

**Monterey College of Law**

**EVIDENCE**

Final Examination

Spring 2024

Judge J. O'Keefe

**General Instructions:**

Answer All Three Essay Questions.

Total Time Allotted: Three (3) Hours

Recommended Allocation of Time: Equal Time per Question

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### QUESTION 1

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

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

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

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

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

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

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

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

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## Question 2

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

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

Apply the **Federal Rules of Evidence**.

1. In the Plaintiff's case in chief, Pete testifies that he was using the safety harness properly when the harness suddenly slipped causing him to fall and become injured. He denies improperly removing the harness. On cross-examination, RWAP asks Pete if he was once fired from working as a security guard because he was caught stealing merchandise from a warehouse. RWAP seeks to introduce Pete's termination letter saying he was fired for stealing. Pete objects.
2. Pete next calls Edgar Mountain. Mountain will testify that after he graduated high school, he spent the next 30 years traveling the world mountain climbing. He has personally used the harness used by RWAP hundreds of times and has seen hundreds of other people use the harness. In his experience, the harness will only slip if not secured properly. Additionally, he spoke to Wanda, another RWAP patron, who was present the day Pete fell. Wanda told Mountain that the RWAP employee who put Pete's harness on did not secure it properly. Mountain's opinion is that RWAP's failure to secure the harness resulted in Pete's fall.
3. In the defense case in chief, the defense introduces the incident report of Matt, the manager of RWAP. The incident report says the following:  
  
I (Matt) did not personally see Pete's fall. Five minutes after the accident, I interviewed Bob, another patron at RWAP. Bob said he "saw the whole thing and that Pete unsecured the top part of the safety harness so that he could take a selfie." A day later, I interviewed Ted, the employee who secured the harness. He said he secured it properly and Pete unsecured the top part of the harness so he could reach his arm out to take a selfie.

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

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Question 3

Tom is accused of committing a burglary at a local jewelry store. He has been arrested and charged with the crime. Assume the following occurred in the jury trial of Tom. Discuss all the evidentiary issues and arguments that would likely arise in each section below, including objections, if any and the likely trial court ruling on the admissibility of the evidence. Use the **Federal Rules of Evidence**.

1. The prosecution seeks to call Tom’s attorney, Alex, to the stand to testify about a conversation between Tom and Alex. Upon objection, the prosecution gives the following offer of proof: A prosecution investigator, Ivan, saw Tom and his attorney Alex, sitting at a table in a restaurant at lunch. The investigator sat at a table next to them and overheard their conversation. During the conversation, Tom told Alex that he was involved in the jewelry burglary.
2. Tom's wife, Sarah, is called to testify as a witness for the prosecution. The prosecution seeks to elicit the following testimony from Sarah:
  - Sarah witnessed Tom leaving the house late at night with a bag of tools and returned a few hours later with jewelry.
  - Tom confided in Sarah about their financial struggles and his plans to commit the burglary.The defense objects.
3. On cross-examination, the defense asks Sarah:
  - Isn’t it true that you told Tom you are going to divorce him because you discovered he was cheating on you?
  - Isn’t it true that you have a misdemeanor conviction for embezzlement that occurred last year?

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*Evidence – SLO - MCL - HYB-Sec2*

*Spring 2024*

*Prof. Lizardo & Judge O'Keefe*

## **ANSWER OUTLINE**

### **Q1 (Prof. Lizardo)**

#### **SUMMARY ANSWER OUTLINE- Slasher**

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

#### **1. Testimony of Nosey**

*As per CEC 350, only relevant evidence is admissible.*

#### **Logical Relevance/ CEC 250 Tendency Test-**

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

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

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

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

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

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

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

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

***Hearsay- “Thief, I know you took my money!”***

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

***Spontaneous Statement Exception***

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

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

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

***Admission Exception***

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

***Contemporaneous Statement Exception***

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

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

***State of Mind Exception***

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

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

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

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

***MIMIC - used by Prosecution.***

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

## **2. Detective Dodd's Testimony**

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

***Logical Relevancy- tendency test***

***Legal Relevancy- balancing test***

### ***Writing- The Receipt***

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

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

### ***Authentication***

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

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

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

### ***Secondary Evidence Rule***

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

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

### ***The Knife***

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

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

***Logical Relevancy-*** *defined above.*



**Legal Relevancy-** defined above

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

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

**Attorney- Client Privilege: Jury Consultant**

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

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

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

**Reasonably Necessary”- Jury Consultant- Third Party’s Presence**

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

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

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

**Exception to Privilege: Crime/Fraud**

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

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

#### **4. Manager’s Testimony (outline only)**

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

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

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

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

*Not allowed- expert opining on guilt.*

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### *Answer Q2 (O’Keefe)*

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

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

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

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

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

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

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

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

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

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

*Analysis:*

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

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

*The expert possesses a reasonable probability regarding his opinion.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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*ANSWER - Q3 (O'Keefe)*

Tom is accused of committing a burglary at a local jewelry store. He has been arrested and charged with the crime. Assume the following occurred in the jury trial of Tom. Discuss all the evidentiary issues and arguments that would likely arise in each section below, including objections, if any and the likely trial court ruling on the admissibility of the evidence. Use the **Federal Rules of Evidence**.

1. The prosecution seeks to call Tom's attorney, Alex, to the stand to testify about a conversation between Tom and Alex. Upon objection, the prosecution gives the following offer of proof: A prosecution investigator, Ivan, saw Tom and his attorney Alex, sitting at a table in a restaurant at lunch. The investigator sat at a table next to them and overheard their conversation. During the conversation, Tom told Alex that he was involved in the jewelry burglary.

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

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

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

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

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

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

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

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

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

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

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

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

The defense objects.

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

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

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

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

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

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

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

#### **Elements of the privilege:**

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

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

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

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

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

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

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

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

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

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

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

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

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

**Impeachment for a Prior Crime Involving Dishonesty:** *Under the Federal Rules, a witness' character for truthfulness may be attacked (or impeached) by any crime (felony or misdemeanor) if it can be readily determined that conviction of the crime required proof or admission of an act of dishonesty or false statement. Embezzlement would qualify as a crime involving dishonesty. The trial court has no discretion – not even under FRE 403 to disallow impeachment by such crimes. The only time when admission of this*

*evidence is not automatic is when a ten-year period has elapsed since the date of conviction or the witness' release from confinement related to the conviction (whichever date is later). In that circumstance, the evidence is subject to a balancing test under Rule 609(b).*

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



1)

1.)

Relevance

### Logical Evidence

Good! Evidence is relevant if it has a tendency to make a fact more or less probable than it would be without the evidence, and the fact is of consequence in determining the action.

Here, Nosey's testimony is relevant because he saw Slasher stab Von and heard the accusation.

Thus, the evidence is relevant.

### Legal Evidence

Good The court has the power to exclude relevant evidence if its probative value is in danger of being substantially outweighed by one or more of the following: unfair prejudice, confusing the issue, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Here, the evidence is not in danger of being outweighed.

Thus, it is legally relevant.

### Lay Witness

Opinions by lay witness are generally inadmissible. However, there are many such cases where no better evidence can be obtained. In these cases, where the event can be perceived as an entire impression, the lay witness opinion is generally admissible.

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### *Admissibility*

Good In order for a lay witness opinion to be admissible it must: be rationally based on the perception of the witness; and it is helpful to a clear understanding of their testimony; or help determine a fact in issue; and is not based on scientific, technical, or other specialized knowledge.

Here, Nosey witnessed the incident first hand, so he can help determine the fact in issue (if Slasher stabbed Von) .

Thus, Nosey's opinion as a lay witness is admissible.

### **Competency of a Witness**

Every person is competent to be a witness, unless the rules provide otherwise. A witness must have knowledge of the facts they are testifying to and declare that they will testify truthfully.

Here, Nosey is 95 years old. The defense could argue that Nosey is too old to testify. The prosecution will argue that Nosey is mentally present and shows no signs of mental deficiency.

Thus, nosey is competent to be a witness. \

### **Impeachment**

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

### **Sensory Deficiencies**

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A witness can be impeached if they lacked knowledge of the facts they testified too, or if their ability to perceive or remember is impaired, casting a shadow of doubt on their testimony. This can be done through cross examination or extrinsic evidence.

Here, the defense would argue that Nosey's age precludes him from testifying. He is too old and feeble, and he is unable to testify in court. His old age will affect his ability to properly recall facts. The prosecution will argue that Nosey shows no sign of mental incompetency and when he witnessed the crime, he called 911 immediately, showcasing his quick reaction time.

Good  
Thus, the court will likely agree with the prosecution.

### **Slasher's Accusations That Nosey Heard**

"Thief, I know you took my Money!"

#### **Relevance**

#### **Logical**

See Supra

Good  
Here, Slasher's accusations are relevant because they give Slasher a motive.

#### **Legal Hearsay**

See Supra

#### **Admission of a Party Opponent**

→ In CA it is hearsay but comes within an exception

This is not hearsay when it is the party's own statement and it is used against the party.

Here, Slasher's statement is his own statement and can be used against him.

---

## **Circumstantial Evidence of Speakers State of Mind**

Good Here, the statement may be admissible as a circumstantial evidence of speakers state of mind, showing why Slasher was so enraged.

## **Hearsay**

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

## **Spontaneous Statement**

A declaring describes an event they witnessed; made spontaneously under stress or excitement.

Here, Slasher's statement is describing the circumstances that caused him to be so angry at Von.

Thus, the statement is admissible as spontaneous statement.

## **Contemporaneous Statement**

An event occurred; statement describes declarants conduct, during the conduct, and refers to the declarants own conduct.

Here, the event of the stabbing occurred. The statement describes Slasher's conduct, and its his own conduct.

Thus, the statement may come in as a contemporaneous statement.

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2.) Detective Dodd

Whenever you have a writing, consider Rash.

**Relevance**

**Logical Relevance**

**See Supra**

Good The knife and the receipt are logical relevant because they help establish a the murder.

Thus, it is logically relevant.

**Legal Relevance**

**See Supra**

The evidence is not in danger of being substantially outweighed.

**Authentication**

Good Authentication is the introduction of proof that the evidence is what the proponent says it to be.

*Quantum of Proof Authentication*

You must provide proof that is sufficient to support a jury finding of genuineness.

Good! Here, Dodd authenticated the receipt and the knife at the sporting good store. It was appropriate because the party who authenticated it was the store manager, as well as a retired US Army military knife expert. He had the knowledge and experience to authenticate both items since they both came from his store.

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## Secondary Evidence Rule

California abolished the best evidence rule in favor of the secondary evidence. California does not express preference for the original, allowing secondary evidence except when there is a

- Good!*
- Dispute to the material terms of the writing that require an exclusion
  - It would be unfair
  - In CA, you do not need to provide an excuse before you can use secondary evidence
  - If the judge decides that a proponent of the evidence has the original and does not make it readily available before trial, or present it to the other side, he cannot use secondary evidence.

Here, Dodd has the original receipt and the knife.

Thus, secondary evidence does not apply.

### 3.) Quinn's Testimony

#### Relevance

#### Logical

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Evidence is relevant if it has as tendency to make a fact more or less probable than it would be without the fact, and the fact is of consequence in determining the action.

Here, Quinn's testimony will be relevant because she heard Slasher admit to the crimes.

Thus, it is logically relevant.

## **Legal**

A court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, misleading the jury, wasting time, undue delay, or needless presenting cumulative evidence.

Here, the evidence is not in a danger of being outweighed.

Thus, it is legally relevant.

## **Privileges**

Privileges refer to the confidential communications between related parties. Confidential communications consist of physical privacy and an intent to maintain secrecy by the holder. If a third party is present, courts typically deem the communications as non privileged.

## **Attorney Client Privilege**

This privilege protects the private communications made between an attorney and a client during a professional consultation. The client holds the privilege and can choose to claim or waive it. The privilege does not apply to objects and pre existing documents.

### *Elements*

- 1.) There must be an attorney client relationship
-

Great 1  
2.) Communication is confidential, if disclosure was only intended for those solely responsible for giving legal advice, or those essential to carry out communications transmissions.

3.) Client's communication must be regarding advice about past (lawful/unlawful activity) or future (lawful activity).

Here, Quin is a jury consultant for the law firm. She is not essential to carry out communication transmissions.

Thus, there is no lawyer/client privilege

### **Attorney/Client (Objects)**

Here, the attorney client privilege does not cover objects.

Thus, the gun will be admissible.

### **Slasher's Statement That Quinn Heard**

### **Admissions of a Party Opponent**

### **See Supra**

Good  
Here, Slasher's statement "I just stabbed Von and his blood is all over my clothes! He had a gun, it was self defense!" is an admission of a party opponent, because it is made by the party and used against the party.

### **Statement Against Interest**

Declarant is unavailable, statement is against there legal, property, or financial rights. Declarant has personal knowledge, knows the statements are agiant his interest, and has no reason to misrepresent.

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Here, the statement is against Slasher's interest because he is unavailable, it is against his legal interest, and he has personal knowledge.

### Spontaneous Statement

#### See Supra

Here, Slasher is describing an event he witnessed (the stabbing) and he is still very stressed.

### Contemporaneous Statement

#### See Supra

Here, Slasher is describing his own conduct, that he stabbed Von.

\* Missed the crime/tort exception

### 4.) Expert Witness

An expert may state their opinions or conclusions as long as 4 factors are satisfied.

*The subject matter is appropriate for expert testimony*

The expert may testify if the subject matter of the testimony is based on scientific, technical, or their specialized knowledge.

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## CA - FRYE/KELLY TEST

### 1.) The expert must be a qualified expert

Here, the manager is a retired US Army military knife expert.

Thus, he is a qualified as an expert.

### 2.) The reliability of the method must already be established

Here, the experts opinions on knives comes from a long history of information on knives from army training.

Thus, the reliability is established.

3.) The frye test only includes that limited class of expert testimony which is based in whole or in part on technique, process, or theory that is new to science and even more so the law. It applies to all social science techniques , and physiological theories. It applies to all expert evidence with the misleading aura of scientific infallibility.

Here, the manager's knowledge came from the US army, which has been around for hundreds of years. It is not new to science or the law.

Thus, the manager passes the frye test.

### *The witness is a qualified expert*

To be qualified as an expert, one must have special knowledge, skill, experience, training, or education on the subject matter to which their testimony relates.

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Here, the manager was a US army knife manager. He has acquired much skill and training in such a high position.

Thus, he is qualified as an expert

*The expert possesses reasonable probability in regards to his opinion.*

The expert must possess reasonable certainty or probability in regards to conclusion. If his opinion was based on speculation or guess, the opinion is not valid.

Here, his opinion possesses reasonable probability because it is based on his knowledge he got in the army.

Thus, the expert possesses reasonable probability in regards to his opinion.

*The opinion must be supported by proper factual basis*

In order for the opinion to be properly supported, it must rely on facts that are reasonably relied upon by other experts in the community.

The expert's opinion can come from one or more of the three sources of info. (Facts from the expert's own observation, facts presented as evidence in trial and presented to the expert in the form of a hypothetical question, or facts that were not used in evidence that were supplied to the expert outside of trial and are the type that are reasonably relied upon by other experts in the field to form opinions on the subject.

Here, the facts from the manager come from his own personal observation.

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*Opinions (Factual vs Legal)*

An expert may not state his opinion on ultimate legal issues.

Here, the manager stated that he believed that Slasher was trying to murder Von. The manager is giving his opinion on a legal issue.

Thus,, the managers opinion is not admissible.

Great job!

2)

1. No Relevance Discussion

### Competence of Witness

All witnesses are assumed competent to testify. To testify a witness must have personal knowledge of the subject matter of his testimony. A witness' competency is his capacity to perceive, recollect, communicate, and understand the duty to tell the truth.

Good

In the present testimony of Pete, that he was using the safety harness properly when the harness suddenly slipped causing him to fall and become injured, he has personal knowledge of the event, he was able to properly recollect what he had experienced and had no issue in communicating what he had experienced. Pete is a competent witness.

### Character Evidence - Civil Case

Good

The purpose of character evidence is to prove character when character is at issue, to act as circumstantial evidence of how a person probably acted, and for impeachment purposes.

Character evidence is generally not admissible in Civil cases unless character is at issue.

This case does not involve any character being at issue. This case is for negligence and this cause of action does not contain any controversy regarding character.

### Prior Bad Acts

A proponent of evidence may not use prior bad acts, prior wrongdoings, or prior crimes to show propensity evidence. However, other things can be established by the evidence of prior bad acts, such as motive, intent, knowledge, etc.

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Presently RWAP is seeking to introduce evidence of a prior wrongdoing/crime that Pete committed. This will not be admissible for propensity purposes, to allude that Pete has the propensity for wrongdoing or lying, however, can be used to prove a motive or intent that Pete may have had. In the facts, there is nothing to indicate that the prior bad act of stealing and subsequently being fired, will prove anything that RWAP may use to establish that Pete was negligent.

### **Impeachment**

Impeachment is the discrediting of a witness' credibility by showing that they lied intentionally, their perception or memory was questionable, or that they provided a factually inaccurate statement.

Good RWAP will attempt to impeach Pete in order to show the jury that is incapable of belief and that they should not believe his testimony that he was not negligent in operating the safety harness.

### **Prior Conduct**

Great! A witness may be impeached by showing that they are unworthy of belief due to have had engaged in distrustful conduct. The theory is that if the witness is so willing to engage in dishonest activities, then they may be willing to lie if called to testify. A witness may be impeached by prior conduct on cross examination, but the use of extrinsic evidence is not permitted.

Great RWAP will attempt to use the prior bad act of Pete stealing merchandise from his previous job to show that he is unworthy of belief and may be lying as he testifies about his experience rock wall climbing. If the prior bad act, being fired for stealing, was extracted from Pete on Cross Exam, then that may be used for impeachment purposes, however, if extrinsic evidence is being offered to show that Pete was fired for stealing, in order to show that he may be lying, then that is inadmissible.

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### **Conclusion**

Character evidence will not be permitted in this civil case since character is not at issue, additionally, RWAP may not use prior bad acts to show that Pete has the propensity for a certain conduct. The only possible use for the prior bad act is for impeachment purposes, and if RWAP can extract the prior bad act from Pete on Cross, then that is the only evidence that may be admissible.

Great Job!

2.

### **Expert Witness - Edgar Mountain**

An expert witness' opinion is relevant to aid the trier of fact in understanding evidence that involved material and knowledge that is beyond their experience.

### **Subject Matter**

To determine whether expert witness testimony is required, we must determine whether the subject matter is appropriate.

Good

Presently, the safeness of a mountain climbing harness may be beyond the experience of the trier of fact. The expert opinion provided by Edgar Mountain may assist the jury in understanding the evidence that is before them, the safety harness that failed. With Edgar's opinion, and a newfound understanding of the evidence, the jury will be better suited to provide a decision on the issue.

### **Qualifications of an Expert**

An expert may be qualified by their overall education, skill, training, expertise, or specialized knowledge in a particular field.

Good Edgar Mountain has over 30 years experience traveling the world and climbing mountains. This amount of experience with climbing and climbing equipment properly suits him as a more than qualified expert to provide an opinion on the safety harness.

### **Proper Basis of Opinion**

An expert witness' opinion is based on what was made known to them before trial, at trial, what their personal knowledge is, or what they personally observed.

In this case, Edgar has personally observed and used RWAP's harness hundreds of times, and has seen other patrons use the harness. He may base his opinion on what he has personally observed from having seen and used the harness himself, but also from having watched others use the same type of harnesses. Also, Edgar is basing his opinion on his personal knowledge. He has over 30 years experience in the field of climbing and it is his experience that the harness will not slip unless it is not secured properly. Lastly, Edgar is basing his opinion on what was made known to him prior to trial, the hearsay statement of Wanda.

Good In the FRE, an expert witness may base their opinion on information that was made known to them prior to trial if the information is reasonably relied upon in the related field, even if the information that was made known to him before trial comes in the form of hearsay. The FRE has determined that the hearsay statements are admissible because the Expert is not using the statements for their truth, rather, he is using them to base his opinion.

### **Hearsay**

An out of court statement that is offered to prove the truth of the matter asserted.

Wanda's statement to Edgar, that she saw the RWAP employee not properly secure the harness on Pete is hearsay that will be objected to. However, because Edgar is using the

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statement to base his opinion, the statement will not bar him from providing his opinion to case specific facts.

### **Reliability of Opinion**

The FRE follow the Daubert Test. The Daubert test compares the facts of the case to the principles relied upon by the witness.

The reliability of the principles and theories that Edgar will rely upon on basing his opinion, provided that they are generally accepted in the expert community, and the tests are properly tested and peer reviewed, will allow for Edgar to base his expert opinion applying those principles and methods.

3.

### **Relevance**

Evidence is relevant if it has any tendency to make a fact more or less probable than the fact would be without the evidence, and is material in the determination of the action.

The incident report of Matt is incredibly probative because it contains a detailed report of the incident after it occurred, as well as statements of witnesses who were present.

### **Hearsay**

see supra

The incident report that the defense seeks to introduce is hearsay. The content of the document contains out of court statements that are being offered to prove the truth of the matter asserted, that Pete was the cause of his own harm.

### **Business Records Exception**

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Good!  
A business records exception is the vessel to get documents admitted at trial. The business record must have been prepared by someone with a business relationship to the company, had a business duty to prepare the record, prepared the record contemporaneously to the event, had personal knowledge of the event, and prepared the record during the regular course of business.

Great  
The document, the incident report, was prepared by the manager of RWAP, Matt. Matt prepared the incident report after Pete fell. Matt has a business relationship with RWAP, and as manager, has a business duty to prepare incident reports. Although, Matt did not personally see the fall, he was made aware of the fall after interviewing a few witnesses to the fall. The incident report was prepared contemporaneous to the accident, as Matt prepared it after interviewing the witnesses and getting an understanding of what had occurred. The incident report was prepared by Matt during the regular course of business, as there is nothing to indicate that he had waited to write the report.

### Double Hearsay

Hearsay statements may exist within other hearsay statements. Each hearsay statement would need to be properly made admissible independently of the others.

### **Hearsay**

see supra

### **First double hearsay - Bob's statement**

Bob's statement to Matt, that he saw the whole thing and that Pete unsecured himself to take a selfie is hearsay. This is a hearsay statement since it is an out of court statement that is being offered to prove the truth of the matter asserted, that Pete did cause his own harm.

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**Present Sense Impression**

*Great!*  
A present sense impression exception occurs when the declarant perceives an event and makes a statement during or shortly after had perceived it.

Bob's statement came five minutes after the incident. Bob's statements related to what he had witnessed and a time very close in time to the events occurrence.

**Ted's statement****Non-hearsay****Party Opponent statement**

In the FRE, a statement of a party opponent is not hearsay.

**Vicarious Admission**

*\* RWAP is the party seeking to admit the statement, so it is not a statement of a party opponent*

A statement made by someone who has a legal relationship with the party-opponent.

These statements are made a third-party and are attributed to the party opponent, even if they do not agree with them, because of their legal relationship.

Ted's statement, as an employee of RWAP, will be attributed to RWAP since the statement came during the scope of Ted's employment. The statement by Ted, that he did secure the harness properly and that Pete unsecured the top part so that he can reach out to take a selfie, is admissible.

4.

**Relevance**

see supra

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The identification of tattoos and clothing is important to determine whether an identification may be made of the person who is assumed to have been involved in the incident

### **Prior Identifications (Not Hearsay)**

A prior identification is admissible if the previous identification that was made would have been admissible if offered as testimony at trial.

Here, Matt is providing his prior identification of Pete, the highly detailed tattoo and the clothing that Pete was wearing. This prior identification made by Matt is admissible because if he would have made the same identification at trial, and it was admissible, then his prior ID would be properly admitted.

### **Facebook Post**

#### **Relevance**

see supra

The facebook post is relevant because there may be a video that shows Pete falling from the rock wall after he put himself in danger.

#### **Hearsay**

see supra

The posts on Facebook titled "Crazy fails" is inadmissible hearsay because it is asserting that the people involved in the videos put themselves in harm's way. This post, as well as the Facebook page, is inadmissible because if taken as true, alludes to the fault of those involved in the depicted media.

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### **Best Evidence Rule**

The best evidence rule promotes the desire for original evidence when the content of writings have been put at issue.

#### **Relevant**

see supra

The snapshot of the video is relevant because it may identify Pete as the one in the video showing the fall.

#### **Writing**

A writing is a document, photo, or recording, set forth in any form.

Here, the snapshot from the Facebook page is the writing at issue.

#### **Authentication**

The writing being offered, the photo, needs to be authenticated. A proper method to authenticate writings is to have an eyewitness testify to the object of the photo. Matt has authenticated the snapshot of the photo because he frequents the Facebook page and has recognized Pete and his identifiers, the object of the photo.

### **Best Evidence Rule**

Best Evidence requires that the original or a duplicate be provided when the content of the writing has been placed at issue. A writing can be placed at issue when the content is legally dispositive or the witnesses knowledge came from relying on the writing.

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Matt's knowledge of the video showing the fall and Pete's tattoos came from having seen it on the Facebook page. Since his knowledge that he testified to came from the video, then the original video needs to be produced.

If the original is unavailable to the proponent because it has been destroyed or lost in good faith, outside their reach, or in the possession of the adverse party who didn't hand it over, then if the court finds it sufficient reason, secondary evidence, like testimony may be offered to prove the content of the writing, provided that it is admissible evidence.

3)

### **LOGICAL RELEVANCE**

Evidence is relevant if it has any tendency to make a fact more or less probable than it would without the fact; and the fact is of consequence in determining the action.

Here, the evidence may be relevant as it is essential to the issue of identity in who committed the burglary.

### **PRIVILEGE**

Privilege is confidential communications between related parties. Confidential communication relates to communication made in privacy with an intent to be kept secret by the holder. If there is a third party present, the court typically deem this non-confidential.

Here, the statement that was made was between an attorney and client. Prosecution may argue that this conversation was not confidential because the two were sitting at a restaurant at lunch, if at lunch time, this could suggest a lively atmosphere and many people around to hear the communication.

Therefore, the privilege may be waived.

### **WAIVER**

A waiver occurs when the holder fails to claim or object to privilege, there is a voluntary disclosure, unless the disclosure was also protected, there was an agreement, or **EAVESDROPPER**: traditionally, an eavesdropper was able to testify on what they heard. Modernly, the courts do not allow an eavesdropper to testify unless the party was negligent.

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Here, traditionally, the investigator would be able to freely disclose what was overheard, but modernly the investigator would only be able to disclose if the parties were negligent. In this case, Alex and Tom were sitting at a table at lunch. Alex sat at a table right next to them and overheard this conversation. This would likely be considered negligent, and the investigator would be able to testify to this if he were in court, though this is only an offer of proof.

### **ATTORNEY CLIENT PRIVILEGE**

Attorney client privilege is confidential communication made between an attorney and client during professional consultations. The client holds the privilege and can choose when to disclose certain information or withhold. Objects and existing documents are not protected. The necessary requirements are that: there is an attorney/client relationship; communication is confidential: intended to be kept between attorney/client or those necessary for communication or providing legal assistance; and is providing legal aid for past legal/illegal or future legal conduct. It does not apply when it is in aid of wrongdoing; when there are multiple claimants representing a single client; or attorney/client disputes.

Here, the communication was for a professional consultation as Alex was Tom's attorney. However, Tom holds the privilege and only he can choose to decide when to waive this privilege. The prosecution cannot compel a defendant's attorney to testifying against the. Alex was the attorney at the time, communication was confidential, to a point, and the communication was for past illegal conduct. Again, the investigator may testify to what was heard, but Alex would not be able to unless Tom waived.

Thus, attorney client privilege precludes the use.

### **HEARSAY**

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Hearsay is an out of court assertive statement or act offered in court to prove the truth of the matter asserted.

If the statement was presented at trial by the investigator, this would be hearsay to prove the truth of the matter asserted, the Tom robbed the bank. However, this would still be allowed as a statement of a party opponent.

### **STATEMENT OF PARTY OPPONENT**

Good!  
A statement may be offered against a party opponent that is the party-opponents own statement in either a representative or individual capacity. Under FRE, statement of a party opp is an exclusion to the hearsay rule.

Here, this would be Tom's own statement in an individual capacity, and would be offered against him in court, which gives him a fair opportunity to deny.

Nevertheless, the statement would still not be coming in because the attorney client privilege protects against the disclosure.

### **QUESTION 2**

#### **COMPETENCY OF A WITNESS**

All are competent to testify as a witness unless the rules provide otherwise. A witness must have personal knowledge and declare under oath that they will testify truthfully.

Here, Sarah would be able to testify, as the rules do not provide otherwise and she has personal knowledge.

#### **LAY WITNESS**

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7  
GIVE OPINION

Generally, lay witnesses are not permitted to testify. However, a lay witness may testify when other better evidence is not available. When the impression is likely to be perceived as a whole, a lay witness may testify. Certain criteria are required: the lay witness must testify to that which is rationally based on the perception of the witness; testify to something that is helpful to understand the witnesses testimony or to determine a fact; and is not based on a scientific, technical, or other skilled basis.

Here, Sarah is an adequate lay witness as she is perceiving the whole night as one impression and it is rationally based on her own perception.

### MARITAL PRIVILEGE

Good  
Protects confidential communication spouses during a valid marriage. This applies in both civil and criminal cases. Both hold the privilege and both can refuse to disclose or prevent others from disclosing. There are two requirements: 1) valid marriage: must be made during a valid marriage. Divorce or annulment does not preclude terminate retroactively, but statements made after divorce are not protected; and 2) reliance on intimacy: abusive language towards the spouse, misconduct, or routine business exchanges are not protected. Additionally, statements made in the presence of a third party waives the privilege. Furthermore, communication need not be verbal, but may be non-verbal.

Good!  
Here, Sarah may testify to the fact that she saw Tom leaving the house. This is an act of misconduct and has no reliance on intimacy, instead, this was all based on the perception of Sarah. Tom may try to preclude Sarah from testifying, as both hold the privilege, but the action would not be protected, because as just stated, there is no reliance on intimacy. However, Tom may claim that the statement that Tom confided in Sarah will be protected, as it is a statement of unity and love--true love, which demonstrates the the subjection of the self for the One. This is highly intimate.

Thus, the observation would be admissible, but the statement would not be.

### **SPOUSAL IMMUNITY**

Only applies in criminal cases and precludes the prosecution from compelling the witness spouse from testifying against their spouse, the defendant. Requires a valid marriage at the time of prosecution. The witness spouse holds the privilege and can choose to waive it. Terminates upon divorce or annulment. However, if there is a valid marriage it applies even to information from before the marriage and precludes the testimony on any subject.

Here, if Sarah did freely choose to testify then she is free to do so. The facts suggest that Sarah and Tom were still married which precludes the testimony on any subject, if Sarah freely chooses to do so. As stated above, the statement that Tom made to Sarah may be protected under Marital privilege as it was made in reliance on intimacy.

Thus, Sarah may freely choose to testify, but the statement may be protected. However, if Tom's statement is admissible it would be hearsay.

### **HEARSAY**

An out of court assertive statement or act offered in court to prove the truth of the matter asserted.

Good!  
Here, Tom's statement would be hearsay offered in court to prove whether Tom committed the burglary. However, not without exception.

### **STATEMENT OF PARTY OPPONENT**

A statement may be offered against a party opponent that is the party-opponents own statement in either a representative or individual capacity. Under FRE, statement of a party opp is an exclusion to the hearsay rule.

Here, this would be Tom's own statement offered against him in court, giving him a fair opportunity to deny or raise objections.

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Thus, if admissible, it would be admitted under statement of a party opponent.

### **HILLMAN DOCTRINE**

Statement serves as circumstantial evidence that declarant had a specific plan or intention; statement is offered to prove whether or not declarant carried out the plan.

Good

Here, if admissible, the statement may be admissible as under the hillman doctrine, as it demonstrates that Tom had a plan to commit burglary, and he carried out his plan, being that this is now what he is being charged with.

Thus, if admissible, it would be admissible as under the Hillman doctrine.

### **CONCLUSION**

The statement should be inadmissible, protected under the marital communications.

### **QUESTION 3**

### **LOGICAL RELEVANCE**

The questions may be important to determine if Sarah can freely be impeached showing a motive for dishonesty or a trait of dishonesty.

### **COMPETENCY**

See Supra

Of Sarah: See Supra

### **LAY WITNESS**

See supra

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Of Sarah: See Supra

## **IMPEACHMENT**

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

## **BIAS/INTEREST IN THE OUTCOME OF LITIGATION**

Good!  
A witness's character for truthfulness may be impeached by a showing of a bias or interest in the outcome of litigation. To show bias/interest in the outcome of litigation, must lay a proper foundation. Must ask on cross-examination about the bias/interest. If the witness admits, then the judge may determine if further extrinsic evidence is allowed to demonstrate bias. However evidence justifying bias is inadmissible.

Here, the defense may properly ask Sarah this question of infidelity because it would demonstrate that Sarah has a reason for testifying against Tom because she wants him to suffer for the pain that she has caused him.

Thus, the first question may be asked as a showing of bias/interest.

## **CHARACTER EVIDENCE**

Defendant must be the first to introduce evidence of good character evidence. If he does not, the prosecutor is prohibited from doing so. The defendant does not open the door to character evidence merely by taking the stand. If the defendant introduces character evidence, he may do so through opinion or reputation, not general law abiding character.

Here, defendant is not raising good character evidence at all, in fact, this is bad character evidence and would only be useful to show that Sarah had a motive to testify.

Thus, character evidence does not apply.

**IMPEACHMENT BY PRIOR CONVICTIONS/CRIMES INVOLVING DISHONESTY**

A witness character for truthfulness may be attacked through impeachment by a showing of a conviction if the conviction resulted in the death penalty or imprisonment for longer than one year (felony). If the d-witness FRE 609, anyone else 403. If older than 10 years FRE 403 is required and notice to the other side.

Here this is a misdemeanor so Sarah would not be impeached by a conviction, but she may be impeached by:

**CRIMES INVOLVING DISHONESTY/FALSE STATEMENT**

A witnesses character for truthfulness may be impeached by a any crime that involved dishonesty or deceit if it can be readily determined that the conviction required proof or admission of deceit or dishonesty. A witness only need declare the name, date, elements, and place of conviction/crime.

Here, Sarah had a misdemeanor conviction for embezzlement. As with Pete v RWAP, stealing, which is the essence of embezzlement is directly related to honesty, as this is a conversion of money that was entrusted to a party and the misappropriation of such money/funds.

Thus, Sarah may be properly impeached by a showing of a misdemeanor conviction for embezzlement.

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