

QUESTION 1

1. Testimony of Whitney Witness: Whitney is simply a percipient witness, testifying about her observations on the night that the restaurant caught fire. There are no evidentiary problems, assuming she is competent to testify, regarding single fire breakout, the orange Ford fusion drive away, and the fact that two men were in the Ford fusion.
2. Testimony of the text of Blair: although Detective Blair's testimony that the department of motor vehicle records show that in orange Ford fusion was registered to Dalbert may have been logically relevant as having a tendency to prove that Dalbert owns such a car, the testimony also creates legal relevance issues because it potential. He implicates Dalbert, when combined with Whitney's testimony, as the driver of the orange Ford fusion that drove away just as the fire broke out. Dalbert's attorney would argue that such testimony was only collaterally relevant due to the lack of specificity in proving that it was definitely Dalbert scar. The mere reference to and quote orange Ford fusion" would be argued to be too prejudicial because it does not specify with greater certainty other identifying characteristics that narrows the probability that the quote orange Ford fusion" was actually Dalbert's.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Dalbert's attorney would contend that the department of motor vehicle registration, as an out of court statement, was being offered to show the truth of Dalbert's ownership of a in orange Ford fusion and should be excluded as inadmissible hearsay unless an exception applies. The prosecutor will argue that the department of motor vehicle registration is admissible, because, as a public or official record, it was undoubtedly made within the scope of the duty of a public employee at or near the time of the registration of the vehicle and is, therefore, trustworthy. In contrast, it is unlikely the record would qualify as a business record unless Dalbert's ownership of the Ford was within the personal knowledge of the entrance of the record.

The department of motor vehicle registration likely would be found to be an authentic document and, therefore admissible if it is established to be a certified public record.

A department of motor vehicle registration would qualify as a writing so that under the best evidence rule/secondary evidence rule, the original document should be produced to prove the content. Here, the issue being Dalbert's ownership as the registered owner of an orange Ford fusion. The prosecutor would overcome the defense objection to a copy of the record if he could show that, as a public record, it was a certified document.

Blair's testimony that he observed Dalbert drive and orange Ford fusion to court may be logically relevant to the issue of whether Dalbert drove or owned a car similar in color and model to the one seen driving from the restaurant fire. It also may be legally irrelevant if it is viewed as raising too many collateral and, thus, prejudicial issues because of its lack of specificity. These might include, for example, further identifying factors that connect the car to Dalbert.

Blair's testimony regarding the color of the Ford would be admissible lay opinion because it appears to be rationally based upon his perception. The prosecutor would also contend that the color and location of the four was within the personal knowledge of Blair because he actually saw the car driven to the courthouse.

3. Testimony of Emma Bezzler: prosecution would argue that Emma's testimony that her employer Dalbert wanted her to "show increased accounts receivable" before the fire as a means of increasing his chances to attain a stimulus loan was logically relevant because it had a tendency to prove the motive for the arson. In contrast, however, there also may be an issue regarding its legal relevance as improper character evidence. Character evidence is generally inadmissible unless the defense opens the door, through the introduction of the defendant's good character or it is offered for an independent relevant purpose by the prosecutor, such as to show common plan or scheme for the commission of an offense, motive or to identify the defendant. In this case, the prosecutor could argue successfully that Dalbert's conduct in requesting, to fabricate the phony accounts receivable was being offered to prove his motive of financial gain regarding the insurance proceeds because they undoubtedly would have been increased if he could show a more profitable business during the recession.

Dalbert's attorney would argue that Emma's testimony was inadmissible hearsay because it was being offered to prove the truth of Dalbert's intention to fabricate phony books for financial gain. As such, it would be inadmissible unless an exception applies. The prosecutor would argue that the statement by Dalbert demonstrated his then existing state of mind, and so is admissible as an exception in proving Dalbert's intent to set the fire, for the purpose of receiving increased insurance proceeds. The prosecutor would also argue that Dalbert's unavailable to testify as a witness because of his potential assertion of his Fifth Amendment privilege against self-incrimination as a defendant would allow the statement because it was inherently against Dalbert's penal interest of the time it was made. The prosecutor also could argue that the statement was an admission and therefore admissible under this exception because it amounted to a prior acknowledgment by Dalbert of relevant facts regarding his motive and identity as the arsonist.

Emma's testimony that she created the increased accounts receivable was both logically and legally relevant, given its tendency to prove both the motive and identity of the arsonist of Dalbert's restaurant. Well Emma's testimony regarding the creation of the accounts receivable could be construed as assertive conduct offered for the truth and thus hearsay, the prosecutor would contend that the statement was admissible under exceptions to the hearsay rule. Emma's conduct in creating the increased accounts receivable seems to implicate her as a co-conspirator in the scheme to defraud the insurance company. Her conduct in creating the accounts receivable as an acknowledgment of the skiing would be at admissible as a co-conspirator admission. Prosecutor could also argue that this was an exception. As a declaration against interest by Emma: Her potential unavailability as a co-conspirator, which would allow her to assert her Fifth Amendment right to testify would trigger the declaration against interest exception.

Emma's statement could also be argued to be admitted under the exception as a business record, given that she was the bookkeeper for Dalbert's restaurant and presumably made a record of the increased accounts receivable at or near the time of the transaction prior to the fire.

Emma's testimony that she saw gasoline being stockpiled is simply the observation of a percipient witness. Tony's comment that he was hired to "fire up the business," could be construed as an admission, however there exists a Crawford/Davis issue regarding the 6th Amendment right to confrontation. Dalbert's attorney would argue that the statement is so ambiguous that it should be given very little weight. However, it does appear that the testimony would survive a hearsay objection as a possible declaration against penal interest. Emma's testimony that Dalbert told her gasoline, "is a great way to start a fire" is hearsay if offered for the truth of the matter stated. The statement is logically relevant to prove that Dalbert may have been the arsonist. The prosecutor would also argue the logical relevance of the statement, since it was made before the fire. If the statement is considered hearsay, then an exception would be needed to make it admissible. The prosecutor would argue that the admission exception would apply. Additionally, the prosecutor would argue that an exception under declaration against interest would allow admissibility. The statement could be used to show Dalbert's intent to cause the fire by using gasoline, but this is speculation, given the facts. The prosecutor would argue that the statement is not hearsay because it is not offered to prove that gasoline, "is a great way to start a fire." But is offered to show that the statement could have been made by Dalbert because of the timing and location of where the statement was given.

4. Testimony of Marcus Welby, M.D.: as a medical doctor, Dr. Welby can provide expert testimony on behalf of Dalbert. Dalbert has tendered his condition of arson phobia and the length of time of his treatment. The physician- patient privilege would be waived by Dalbert although not really applicable in a criminal action.

This is a criminal case in California so that Proposition 8 would apply. This proposition, in part, amended the California Constitution to give parties to a criminal proceeding a constitutional right not to have relevant evidence excluded.

QUESTIONS 2

1. To exclude evidence of the warning part of the label based on hearsay: hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, if offered in evidence to prove the truth of the matter asserted. Here, the wording "Do not exceed 220 pounds on any one rung" is a statement that the rung only has a capacity to hold 220 pounds. If this is offered for the truth of that statement, it is hearsay and can only be accepted into evidence if there is an exception under the California Evidence Code. The defendant presumably would argue that the label is a business record, as it is made in the regular course of business simply for providing information about the ladder and is made by someone in the company with a duty to make the label. Additionally, the defendant may argue that the label is coming in simply to provide evidence that a warning was given, not for the truth of the statement that the ladder's capacity was only 220 pounds
2. To exclude evidence of Pablo's examination by Dr. Good: there are at least two basis for keeping out Dr. Good's examination of Pablo. The attorney work product privilege would apply to the use of this expert pretrial. Additionally, Dr. Good has been retained by the attorney Moe Howard to assist Mr. Howard in his representation of Pablo. Therefore, Pablo and Mr. Howard can argue that all communications should be protected under the attorney-client privilege.
3. To exclude Meg's testimony: the attorney-client privilege is designed to promote effective representation by encouraging clients to disclose all pertinent information, favorable, as well as unfavorable, without fear that others may be informed. Here, the defendant is attempting to have Meg testify about an attorney client interview. Under the facts, it does not appear that Moe and Pablo understood that their communication would be heard by a computer technician "through the computer wiring." The California Evidence Code rejects the eavesdropper doctrine, which permits individuals who overhear attorney-client communications to reveal them despite the desire of the attorney and client to keep the communications confidential. Clients are protected against the risk of disclosure by eavesdroppers and other wrongful interceptors of confidential communication transmitted between clients and lawyers by permitting the holder of the privilege to assert the privilege against anyone, including an eavesdropper, who acquires the information without the clients consent. See California Evidence Code section 952.
4. To exclude the ladder on the ground of lack of authentication and To exclude the ladder on the ground of hearsay as to the label: Although authentication presents only a sufficiency issue, the plaintiff still must offer evidence connecting the defendant with the ladder which the plaintiff has identified as the ladder from which he fell. If made by Get You Up Quick Ladder Company, a label identifying the ladder as manufactured by Get You Up Quick Ladder Company would be an admission and could be offered for the truth of the matter asserted. The problem for the plaintiff is that he must offer evidence connecting the defendant with the label. If no connection is made, the hearsay objection should be sustained. "Under the evidence code, a trial judge may admit evidence on the condition that the

- proponent supply the evidence connecting the item with the case before the close of evidence. Thus, a judge could admit the purported contract, knife, or ladder subject to a motion to strike if the proponent failed to furnish the connecting evidence." (See Mendez text, page 442.)The federal rules allow self authentication in the case of trade inscriptions. Under the rules, the label would provide the necessary link to the defendant to allow the label to be offered against it as a party opponent admission. The label in turn would provide the link connecting the latter with the defendant.
5. To exclude evidence of attorney-client discussions re: mediation: Absent an express waiver of confidentiality, all communications, negotiations, or settlement discussions made for the purpose of mediation shall remain confidential. See California Evidence Code section 1119. See also, *CASSEL v. Superior Court of Los Angeles County*, 2011 DJ DAR 658, which upheld the exclusion of communications between the attorney and client made at mediation in a subsequent legal malpractice action. See also Mendez text, pages 171 and 172.