1) Q1 - 90

======== Start of Answer #1 (1292 words) ========

CRIMINAL

• **Def Ace calls his wife, Wilma, to testify to the following. W claimed privilege and refused to testify.**

• Because they are married at the time of trial, Wilma can refuse to be called by the prosecution, but cannot refuse to take the stand when called by Ace. On the stand, however, she can claim spousal privilege and refuse to testify. Even testifying on his behalf is in effect testifying against him, because of what she'll be asked on cross.

• W's proposed testimony:

• **Ace told her several times over the past year that Vic scared him.**

• This is an out-of-court statement offered for the non-hearsay purpose of showing that Ace was afraid of Vic, and that he felt this way more than once. This is not offered for the truth of what Ace said, but under the Fresh Complaint Doctrine, showing Ace had talked about his concerns.

• If W's spousal privilege claim was not honored, she could claim Confidential Marital Communications and refuse to disclose what Ace told her within their marital relationship because they were married at the time of the communication.

• If W's privilege claim is denied, Ace's statements to her would be admissible for the non-hearsay purpose. • **Two days before the shooting, Ace told her he was going to start carrying his gun and would use it if Vic attacked either of them.**

• This is an out-of-court statement offered for the non-hearsay purpose of showing that Ace was feeling threatened.

• Over a hearsay objection, Def could offer this as a state-of-mind hearsay exception, showing what Ace was thinking/planning to do, just before the shooting.

• This is not an exception to Marital Communications if Ace is not asking her to help him commit or hide a crime, so that privilege applies.

• If W's spousal and marital communications privileges were also denied on this

statement, it would be admissible as a hearsay exception.• **During the past month she had seen Vic make threatening gestures toward Ace.**

• This could count as an out-of-court statement because W interpreted the gestures as "threatening", meaning they conveyed a message to Ace. They could be admissible under a hearsay exception for Vic's state-of-mind, or for the non hearsay purpose of showing that Vic intended to hurt Ace.

• The gestures could also be considered past acts, supporting Ace's self-defense claim by showing that he felt threatened by Vic.

• If W's spousal privilege is denied, this evidence would be admissible as a hearsay exception or for a nonhearsay purpose.

• Vic would argue W had misunderstood his gestures and give a plausible explanation for them.• **She had seen Vic taking target practice in his backyard using a poster-sized picture of Ace as the target.**

• This is not an out-of-court statement, because it was not communicated from Vic to Ace, but could be admitted as past acts witnessed by W, again for the purpose of supporting Ace's defense that Vic meant him harm.

• There is a question of whether this evidence is relevant. Shooting at a picture is not probative of Vic's intent to harm Ace, and any probative value could be substantially outweighed by the idea of someone shooting at poster-sized pictures of their neighbor's face - an emotion-provoking image.

• If W's spousal privilege is denied, this would probably be admitted despite the prejudice. Ace's mention of the picture in his statements indicate this was an important part of the dispute between Ace and Vic.

• **Def Ace testified that he shot Vic in self-defense. He attempted to testify about what he told W, but her lawyer claimed privilege and prevented his testimony.**

• W claimed the Confidential Marital Communications privilege to refuse to testify about what Ace had told her (that he was scared and had his gun). Both spouses are holders of this privilege, and either can prevent the other from testifying about what was said.

• However Ace can make the argument that his own statements are an integral part of

his defense. State-based privilege law should not override his right to a fair trial.

- Judge should admit Ace's own statements despite W's claim.

- **On cross, Pros Pete asked Ace about the following statements. Ace claimed privilege and refused to answer.**
- **Ace's statement to his Psychotherapist Cy: Two days before Vic died, Ace said he was having bad feelings toward Vic and was thinking about spray painting "Why don't you move away!" on Vic's fence, and obliterating the picture of himself.**
- Privilege no longer applies if a psychotherapist has reasonable cause to believe that a patient's mental condition is a danger to himself, others, or property, and disclosure is necessary to prevent the danger. In this case, Ace's mental condition seems to be a danger to Vic's property. His statement to Cy is not privileged. Ace cannot refuse to answer Pete's question.• **Ace's statement fo his Lawyer Lana: Two days before Vic died, Ace said he was having bad feelings toward Vic and was thinking about spray painting "Why don't you move away!" on Vic's fence, and obliterating the picture of himself.**
- Privilege no longer applies if an attorney has the reasonable belief that disclosure is necessary to prevent a criminal act that could result in death or substantial bodily harm. Ace's statement did not suggest any such threat, so his statement to Lana is privileged. Ace can refuse to answer Pete's question.

- **On rebuttal, Pros Pete called the following people to testify to Ace's statements to them, and asked whether they had notified anyone after their most recent meetings with Ace, two days before Vic died. Each refused to answer, asserting privilege:**
- **Psych Cy**
- As described above, Ace's communication to Cy was not privileged. The privilege claim will be overruled.
- Ace's out-of-court statements can be admitted under the hearsay exception for Ace's

state-of-mind, and for the nonhearsay purpose of showing his intent, which is important because it did not include shooting Vic.• **Lawyer Lana**

• As described above, Ace's communication to Lana was privileged.

• **On rebuttal, Pros Pete offered a receipt for red paint and a paint sprayer dated the day before Vic died.**

• This is tangible evidence, offered to support Ace's statement to Cy that he was going to paint Vic's fence.

• Authentication by Officer Ollie, who has personal knowledge and can testify that the receipt was found in Ace's garage. This is sufficient to authenticate and admit the receipt.

• This does not count as a business record hearsay exception, because Ollie didn't create the record, the hardware store did. There is no one here to testify about its accuracy.

• It is an out-of-court statement, but offered for a non hearsay purpose, to show that Ace bought paint and a sprayer.

• There is not a confrontation issue, because it is not being offered for the truth, and was not created specifically to target Ace.

• **Def Ace called Copy Store Sam to testify:**

• **A month before his death, Vic ordered and picked up five poster-sized pictures of Ace.**

• This is what Sam saw Vic do. It is admissible as his first-hand knowledge, and is relevant because it ties in with the story about the picture on the fence. Under the Completeness Doctrine, this is admissible to clarify Vic's statement.• **Vic said, "Don't worry, I'm just getting ready for hunting season."**

• This is an out-of-court statement. It is not being offered for the truth of the matter, but for the non-hearsay purpose of what can be inferred from the statement. Said in the context of buying the pictures, it could suggest that Vic will shoot at the pictures. As with W's testimony, there is a question of whether this is relevant - shooting at pictures does

not mean Vic will shoot at Ace. But it is a brick in the wall, and should be admitted as part of the story.

======== End of Answer #1 ========

2)

======== Start of Answer #2 (1293 words) ========

Testimony of Dr. E:

D would first argue as to Dr. E's qualifications as an expert. In order for an expert to give expert opinion he must be qualified as a witness. P would argue that as an experiences tire analyst and professional, not only was he experienced, but he was knowledgeable. Also, he was still active in the field in that he was currently creating new tests as to the reliability of tire. Dr. E would likely be considered qualified.

D would then argue that as his test was a new technique to the scientific and legal community it would be subject to Kelly under California law. Under *Kelly*, the new technique must be generally accepted in the relevant community. This is especially true if the test gives an "aura of certainty" that may improperly mislead the jury if incorrect, such as a test determining whether a tire failed. If an appellate court upholds trial courts ruling to allow the evidence, *Kelly* will no longer apply until it can be demonstrated that the is a change in attitude in the community. Here, though, Dr. E. testified that his test is too new to be "generally accepted." D will argue that in the lack of negative response, and the fact that it has been widely published and peer reviewed with no negative reaction in the industry, there is acceptance of his theories. However, by the expert's own admittance, it is not generally accepted as it is too new, and as a result it will not be admissible under California law.

Under federal law, a different standard applies. Under *Daubert*, the trial judge must independently evaluate the testimony and determine whether the scientific technique is

reliable enough to be admitted into evidence. Here, Dr. E has testified that his research was extensive and his publications had been peer reviewed and he had determined the error rates. However, Bob opined that none of Dr. E's test results had been confirmed. Furthermore, the facts don't say what the error rates are but if they are high, that would also go into the judge's determination of admissibility. The judge would need to consider the fact that the test is unconfirmed outside of Dr. E's use of that evidence. The question is whether the new technique is reliable enough for a jury to consider. Here, based on Dr. E's testimony that the evidence is too new to be accepted, and Bob's testimony appears that he is familiar with the test, and that the results are "unconfirmed." Lending themselves towards being unreliable.

However, P will argue that Bob's testimony should be excluded because D had not provided him with the relevant information needed for him to base is conclusion. He will argue that as a result, Bob is not qualified to give that opinion. An expert may base his opinion on one of three things, testimony at the hearing, hypothetical questions, and the relevant reports and documents which experts in the relevant field would consider in coming to their conclusion. Here there is nothing showing that Bob watched Dr. E's testimony, and there are not hypothetical questions. Bob's opinion should be based on the test that he has been brought in to rebut, however, Bob has no knowledge of the most relevant material relating to that test, the publications by Dr. E.

As a result the court will likely find that Bob is not qualified and that Phil should have provided the reports prior to his testimony. To bring the testimony prior to his reading of the relevant publications resulted in testimony that should not have been admissible and was prejudicial to the jury. The testimony of Bob will be stricken based on his lack of qualification. There is also no indication as to what Bob's other qualifications are, but D would want to attck those as well, since he was apparantly not enough of an expert to know he shoud find the relevant publications, or at least ask the attorney who hired him about them.

This brings the question back to whether Dr. E's testimony can come in now that Bob's

testimony is stricken. Here, the judge will need to consider the information as to reliability provided by Dr. E, however, due to the lack of confirmation of his results byond his own error rates, unless his publications are extensive and thoroughly reviewed this test will probably not come in un Federal rule either as it is too new. If P can show that the test is used by more that Dr. E and that other experts have had similar results with similar error rates, he may be able to get the test in. But based on the infomration provided, it is probably not enough.

P's expert as to lost wages

An expert's opinion must be based in reasonable reliance on materials on which other experts in the relevant field would rely. Here, it seems entirely reasonable that an expert would consider the growth of similar companies in size and type, in the year that D was unable to work. P would want to establish with his expert that when considering the lost wages, other experts in his field rely on this information in forming the opinion. As the judge it seems that if other experts rely on this information, it is reasonable reliance and the testimony should be available for the jury to consider. Here, the expert relied on the overall average in the field looking at comparable companies of the same type and size (one employee) of P's company. If a judge were to weigh this, it appears reliable.

D's expert as to lost wages

Again, the issue of last wages is not new or novel and therefore the lesser reasonable reliance test would apply when looking at whether the testimony should be admitted for jury consideration. Experts do not need to agree on their method of evaluation and as long as both used techniques reasonably accepted in their field both experts may come in to testify even if their results are different.

Here, P will argue that it is not reasonable to assume that he is going to have a downturn because, statistically, a lot of businesses have a downturn after being in business for the amount of time that he was in business. This would be speculation

and would be inadmissible. P would argue that speculation is not a basis for an expert opinion and that an expert in the field would not reasonably rely on something that happens to some businesses but not others. A judge needs to way the evidence as to whether the experts opinion is based on reasonable reliance. By simply listing other companies that had a bad year there does not appear to have been a comparison to similar companies that thad a good year on which to make a valid opinion. On eman companies can fail for a litinany of reasons on related to the business or the economic prospects of the business. As a one man company a business could fail due to personal prolems in teh sole employees life. The list companies that did poorly does not take in how the average company such as P's would do over the course of the year. This information is not reliable in determing P;s lost wages and. The industry was probably doing well even if the single one man companie weren't.

Based on the ruling in the *Sargon* case in CA and *Daubert* in Federal law, expert testimony must be reliable. Here the testimony was based almost entirely on speculation and cherry picking only the companies that had had bad years. There is no was a court could reasonably rely on this evidence. It should not come in.

======== End of Answer #2 ========
END OF EXAM