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

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

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

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

Students should analyze whether the evidence is admissible.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Students should analyze whether the evidence is admissible.

Question 3 – Prof. Lizardo

QUESTION 3: ANSWER OUTLINE – BLAZE

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

1. TESTIMONY OF PASSERBY

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

Logical Relevance (Tendency Test)

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

Legal Relevance (Balancing Test)

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

Lay Witness- Passerby's Observations

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

2. TESTIMONY OF DR. HERTZ

Relevance

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

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

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

DOCTOR- PATIENT PRIVILEGE

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

3. TESTIMONY OF FIRE MARSHALL BILL

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

Witness:

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

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

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

4. TESTIMONY OF LAW CLERK

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

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

HEARSAY, Throwing the gas can into the river

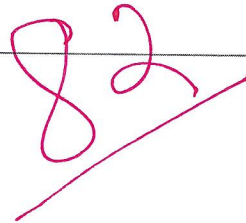
- Exception- Admission by Blaze, Declaration against Interest
If offered by Prosecution. See Privileges.

ATTORNEY – CLIENT PRIVILEGE

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

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

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



1)

(1) Testimony of John

Logical Relevancy (Tendency Test)

Evidence is logically relevant if it has any tendency to prove or disprove a disputed fact of consequence.

Here, the prosecution will argue John's testimony, in which he will state that he received an email from Emily's account stating "I am going to have to move funds around to cover the shortfall," is logically relevant because it tends to prove Emily's intent to commit embezzlement. Emily's intent is a disputed fact of consequence because her defense is that the "accounting errors were unintentional." The prosecution will argue John's testimony will not only provide evidence about Emily's intent, but also establish that it was indeed Emily who committed the embezzlement because the email came from her account. The defense, however, will argue that John's testimony is not logically relevant because it is possible that somebody else logged into Emily's company email account to cover their tracks.

good

Therefore, the court will rule John's testimony is logically relevant and thus admissible.

Legal Relevancy (Balancing Test)

Evidence is legally relevant if its probative value substantially outweighs the dangers of undue prejudice, jury confusion, or waste of court time (or other pragmatic considerations). The court has discretion to exclude evidence that is not legally relevant.

Here, the prosecution will argue John's testimony has great probative value because it establishes (1) Emily transferred the funds from the company and (2) Emily intended to commit embezzlement. The prosecution will further argue the dangers of undue prejudice are minimal because the jury is unlikely to rule against Emily on John's testimony alone. Further, the prosecution will argue John's testimony will not confuse the jury because it is directly related to the issue at hand and involves the defendant. Finally, the prosecution will argue John's testimony will not waste court time or be unduly summative. The defense, however, will argue John's testimony is highly prejudicial against Emily because the jury will give undue weight to the email allegedly sent by Emily -- an email that cannot definitively be tied back to Emily.

prejudicial (?)

Therefore, the court will rule John's testimony is legally relevant and thus admissible.

Witness Competency

Witnesses are generally deemed competent unless disqualified for deficiencies regarding memory, perception, ability to communicate, or appreciation of telling the truth. A lay witness may testify to rationally based perceptions that are helpful to the understanding of her testimony. An expert witness may testify as to matters beyond common knowledge that are helpful to the jury, and may be qualified through education, experience, training, and skills. Experts may form their opinion based on personal experience (e.g., a physician treating the plaintiff's injuries), facts from the case (e.g., hypothetical questions), and facts from outside the case (e.g., texts or treatises). If an expert is relying on a novel theory or method, the court will examine the method's reliability using the Daubert Factors: (1) whether the method has been adequately tested; (2) the method's rate of error; (3) reasonable reliance in the expert's community/field; and (4) peer-review.

*Why include expert
wts when John is not an
expert?*

Here, John will testify as a lay witness and relay his perceptions. The prosecution will argue John is competent to testify because there are no issues regarding his memory, ability to perceive or communicate, and he appreciates the necessity of telling the truth. The prosecution will argue John will simply be a percipient witness and testify as to the email he received and the contents. The defense may try to argue John is incompetent to some degree, but the facts are silent as to whether John is likely to be disqualified for any reason (e.g., age, memory problems).

Therefore, the court will rule John a competent lay witness.

Hearsay

Hearsay is an out-of-court statement or assertion offered to prove the truth of the matter asserted (TOMA). Hearsay is generally inadmissible unless an exception or exemption applies.

Here, John will testify as to the contents of the email he allegedly received from Emily: "I am going to have to move funds around to cover the shortfall." This statement is hearsay because it was made outside of the present court. The defense will argue the prosecution is offering the email for the truth of the matter asserted: namely, that Emily moved funds around to hide her tracks. The prosecution will argue the statement is admissible because exemptions and exceptions both apply, or, in the alternative, that the statement is admissible for non-TOMA reasons. *like what?*

Therefore, John's testimony about Emily's email will be inadmissible unless the prosecution can prove an exception, exemption, or non-TOMA reason applies.

Party Admission

A party's statement may be introduced against her by her opponent.

Here, the prosecution (the proponent) is offering the party-declarant's statement against her. The defense will argue that the prosecution cannot establish Emily authored the email, and thus the exception does not apply.

Therefore, John's testimony about Emily's email is admissible as a party admission.

Declaration Against Self-Interest

Statements made by a now-unavailable declarant in a criminal case that were against her proprietary, penal, or financial interests are admissible.

Here, the prosecution will argue that Emily's email was, when made, against her proprietary, penal, and financial interests. The defense, however, will point out that the exception applies only to unavailable declarants. Emily is notably present because she is the one on trial. *But if she pleads the 5th Am. ? Then what ?*

Therefore, the declaration against self-interest exception does not apply.

Non-TOMA

Evidence that would otherwise be hearsay may be admitted if it is proving something other than the truth of the matter asserted.

Circumstantial State of Mind

Statements showing the declarant's circumstantial state of mind or physical condition are admissible.

Here, the prosecution may argue that Emily's email shows her mental state at the time: that she intended to embezzle funds and cover her tracks.

Therefore, the email may be admissible as circumstantial state of mind.

MIMIC: Lack of Mistake; Intent

In criminal cases, the prosecution may offer evidence to show the defendant's relevant misconduct to prove *guilt, mis conduct* as in the following: motive, identity, lack of mistake, intent, and common scheme or plan.

Here, the prosecution may argue that the email is admissible to show not only that Emily did not move the funds by mistake, but also to prove that she fully intended to embezzle.

Therefore, the email may be admissible through MIMIC.

Writing

What constitutes a writing sweeps broadly, encompassing letters, emails, graffiti, tattoos, and other types of communication. The proponent may need to authenticate the evidence to show that it is what the proponent purports it to be.

Best Evidence Rule

Where the contents of a writing are in dispute, the Best Evidence Rule requires the original document be produced. Copies may be produced if the original was destroyed. The Best Evidence Rule does not apply when the disputed facts exist outside the writing.

Here, Emily's email constitutes a writing: it is an email. The defense may demand the original be produced because the contents are disputed. The prosecution, however, will counter the Best Evidence Rule does not apply because not only is the email unavailable because "John deleted the email shortly after he received it," but also John can testify as to the disputed facts. The original email, then, does not need to be produced because John can testify as to the contents. *good*

Therefore, Emily's email will be admissible through John's testimony, and the original email need not be produced.

Conclusion

John's testimony will be admissible, and he can testify as to the contents of Emily's email.

(2) Testimony of Taylor

Logical Relevancy

See rule above.

Here, the prosecution will argue Taylor's testimony is logically relevant because it tends to show that it was Emily who fraudulently transferred the funds and how she did it. The prosecution will argue that Taylor's status as an expert witness will help the jury better understand the testimony. The defense, however, will argue that Taylor's testimony is not relevant because it is founded on conjecture. The defense will stress that there is no way of knowing it was Emily who fraudulently conveyed the funds, and Taylor's testimony is further speculation founded on junk science (i.e., does not use methods generally accepted in the financial analyst community).

Therefore, the court will rule Taylor's testimony logically relevant and thus admissible.

Legal Relevancy

See rule above.

Here, the prosecution will argue Taylor's testimony is legally relevant because its probative value substantially outweighs the dangers of jury prejudice, waste of time, or jury confusion. The prosecution will stress that Taylor's testimony sheds light on an otherwise complex topic, and provides a clear pathway for how the funds were transferred and by whom. The defense, however, will argue that the dangers of unfair jury prejudice substantially outweigh the probative value because the jury is likely to give more weight to Taylor's testimony than warranted because of Taylor's expert status.

Therefore, the court will rule Taylor's testimony legally relevant and thus admissible.

Witness Competency

See rule above.

Here, the prosecution is offering Taylor, a financial analyst, as an expert witness to "explain the methods used in the fraudulent transactions." The prosecution will stress Taylor's expertise drawn from her "educational background, professional certifications as a CPA, and work experience in forensic accounting." The foundational requirements of Taylor's expertise thus laid, the prosecution will further argue that Taylor's opinion is built upon reliable methods and sources: (1) Taylor's analysis of the company's financial records; (2) Emily's bank records; and (3) Emily's Instagram account. The defense, however, will argue that (3) is not a reliable method embraced by the financial analyst community, and thus Taylor's testimony as a whole should be thrown out as unreliable and failing the Daubert Factors. The prosecution, in their turn, will argue that the rest of Taylor's testimony -- items (1) and (2) -- are nonetheless sound and reasonably relied upon in the research community, and thus Taylor's status as an expert witness remains.

Therefore, the court will likely accept Taylor as an expert witness, but will not allow Emily's Instagram profile to be a factor in the analysis.

missed: what about Taylor's opinion that Emily is guilty? not permitted.

(3) Emily's Thesis

Logical Relevancy

See rule above.

Here, the defense will argue Emily's thesis is logically relevant because it tends to prove Emily's character for honesty, which is a disputed fact of consequence. The defense will stress that Emily's opus demonstrates that if

Therefore, the BER does not apply.

Character Evidence

Character evidence is generally inadmissible to prove propensity to commit crime or conduct in conformity. However, in criminal trials, the defense may introduce CE as to ~~their~~ ^{the D's} own propensity for honesty, for example; this, however, opens the door for the prosecution (who otherwise cannot introduce CE) to address CE by either cross-examining the defendant's character witnesses or by introducing their own witnesses. There are three types of CE: opinion; reputation; and specific instances.

Here, the defense will try to admit Emily's thesis to prove Emily's character for honesty. Specifically, that Emily would not embezzle because she understood the ethical standards of financial management. So, if Emily did transfer the funds, it was not done with the requisite intent. The prosecution will likely delight at the evidence being admitted because it opens the door for them to bring in their own witnesses regarding Emily's character for truthfulness.

Therefore, Emily's thesis could be admissible as character evidence.

(4) Testimony of Lisa

Logical Relevancy

See rule above.

Here, the defense will argue Lisa's testimony is logically relevant because it tends to prove that Emily is an honest person with "honest business practices." The defense will stress that Lisa's testimony shows Emily did not intend to embezzle the company. The prosecution, as noted above, will likely want Lisa's testimony admitted because it constitutes Character Evidence (CE), and thus opens the door for the prosecution to introduce evidence showing Emily's character for dishonesty.

Therefore, the court will rule the evidence logically relevant.

Legal Relevancy

See rule above.

Here, the defense will argue Lisa's testimony is legally relevant because its probative value substantially outweighs the dangers of undue prejudice, jury confusion, or waste of time. The prosecution will likely agree because they want the character evidence admitted.

Therefore, the court will rule the evidence legally relevant.

Character Evidence

See rule above.

Here, the defense may properly introduce Lisa as a character witness testifying to Emily's character for honesty. The prosecution will not object, and instead either cross-examine Lisa (using "Have you heard?" line of questioning) to establish Emily's character for dishonesty. The prosecution will likely also introduce character witnesses of their own to establish Emily's character for dishonesty.

Therefore, Lisa's testimony will be admissible reputation character evidence.

END OF EXAM

overall - very good.
- cannot have expert opinion on guilt.
- some minor organization - just discuss
Experts when the issue is experts. No need
to go into Expert in call #1 (John) - he is not an
expert.

82

2)

EVIDENCE OF DARREN'S PRIOR CONVICTIONS

LOGICAL RELEVANCE (TENDENCY TEST)

Evidence is logically relevant if it has the tendency to prove or disprove a disputed fact of consequence.

Here, the prosecution would argue that evidence of Darren's prior misdemeanor for fraud and prior felony for assault are logically relevant as impeachment evidence if Darren chooses to testify because they have the tendency to prove that Darren is dishonest and deceitful and cannot his testimony is not credible. The prosecution would also argue that evidence of the felony assault conviction is legally relevant because it establishes Darren's character for violence, which is relevant to the elements of the charged crime of aggravated assault.

On the other hand, the defense would argue that evidence of Darren's prior misdemeanor for fraud and prior felony for assault is not logically relevant because it does not have the tendency to prove or disprove any disputed facts of consequence in *this* case. As will be discussed further below, the defense would argue that evidence that is being offered merely to show that the defendant has a criminal disposition is not sufficient for purposes of logical relevance.

The prosecution probably has the stronger argument, and the court would find that evidence of Darren's prior convictions is logically relevant.

LEGAL RELEVANCE (BALANCING TEST)

The trial court has the discretion to exclude evidence as not legally relevant if its probative value is substantially outweighed by dangers of unfair prejudice. Unfair prejudice includes undue consumption of time, misleading the jury, and confusing the issues.

Here, the prosecution would argue that evidence of Darren's prior misdemeanor for fraud and prior felony for assault is legally relevant because it holds substantial probative value for both impeachment and substantive evidence that is not outweighed by dangers of unfair prejudice. The prosecution would argue that the evidence's admission would not result in confusing the issues, misleading the jury, nor would it result in an undue consumption of time.

On the other hand, the defense would argue that the court should exercise its discretion to exclude evidence of Darren's prior misdemeanor for fraud and prior felony for assault because its admission is would unduly prejudice

him. The defense would reiterate that evidence that is offered merely to prove criminal disposition is admissible and highly prejudicial. *Can it be admissible?*

Again, the prosecution likely has the stronger argument, and the court would find that evidence of Darren's prior convictions is legally relevant.

BURDEN OF PROOF

The burden of proof for a Motion in Limine is based on a preponderance of the evidence.

Here, the prosecution must persuade the court as to the admissibility of evidence of Darren's prior misdemeanor for fraud and prior felony for assault based on a preponderance of the evidence.

IMPEACHMENT

Impeachment is the casting of an adverse reflection upon the veracity of a witness. Any party may impeach a witness. Among the ways to impeach a witness include showing bias, motive to lie, or conflict of interest, character for truthfulness (or lack thereof), prior convictions, prior bad acts, and prior inconsistent statements. Further, the primary purpose of the evidence must be for impeachment. If the proponent seeks to introduce the evidence as impeachment evidence merely as a backdoor to overcoming hurdles to hearsay, the evidence will not be admissible.

Here, the admissibility of evidence of Darren's prior misdemeanor for fraud and prior felony for assault to impeach Darren depends upon whether he chooses to take the stand and testify. If Darren chooses to testify, the evidence may be admissible, discussed below. If he chooses not to testify, the evidence would have to overcome impeachment hurdles. Given that the facts specifically state that the prosecution seeks to introduce evidence "to impeach his credibility if he testifies," a hearsay analysis is omitted.

PRIOR CONVICTIONS

Under the FRE, a witness may be impeached by prior convictions if the conviction is a felony or misdemeanor that has elements of dishonesty or deceit. The prior convictions are still subjected to the legal relevancy balancing test discussed above. Generally, convictions within the past 10 years are admissible, while others that are more remote in time are commonly excluded. Finally, another factor that is commonly considered is the similarities between the prior conviction and the charged crime.

Here, the prosecution would argue that the prior misdemeanor for fraud is admissible because it is a crime that involves elements of dishonesty or deceit and it was only 10 years ago, which meets the requirements for admissibility as impeachment evidence. The prosecution would also argue that the prior felony for assault is

admissible because it was only two years ago and the elements of the crime are substantially similar to the elements of the charged crime of aggravated assault.

The defense would argue that the prior misdemeanor for fraud is inadmissible because it was only a misdemeanor and it was 10 years ago, which is essentially the furthest point that the court would even remotely consider admitting into evidence. Further, the defense would argue that the prior felony assault is inadmissible because assault is not a crime involving elements of dishonesty or deceit.

The court would likely find that the prior misdemeanor for fraud is admissible as impeachment evidence if Darren chooses to testify, but the prior assault is not admissible because it does not include elements of dishonesty or deceit.

PRIOR BAD ACTS - MIMIC

These are separate doctrines

Evidence of a defendant's prior bad acts or relevant misconduct may be admissible if they are independently relevant to an issue other than mere propensity to commit a crime. Independently relevant issues include motive, intent, absence of mistake, identity, and common plan or scheme.

Here, the prosecution has argued that evidence of Darren's prior felony for assault establishes Darren's character for violence. This argument is unacceptable, as it is only mere propensity to commit a crime. Thus, the prior assault conviction is likely only admissible if the prosecution offered an alternative theory, such as common scheme or plan, by establishing similarities between the charged crime and the prior assault, or if Darren used a "signature move" in both crimes.

motive ?

If it is character - then Pros. may not argue. The convictions are separate pieces Δ must testify 1st

LIMITING INSTRUCTION

The court may give the jury a limiting instruction, advising them that certain evidence is admissible only for a limited purpose.

Here, the court is likely to give the jury a limiting instruction as to the prior convictions and instruct the jury that they are only admissible for the limited purpose of impeaching the witness.

The convictions do not come in unless Δ testifies - then they are limited

CONCLUSION RE: EVIDENCE OF DARREN'S PRIOR CONVICTIONS

Evidence of Darren's prior misdemeanor for fraud is admissible if Darren chooses to testify, but the prior assault conviction is likely not admissible.

2. TESTIMONY OF MORGAN

LOGICAL RELEVANCE

See rules above.

Here, the prosecution would argue that Morgan's testimony about what she observed of Darren before the fight and the statement made by David after the fight is logically relevant because she is an eyewitness to the events that transpired immediately before and immediately after the bar fight, and she heard statements that have the tendency to prove that Darren was the aggressor, which is a disputed fact of consequence.

The defense would argue that Morgan's testimony is not legally relevant because she did not witness the bar fight itself, and only made inferences from events that transpired before and after, which is insufficient to prove any disputed facts of consequence.

The court will likely find that the prosecution has the stronger argument, and Morgan's testimony is logically relevant.

LEGAL RELEVANCE

See rules above.

Here, the prosecution would argue that Morgan's testimony about what she observed of Darren before the fight and the statement made by David after the fight is legally relevant because it holds significant probative value that substantially outweighs the dangers of unfair prejudice. The prosecution would argue that Morgan's testimony is imperative to establishing a timeline and her testimony is essentially an eyewitness account of the events that transpired, so her testimony is sure to provide more clarity and efficiency to the jury that confusion or undue consumption of time. *good point*

The defense would urge the trial court to use its discretion to exclude Morgan's testimony as not legally relevant because she did not witness the bar fight itself, and only made inferences from events that transpired before and after, which is insufficient to establish that her testimony holds any probative value. The defense would argue that even if her testimony holds *some* probative value, it does not hold enough to substantially outweigh the dangers of unfair prejudice, specifically misleading the jury by causing them to think that Morgan actually witnessed the bar fight in dispute.

The court will likely find that the prosecution has the stronger argument, and Morgan's testimony is legally relevant

LAY OPINION TESTIMONY RE: DARREN'S APPEARANCE BEFORE THE FIGHT

Lay opinion testimony is admissible if it is rational based on the witness's own perception/personal knowledge, the testimony is helpful to understand the testimony or to determine facts in issue, and the testimony is not based on any scientific, technical, or other specialized knowledge. Lay witnesses are generally allowed to provide their opinions on matters such as sobriety, appearances, distances, times, speeds, and more.

Here, the prosecution would argue that Morgan's testimony that Darren looked suspicious and angry before the fight broke out is admissible lay opinion testimony because it is based on her own perception, personal knowledge and observations before the fight broke out, and it is helpful to understand the events that transpired before and after the bar fight. The prosecution would urge that her testimony is admissible because it is not based on any specialized training and it is simply a lay opinion on what she observed.

The defense would argue that Morgan's lay opinion testimony is inadmissible because her opinion on what Darren may have felt, specifically "angry," is pure speculation and cannot be based on one's appearance. Further, the defense would argue that her opinion that Darren appeared "suspicious" is vague, ambiguous, and again pure speculation. *good*

The prosecution likely has the stronger argument and Morgan's testimony about Darren's appearance before the fight is admissible, although it will be up to the jury to decide the weight of her opinions.

HEARSAY - DAVID'S STATEMENT TO MORGAN

Hearsay is a statement or assertion by an out of court declarant that is offered for the truth of the matter asserted. Hearsay is inadmissible unless an exception or exemption applies.

Here's Morgan's testimony about David's statement to her is hearsay because it was a statement by an out of court declarant, David, that is offered to prove Darren's guilt. *good*

Thus, the testimony is inadmissible unless an exception applies.

PRESENT SENSE IMPRESSION

Statements are admissible under this exception if the statement describes an act, event, or condition contemporaneously with or immediately after the act, event, or condition transpired.

Here, David's statement to Morgan described what transpired in the bar fight, and his statement was made immediately after the bar fight transpired, which is sufficient for the timing requirements of this exception.

Thus, this exception applies.

EXCITED UTTERANCE

Statements are admissible under this exception if they were made under the stress of and in response to a startling event.

Here, David's statement to Morgan is an excited utterance because it was made in response to the bar fight, which constitutes a startling event. The statement was made immediately after the fight while David was still under the stress of the startling event.

Thus, this exception applies.

THEN EXISTING STATE OF MIND

Statements are admissible under this exception if they describe the declarant's then-existing mental state, physical state, or emotional state to establish intent, memory, or belief.

Here David's statement to Morgan is a statement of his then-existing belief that Darren threw the first punch in the fight. The statement was made immediately after the fight, and described his memories, belief, and thoughts at the time that he said the statement.

Thus, this exception applies.

CONCLUSION RE: TESTIMONY OF MORGAN

The court will likely find that Morgan's testimony is admissible as to her lay opinions based on her observations of Darren before the fight, and her testimony about David's statement to her immediately after the fight is admissible.

3. TESTIMONY OF TOM

LOGICAL RELEVANCE

See rules above.

Here, the defense would argue that Tom's testimony is logically relevant because it has the tendency to disprove the truth of Morgan's testimony, specifically her reiteration of David's statement to her. The defense would argue that Tom's testimony is logically relevant because it has the tendency to prove that David has a bias against Darren and a motive to lie. The defense would also argue that Tom's testimony that David was fired from his job for stealing is logically relevant to impeach David because it displays his character for dishonesty.

The prosecution would argue that Tom's testimony is not logically relevant because David is not a witness, and therefore, he cannot be impeached. Thus, it is not admissible to prove or disprove any disputed facts of consequence, either to the charged crime itself or to any testifying witness.

The defense likely has the stronger argument.

LEGAL RELEVANCE

See rules above

The defense would argue that Tom's testimony is legally relevant because it holds substantial probative value that is outweighed by dangers of unfair prejudice. The defense would urge that allowing Tom's testimony to contradict Morgan's testimony of David's statement to her that implicates Darren is imperative to providing the jury with a clear picture of the witnesses and their testimony, so it would not confuse the issues, mislead the jury, or constitute an undue consumption of time.

The prosecution would urge the court to exercise its discretion to exclude Tom's testimony because it is highly inflammatory to a witness that is not even testifying, and is therefore unduly prejudicial.

The prosecution likely has the stronger argument, but in the event that the court agrees with the defense, an analysis of impeachment is below.

IMPEACHMENT

See rules above.

Here, the defense would urge that Tom's testimony to impeach David by showing prior bad acts that relate to his character for dishonesty, as well as his bias and motive to lie specifically due to his hatred for David. The prosecution would reiterate that this is impermissible because David is not a testifying witness, so his credibility is not at issue.

CONCLUSION RE TESTIMONY OF TOM

The testimony of Tom is likely inadmissible.

END OF EXAM

overall - very good

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3)

(1) Prosecution: Passerby's testimony re (A) observations and (B) what he told Fire Marshall Bill

Logical Relevancy (Tendency Test)

Evidence is logically relevant if it has any tendency to prove or disprove a disputed fact of consequence.

Here, the prosecution will argue that the passerby's testimony (in which he (A) notices "a male all dressed in black running in the alleyway carrying a gas can and shaking his hands" and "within moments...sees smoke" and (B) testifies as to his statements made to Fire Marshall Bill) is logically relevant because it tends to prove that Blaze not only started the fire, but committed arson (as evidenced by the gas can in his hands). The prosecution will stress that the passerby's testimony will place Blaze, "shaking his hands" from his burns, as fleeing from the scene. Furthermore, the prosecution will argue that the passerby's statement to Fire Marshall Bill reinforces his testimony because it was consistent. The defense, however, will argue that the passerby's testimony is not logically relevant because it is entirely circumstantial: the passerby merely saw a man wearing black running down the street holding a gas can. The passerby didn't know who Blaze was, and couldn't say whether the man was running for gas for his car, for example, instead of fleeing the scene of arson.

Therefore, the court will rule the passerby's testimony as logically relevant.

Legal Relevancy (Balancing Test)

Evidence is legally relevant if its probative value substantially outweighs the dangers of undue prejudice, jury confusion, or waste of court time (or other pragmatic considerations). The court has discretion to exclude evidence that is not legally relevant.

Here, the prosecution will argue that the passerby's testimony is legally relevant because its probative value -- that Blaze set the fire and fled the scene -- substantially outweighs the risks of pragmatic concerns because it will not unduly prejudice the jury, cause confusion, or waste court time. The defense, however, will argue that the passerby's testimony will substantially outweigh the probative value because the jury will likely be swayed by the provocative scene of an alleged arsonist fleeing the scene, and convict Blaze on this testimony alone.

Therefore, the court will rule the passerby's testimony as legally relevant.

Witness Competency

Witnesses are generally deemed competent unless disqualified for deficiencies regarding memory, perception, ability to communicate, or appreciation of telling the truth. A lay witness may testify to rationally based perceptions that are helpful to the understanding of her testimony.

Here, the prosecution will stress that the passerby is a competent lay witness because there are no facts indicating issues regarding perception, memory, ability to communicate, or ability to appreciate the obligation to tell the truth. The defense, however, will argue that the passerby "just got off work" and was "driving by the restaurant." Thus, the passerby was likely exhausted after a long shift, and his perceptions are thus suspect. Further, the defense will stress that the passerby was driving, and thus could not get an adequate look at the man running down the street.

Therefore, the passerby will be deemed a competent witness.

Hearsay

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted (TOMA). Hearsay is generally inadmissible unless an exception applies, or if a non-TOMA reason exists for its admittance.

Here, the defense will argue the passerby's statement is inadmissible hearsay because it was made to Fire Marshall Bill is an out-of-court statement offered to prove the truth of the matter asserted. The prosecution, however, will argue that exceptions apply that make the witness's statement admissible. In the alternative, the prosecution may keep the passerby's testimony to show prior consistent statement should the defense try to impeach the passerby on the stand.

Therefore, the passerby's statement will be inadmissible unless an exception applies.

Spontaneous Statement

A spontaneous statement narrates, describes, or explains an event or condition perceived by the declarant while the declarant was under the stress of the event. The statement must have been made spontaneously.

Here, the prosecution will argue that the passerby's statement constitutes a spontaneous statement because he had just witnessed an arsonist fleeing the scene of the crime and saw a building go up in flames. The stress of seeing such an event was undoubtedly immense and lasted until Fire Marshall Bill arrived for the statement. The defense, however, will argue that the passerby was not under stress because he only saw smoke. Furthermore, the passerby was driving and did not get a good look at the man fleeing the scene. Further still, the defense will argue that fires are extremely common in California, and though stressful, are not so substantially stressful as to leave the passerby in a state of stress by the time the Fire Marshall finally appeared on the scene.

Therefore, the passerby's testimony about what he told Fire Marshall Bill may be admissible as a spontaneous statement.

Contemporaneous Statement

A contemporaneous statements describes, explains, or makes understandable the conduct of the declarant while the declarant is doing the conduct. The statement need not be made under stress.

Here, the prosecution will argue that the passerby's statement also constitutes a contemporaneous statement because it described the event. The defense, however, will argue that the exception requires the declarant to describe their own conduct -- not the conduct of someone else. Thus, the exception does not apply.

Therefore, the passerby's statement will not be admitted as a contemporaneous statement.

Business Records Hearsay Exception

This exception applies when the record is made in the regular course of business where there is a duty to record made close in time to the event that the declarant perceived and can attest (or the functional equivalent) as to the accuracy of the statement. The methods and information must also indicate trustworthiness. *OK, need a Custodian of Records, too.*

Here, the prosecution may attempt to introduce the passerby's testimony through the Fire Marshall's notes.

However, the defense will argue that the business records exception does not apply here because there are no safeguards of veracity. *Passerby testified & was on the stand. you note this above. Why are the Fire Marshall's notes needed at all?*

Therefore, the exception does not apply.

• Isn't Passerby a "Fact" witness? (perceptual WTS - so no HS)

(2) Prosecution: Dr. Hertz's testimony re diagnosis, treatment, and the strong odor of gas emitting from Blaze's hands

Logical Relevancy

See rule above.

Here, the prosecution will argue that Dr. Hertz's (Dr) testimony is logically relevant because it tends to prove that Blaze caused the fire: not only were Blaze's hands scorched, but his hands also emitted a strong odor of gasoline -- an indicator of arson, not, as Blaze argued, "by lighting the BBQ." Whether Blaze caused the fire is a disputed fact of consequence, and certainly whether Blaze intended arson is directly in dispute. The defense, however, will argue that Dr's testimony is not logically relevant because it is entirely circumstantial. Many people, the defense will

stress, use gasoline on their BBQs (even if they shouldn't), and so just because Blaze's hands smelled of gas does not point to arson.

Therefore, the court will rule the Dr's testimony admissible as logically relevant.

Legal Relevancy

See rule above.

Here, the prosecution will argue that Dr's testimony is legally relevant because its probative value substantially outweighs the dangers of undue jury prejudice, confusion, or waste of court time. The jury, the prosecution will argue, will not convict Blaze on Dr's testimony alone. (The defense, however, will argue that Dr's testimony is will so substantially prejudice the jury as to render a conviction on the testimony alone. *confusing } extra word "is" ?*)

Therefore, the court will likely rule the evidence legally relevant.

Witness Competency

An expert witness may testify as to matters beyond common knowledge that are helpful to the jury, and may be qualified through education, experience, training, and skills. Experts may form their opinion based on personal experience (e.g., a physician treating the plaintiff's injuries), facts from the case (e.g., hypothetical questions), and facts from outside the case (e.g., texts or treatises). If an expert is relying on a novel theory or method, the court will examine the method's reliability using the Kelly Test: (1) whether the method has been adequately tested; (2) the method's rate of error; (3) general acceptance in the expert's community/field; and (4) peer-review.

Here, the prosecution will offer Dr as an expert witness because he has experience, training, and education in the field and personally treated Blaze.

Therefore, the Dr will be qualified as an expert witness.

Organization
The Kelly Test belongs under call # 3 re: "sniff"

Hearsay

See rule above.

Here, Dr's testimony includes two hearsay statements: Blaze's statement "I did this by lighting the BBQ" and the doctor's notes about Blaze's treatment. Both are out-of-court statements being offered to prove the truth of the matter asserted.

Thus, the statements will be inadmissible unless an exception applies.

Therefore, Dr's testimony is inadmissible if Blaze exercises his privilege.

*But Dr can testify -
exception - crime*

(3) Prosecution: Fire Marshall Bill's testimony as an expert and his opinion that this was arson

Logical Relevancy

See rule above

Here, Bill's testimony is logically relevant because it tends to show the fire was set deliberately, which is a disputed fact of consequence.

Therefore, Bill's testimony will be logically relevant and admissible.

Legal Relevancy

See rule above.

Here, Bill's testimony is legally relevant because its probative value -- how the fire was started -- substantially outweighs the risk of jury prejudice and confusion.

Therefore, the court will rule the testimony legally relevant.

Witness Competency

See rule above.

Here, Bill's experience, training, and education establish him as an expert. However, Bill's "sniffer" device must pass the Kelly Test. The facts do not provide details about this "sniffer," but Bill's device will have to be such that his peers would generally accept the method. Although in criminal cases, experts cannot testify as to criminal intent, Bill's testimony is merely that the fire was set deliberately -- not that Blaze had the requisite intent.

*Is the "sniffer" a novel
procedure for Kelly?*

Therefore, Bill will be rendered a competent witness.

(4) Prosecution: Law Clerk's testimony re (A) whereabouts of the missing gas can and (B) statements by Atticus to Blaze about the black clothing.

Logical Relevancy

*Analy JK
Kelly*

See rule above.

Here, the law clerk's (Clerk) testimony is logically relevant because it tends to prove that Blaze not only started the fire, but destroyed evidence (gas can and black clothing) with the help of his attorney. The testimony also solidifies that Blaze was carrying a gas can and wearing all black.

Therefore, the court will rule the evidence logically relevant.

Legal Relevancy

See rule above.

Here, Clerk's testimony is legally relevant because its probative value -- that Blaze started the fire, how, and destroyed evidence with Atticus's help -- substantially outweighs risks of jury prejudice, confusion, or waste of time.

Therefore, the court will rule the testimony legally relevant.

Hearsay

See rule above.

Here, the statements that went down in the attorney's office constitute hearsay because they were made outside of court and are being offered to prove the truth of the matter asserted.

Therefore, the statements are inadmissible unless an exception applies.

Party Admission

See rule above.

Here, Blaze's statements about throwing the gas can in the river and explaining the black clothes are in the washer can be admitted against him because he is a party.

Therefore, the statements are admissible as party admissions.

Attorney-Client Privilege

Confidential communications made between a client and attorney (and reasonably necessary third parties) are privileged from disclosure when made for the purpose of seeking legal advice.

Here, Blaze holds the privilege and can prevent Clerk, a reasonably necessary third party, from disclosing the confidential communications made during the consultation. However, there is an exception for the privilege: crime/tort. Atticus helped Blaze destroy the evidence by telling him "to get rid of any clothing he wore on the scene."

Therefore, the privilege does not prevent the Clerk from testifying.

END OF EXAM

- overall, very good.
- Passerby is a fact witness or percipient wts - no HS.
- Some organizational issues (re: where Kelly Just belong)
- most likely at pg 6, meet Blaze (not Bill)
- needed crime exception, pg 6