

### **QUESTION 1 - One hour**

Ace is accused of the crime of murdering Vic by punching him to death. At trial, the prosecution sought to call Ace's psychotherapist Phil to testify to the following: on the night of the killing, Ace, who was extremely drunk, accidentally ran into him at a bar. Though there were numerous patrons there, Ace slurred in a not-so-low voice, "Phil, I'm so glad to see you. Just between me and you, I took a swing at a guy tonight and heard that he died. I feel dangerous. Can you help me?" Phil did not know whether anyone else heard Ace, but told Ace to shut up because he was speaking too loudly. Phil snapped his fingers, which Ace believed hypnotized him, then gave Ace the message "You will go directly home and fall into a deep sleep", while slipping some knockout drops into Ace's beer, a Coors Lite. Phil did not warn anyone that Ace was dangerous and claimed privilege when Dave tried to call him to testify.

The prosecution also sought permission for police officer Ollie to recite Bill's statement. Bill, who was at the bar that night, overheard Ace then excitedly tipped off the police that Phil could help them. Bill disappeared shortly afterwards, never to be seen again. Ollie canvassed the remaining patrons but was always told that the patrons had heard and seen nothing at all.

In his defense case Ace called Wally, who had heard Vic speak just before dying. Vic said, "I'm not going to make it, but I want everyone to know that Ace didn't do it. He yelled at me and missed a drunken punch, then another guy in a Neighborhood Watch tee shirt came out of nowhere yelling "Defense of others!" and creamed me." Wally noticed that Vic was wearing a hoodie.

Ace testified that he was at home when the crime occurred. To impeach Ace's testimony but also for any other relevant purpose, District Attorney Dave asked Ace on cross if within the last two years, Ace had been arrested for misdemeanor battery on Bob, convicted of felony burglary and beaten up his neighbor Ned in a dispute over boundary lines. Ace denied all three events. Over objection, in rebuttal, Dave offered court records of the burglary and called neighbor Ned to testify that Ace had beaten him up. Ace was not prosecuted for the Ned incident.

On surrebuttal, Ace called Ned's wife Wendy to testify that Ned had told her that he was mad at Ace and wanted to borrow her cell phone so that he could tell a cop that Ace had beaten him up.

As the trial judge, assume all objections and claims of privilege were made. Discuss the reasons for and against the admission of the evidence, and the rulings you would make. Answer according to the general principles we've discussed in class, and point out any significant differences between California and federal law.

### **QUESTION 2 - One hour**

Van sued Ace and Dr. Phil, the same Phil who featured in Question #1, for negligence after Ace, on his way home from the bar where Phil gave him the knock out drops, drove into Van's car. Van himself was on his way home after buying a quart of milk at a convenience store. Ace wobbled out of his own car after the collision and punched Van twice, breaking his nose. The crash totaled Van's car. Van's theory was that Ace drove negligently and Phil was negligent in not waking Ace from his hypnotized state, allowing Ace to drive after giving him knock out drops, and for not notifying the police that Ace was a danger.

A portion of the evidence was as follows:

Van called Dan the doctor, who treated Ace at the emergency room. Using a revolutionary diagnosis machine from Italy named The Mouth of Truth, Dan concluded that Ace was effectively unconscious while driving due to a combination of still being hypnotized and the knockout drops administered by Phil. When Phil objected to Dan's conclusion, the judge said, "I'm not sure how this machine goes over in the medical community, but I like it. You stick the subject's hand into the mouth in the machine, type in your question, and the machine returns an accurate answer. I'm allowing the results."

Van sought to call Ozzie, Ace's optometrist, to testify that not only did Ozzie supply Ace with a new pair of glasses after the crash, but changed the prescription of the glasses to make them three times as strong as the ones that had broken. Ozzie claimed privilege.

Ace's lawyer hired Mel the mechanic to examine Ace's car, giving him instructions that included, "My theory of the case is that there was a mechanical failure" and "Ace tells me that the motor stopped working, the brakes failed and the tires popped just before the accident". Without mentioning any of the foregoing, Mel's report stated that he checked all mechanical aspects of Ace's car and found that everything worked normally, though he noticed an odor of alcohol around the driver's seat. After finding a copy of Mel's report on his doorstep in the middle of the night, Van called Mel to testify at trial. Ace asserted privilege.

Phil called Kathleen, Ace's longtime but recently ex-girlfriend, to opine that Ace was a lousy driver. It seemed to her that every time Ace drove home from the bar, he hit somebody or something.

As advocates for each party, make all appropriate objections and claims of privilege. As the trial judge, discuss the reasons for and against the admission of the evidence, and the rulings you would make. Answer according to the general principles we've discussed in class, and point out any significant differences between California and federal law. Analyze the correctness of the trial judge's ruling admitting the Mouth of Truth's results. Ignore any procedural irregularities.