

QUESTION 1
(One hour)

Ace is accused of murdering his neighbor Vic with a handgun.

At trial, Ace called his wife-of-many-years Wilma, to testify in defense that on several occasions during the previous year Ace told her that Vic scared him. Further, that Ace told her two days before the shooting that he was so afraid of Vic that he was going to start carrying his gun and would use it if Vic attacked either one of them. Ace also expected Wilma to testify that during the past month Wilma herself had witnessed Vic making threatening gestures toward Ace, and also Vic taking target practice at a poster sized picture of Ace which was fastened to a fence in Vic's back yard.

Wilma refused to testify, claiming privilege.

Ace testified about the shooting and claimed self defense. On cross examination, prosecutor Pete asked him whether, two days before Vic died, Ace told his psychotherapist Cy and his lawyer Lana that he was having bad feelings toward Vic and was thinking of spray painting "Why don't you move away!" on Vic's fence, and also obliterating the picture of Ace. Ace refused to answer the question, claiming privilege. When Ace attempted to testify to his statements about his fears to Wilma, her lawyer objected that she asserted privilege.

Ace called Sam, an employee at the local copying store, to testify that one month before his death Vic had ordered and picked up five poster sized pictures of Ace. When Sam asked him what that was about, Vic said, "don't worry, I'm just getting ready for hunting season."

On rebuttal Pete called Cy and Lana to testify to Ace's statements. Pete also asked both of them if they had notified anyone after their most recent meetings with Ace, two days before Vic died. Each refused to answer based on their respective privileges.

Also on rebuttal, Pete offered a receipt for red paint and a paint sprayer from the local hardware store the day before Vic died. Officer Ollie testified that he found the receipt in Ace's garage.

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. If Wilma's privilege claim is denied, what if any evidence Ace seeks to admit is admissible. If Lana and Cy's claims are overruled, which if any statements of Ace are admissible.

QUESTION 2
(One hour)

Phil, who owned a small investment company of which he was the only employee, sued Dan for pain, suffering and loss of wages after being seriously injured while driving his car when a new tire manufactured by Dan blew out on the 101 freeway. Phil had purchased it only a month before the accident and had not driven in any dangerous way. Phil was in a coma for six weeks, needed vocational and physical therapy, and was unable to return to work for one year.

At trial, conducted before either a California or Federal judge, Phil called Dr Ed to testify that the tire was defective. Ed, an experienced tire analyst and eminent professor of subjects relevant to tire construction at a major university, stated that Dan's tire was defective based on a new test Ed had devised. Ed described how he tested his test, error rates, peer review and error rates; all had been published in scientific journals. He conceded, however, that though he believed that his test was reliable and that there had been no negative reaction to articles describing it, his test was too new to be generally accepted in his scientific community. Dan's expert Bob testified that Ed's method was not generally accepted in the scientific community, as it was based on new techniques that, in Bob's opinion, had not been confirmed. When Phil showed him Ed's publications on Ed's test and asked Bob what he thought of them, he said that he hadn't read them, because Dan hadn't provided them before the trial. Phil asked for a recess and for the judge to direct Bob to read the materials so that he could be cross examined on them.

On the loss of wages issue, Phil called experts who examined Phil's past earnings compared with comparably sized companies of the same type as Phil's. They then calculated the average growth of the companies over the year and came up with a "lost wages" figure for Phil which assumed that Phil's company would grow at the same rate as the comparables. Their conclusion was that Phil's profits would have grown 20% in the year he missed, and would take 3-5 years to reach the point he would have reached had he not been injured.

Dan's experts used a formula that included an expectation that many businesses take a down turn on their way to success. They calculated that at the time he was hurt, Phil was statistically due for a bad year. In support of their conclusion they cited examples of several similar companies that had experienced bad years where their profits had declined. Their conclusion was that it was probable that Dan's business would have stayed flat had he not been injured.

As an advocate for each party, briefly make all appropriate objections, motions to strike expert opinions and arguments to the above evidence. As the trial judge, discuss at some length the process you would use in analyzing the evidence and the reasons for and against the admission of it. Give the judge's role more weight than in past exams. Answer according to the general principles we've discussed in class, and point out any significant differences between California and federal law.