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## Testimony of Emma

### Request to Falsify Books

#### Purpose/Relevance

This evidence is being used to show that Dalbert had the financial incentive and lack of moral turpitude required to defraud his insurance company via arson. CEC 210 and FRE 401 define relevance as having a tendency in reason to make a proposition that is properly provable in the action either more or less likely. Because the fact that Dalbert was willing to fraudulently complete loan forms, it makes the propositions that he both 1) had the motive to defraud his insurance company and 2) has the lack of veracity or moral turpitude required to do so.

#### Character Evidence

CEC 1100 et seq. and FRE 404 ban the use of character evidence to show conformity of conduct with a given character trait on a given occasion. The proponent can survive objection by showing that the evidence is being used a permissible non-character purpose. Motive, lack-of-mistake, and opportunity are all considered legitimate purposes. In this case, because the evidence does show that Dalbert had a motive to commit the crime for which he is charged, a character evidence objection would be overruled.

#### Hearsay

CEC s1200 et seq and the FRE both define hearsay as a statement made other than by a witness while testifying in the current trial that is offered for the truth of the matter stated. In this case, the evidence, although possibly subject to numerous exceptions, is not being offered for the truth of the matter stated - in fact, it's arguable that any statement of fact or assertion was made. In either case, this evidence is not being offered for the truth of the matter stated - that is, to prove that he indeed asked her to falsify their books to a given amount - but rather to show that Dalbert had a motive to commit the crime. This objection would be overruled.

#### Impeachment

This evidence could also be offered to impeach Dalbert's credibility as a witness. Under the Code in California, s.787 bans the use of prior bad acts for which there has been no conviction. Prop 8, which gives parties to a trial a constitutional right to have relevant evidence admitted, effectively overturned this limitation, making evidence of prior bad acts admissible in criminal trials. The CA supreme court in *Castro* however said that if the crime does not show at least a lack of moral turpitude, then it's use would be a due process violation. Because of this, the evidence would come in in a CA court. It shows that Dalbert is willing to lie, and this is a criminal trial, so it's relevant. In a federal court, under FRE 608, the evidence would also come in as it evinces a lack of veracity - the ability or appreciation of the duty to tell the truth. Objection to improper impeachment would be overruled.

#### Tony's Statement to Emma

##### Relevance

Supra. This statement is arguably relevant, but because it is clearly a play on words, or pun, it may not in fact be indicative of anything. It, by itself, makes nothing more likely, as a jury could easily infer that he meant it the way a business person would - to increase revenue.

##### Hearsay

Supra. This statement, if offered for the truth of the matter stated, would not be admissible, because was made out of court and is subject to no exceptions. In fact, because of it's inherent

double meaning, the court would be wise to consider it inherently unreliable without being able to have Tony explain himself on the stand. Objection sustained.

### **Prejudice**

CEC s.352 and FRE 403 both require a judge to exclude evidence where it's prejudicial impact would substantially outweigh its probative value. Because this statement is very prejudicial - it could lead a jury to believe the double meaning - but by its nature highly unreliable, it should be excluded by this standard as well. Objection sustained.

### **Confrontation**

If the above two objections were overruled, this statement would raise a confrontation issue. Because Tony is not a witness to the trial, and his statement is being offered against Dalbert in a way that suggests accusation, it would violate Dalbert's constitutional right of confrontation to not have Tony say it himself on the stand. The courts have settled this issue through case law. In *Roberts*, the court held that if the statement is *testimonial-in-nature*, it can't come in. In *Crawford*, the US Supreme Court created a test for testimonial hearsay, requiring that it can only come in if the declarant is available to testify, or 2) that if you can show they are *unavailable* to testify, that you had a prior opportunity to cross-examine. In *Davis*, the court ruled that a statement had to be in the court of investigation to an investigative body, after the exigent emergency had ceased. Because Emma is not an investigator and no investigation was occurring, there is no testimonial statement, and the *Crawford* right-of-confrontation issue is not implicated. Objection overruled.

### **Dalbert's Statement to Emma Re: the Gasoline**

#### **Relevance**

Supra. This statement is relevant because it shows that the defendant may have had an ulterior motive in mind when he hired Tony and stockpiled gasoline.

#### **Hearsay**

Supra. Although cryptic, the statement could, and should, be offered for the truth of the matter stated. Because the statement was made by Dalbert, and is offered by the prosecution, it qualifies as an opposing party admission. In federal court, because the statement was made by a party to the action, it is exempted from the hearsay rules altogether. A hearsay objection would be overruled and the statements would come in.

### **Whitney's Testimony**

#### **Lay Opinion**

The Code and the Rules allow for a lay witness to testify in the form of opinion so long as 1) their opinion is based on their perception of events and 2) their opinion is helpful to a jury's understanding. California and Federal case law have enumerated many opinions that lay witnesses are qualified to give, and color of an object is one of them. In addition, the idea that Whitney could spot and identify two individuals in the vehicle is fine - lay opinion can consider quantity, gender, etc. Objection overruled.

### **Detective Blair's Testimony**

#### **Expert Opinion - Cause of Fire**

The CEC and the FRE both permit expert opinion when it is necessary for the jury to understand an issue in the trial. Here, because the cause of fires can be subject to technical determination, it is appropriate to have an expert testify. In CA, the requirements include that he be qualified, and that his conclusion be based on matters reasonably used in the field. He was "recognized" as an expert, and no facts suggest he used suspect means, so his testimony

would be acceptable to prove the fire was started by gasoline. In addition, the factors outlined by the CA Supreme Court in *Stoll* are not implicated, for fire forensic science is neither "new to the law", nor does it carry an "aura of infallibility or truthfulness." Therefore, the more stringent "generally accepted in scientific community" standard of *Kelly* would not apply. Objection overruled.

### **DMV Documentation Authentication**

In order for the document to be admitted in both Federal and State court, it will need to be authenticated. This will require the court be convinced by a sufficiency standard that the document is what the proponent claims it is.

### **Best/Secondary Evidence**

When testimony or evidence implicates the contents of a writing, as it does here, the best evidence rule is implicated. In a CA court, the rule is relaxed a little and is known as the secondary evidence rule. It requires that copy or certified duplicated of a writing can suffice as original evidence of the writing, and that once entered, the writing can be commented upon by oral testimony. In federal court, the rule requires that the original be obtained if at all possible, and does not favor copies in lieu of the original. In either court, either a copy or the original will have to be produced in order to provide oral testimony on the subject, unless the proponent can show that it has been destroyed or is beyond the reach of judicial procedure. In this case, because Blair provided the certified copy at trial, the objection to best/secondary evidence would be overruled and he can provide oral testimony on the documents. ✓

### **Hearsay - Official Records**

The document also contains a statement - that Dalbert drives an orange Ford Fusion - that is being offered for the truth of the matter stated - to prove that he indeed owns an orange car. One of the numerous exceptions to hearsay rules in both federal and state court is that for Official Records. There are certain requirements that must be met. First the records must be from a qualifying state or local government agency, they must have been made in the regular course and scope of that agency's duty, and the information in them must have been entered by someone with a duty to do so. In this case, it appears that the DMV documentation would qualify and a hearsay exception would be overruled. ✓

### **Judicial Notice**

Judicial notice is a procedure whereby a party can ask the court to recognize the existence of a fact without having to prove it. There are two types of facts that judges typically take notice of; universally known facts, for which mandatory notice is required, and easily verifiable facts, for which permissive notice shall be taken. Because it would be easy to verify that Dalbert did in fact take drive his orange Ford Fusion to court, by simply going to the parking lot and matching the license plate frame to the documentation, the court should take notice that Dalbert did indeed drive the car to court. Motion granted. Note this will create a conclusive presumption, in which the judge will instruct the jury to accept that issue as a matter of fact with no deliberation. NOT USUALLY!

### **Testimony of Dr. Welby**

#### **Relevance/Purpose**

This evidence would be introduced as character evidence to weigh in the defendant's favor. By showing that he is afraid of fire, they are trying to show that he couldn't have been responsible for the blaze.

### **Character Evidence**

Supra. This is an example of the mercy rule, provided for both by the CEC and the FRE. The

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mercy allows the defendant to introduce character evidence - despite the provision in the code that favorable character evidence can only be used once impeached - substantively as an element of their defense. In this case, because the evidence would tend to show that Dalbert is not the type of person that would commit arson, it is being used for a permissible character purpose and this objection would be overruled.

### Privilege - Pscyh-Patient

The code and the common law provide that the communications that occur between a mental health worker or phsyician and their patient are privileged so long as the communication was made with a reasonable presumption of confidence and ocured during the course of the health-care relationship. The privilege is subject to numerous exceptions however. The Physician -Patient privilege simply does not apply to criminal trials. The Psych. -Patient privilege does not apply where the defendant has made put a specific mental condition at issue in their claim or defense however. Because Dalbert has done this, he has waived his right to prevent Dr. Welby from disclosing any pertinent communications they may have had between that could relate to the arsonphobia issue.

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### Pablo v. Ladder Company

#### Motion to Exclude Evidence of Warning - Hearsay

CEC s1200 and the FRE define hearsay as a statement made other than by a witness while testifying in the current trial that is offered for the truth of the matter stated. In this case, the question is the warnign constitutes a statement. Conduct that is not expressly a statement can comprise a statement anyway if any reasonable person engaging in such conduct would consider it a statement. Because the instruction "do not exceed 220 pounds" can only be rationally interpreted to mean "a rung on this ladder cannot hold more than 220 pounds," the declaration is a statement for hearsay purposes. Establishing that, the evidence should be barred as hearsay unless it can be excepted. In this case, the statement on the label could be accepted as a business record. It was presumably made in the regular course of business, for the purpose of providing information on the ladder, and was made by someone with a duty to do so. Because of this the motion would be denied and the statement would come in.

#### Non-Hearsay Purpose

The other issue hurting the possibility of this motion being granted is that the ladder label could be used for various other non-hearsay purposes. The ladder could be used to show knowledge on the part of the plaintiff that he was contributorily negligent or assuming a risk.

#### Motion Re: Pablo's Exam

##### Work Product Privilege

The CEC and the FRE both acknowledge two privileges that protect attorney work-product. One protects the "impressions, thoughts, opinions, legal research" of an attorney that is prepared in anticipation for trial, and this is an absolute protection. The other protects all other information compiled by the attorney but is subject to qualification. The use of an expert to determine pre-trial information is considered protected under this privilege. However, once an expert is designated for testimony, the rules of expert witness testimony control, and the information, reports, and communications regarding the use of the expert and the subject he is testifying on are no longer protected. Because this motion is being made before designating witnesses, the work performed by Dr. Good and any communications or information resulting from it are subject to a qualified privilege. If the requesting party can show that it will be

inherently unfair for them to be denied discovery (usually because there is no other way to get the information), then the privilege can be overcome. If the communications and reports contain information that reflects Moe's impressions, thoughts, strategy, or research, they will be absolutely privileged.

### **Atty-Client Priv**

The CEC and the common law also acknowledge a privilege that protects the communication made in reasonably presumed confidence between a client and their attorney, so long as the communications are made during the course and scope of the attorney-client relationship. In this case, any adjunct professionals or conduits of information, so long as they were used to facilitate information between the client and the attorney, are protected. Communications with experts are considered "conduits" or third-parties that are brought in to aid the attorney and at their behest. Therefore, the communications would also be privileged under this doctrine.

### **Phys-Patient Privilege**

The CEC and the common law also provide for a privilege that protects the communications of physicians and their patient. So long as the communication occurred during the scope and course of the relationship and carried with it a reasonable presumption of privacy, the communication is protected. However, the professional-client privileges are subject to an important exception. When one makes the subject of the privilege a central issue in an action, they waive that privilege as it pertains to those matters. Therefore, this privilege would not be grounds to keep the exam out, but the other two would be. Motion granted to exclude evidence of Pablo's exam.

### **Meg's Testimony**

#### **Eavesdropper Doctrine**

See Attorney-Client privilege supra. In this case, the communication that Meg wishes to reveal would have been protected by the Atty-Client privilege. The code and the rules both reject the notion that ~~an eavesdropper can burst the privilege~~. Instead, the standard is one of reasonable-ness. Would the holder of the privilege, in those circumstances, reasonably expect that the communication was private? Of course they would, no one would have guessed that Meg could hear through buzzing computer wires. This motion is granted as the matter is privileged. Note that the content of the communication likely will not be revealed in determining its privileged nature, so Pablo will avoid a close call on this one.

### **Hearsay**

Supra. This statement qualifies as hearsay because it is an out-of-court statement, being offered to prove the truth of the matter stated - that Pablo was indeed aware of the risk. Because it would be used for a hearsay purpose, it would need a qualifying exception to make it admissible. In federal court, the statement would be exempted from hearsay because Pablo is a party in the action. In the CA rules, the statement would require an exception. The exception for opposing party admissions would make this statement admissible, because it is indeed an admission of a fact by the opposing party. This would not be adequate grounds to deny the motion.

### **Atty-Client Limitations**

The privilege that Moe and Pablo seek to assert is subject to some limitations. Therefore, the evidence that Moe has received from Pablo is not protected. As well, an attorney has a duty to disclose even unfavorable evidence that is material to the action. Therefore, although Moe's motions will likely be granted for the two privileged communications, it is proper that the label will come in. It is relevant and even as Pablo's attorney he cannot ethically bar its entry.

### **Prejudice**

The code and the rules (CEC 352 and FRED 403) allow judge to use their discretion to exclude any matter where the prejudicial impact of the material could substantially outweigh its probative value. Probative value is a measure of relevance, which is defined in the CEC and FRE (210, 401, respectively) as having a tendency in reason to make an issue properly provable in the action more or less likely. The evidence is highly relevant, as it makes the fact that he exceeded the ladder's weight limit very likely. However, this statement doesn't prove his exact weight at the time he was injured, and could be an estimate. Because this evidence, without further corroboration, would tend to prejudice the jury, it could be excluded on those grounds as well.

### **Ladder Company Motion**

#### **Hearsay**

Again, as discussed supra re: hearsay, the ladder label would be allowed to come in for a variety of non-hearsay purposes, including identification, to establish control of safety, and to show that company is aware that weight on the ladder creates a danger. Even for a hearsay purpose, for the truth of proving that the ladder was in fact manufactured by "Ladder Company," it will come to prove the truth of the matter stated as a business record, or perhaps even a statement of identification.

#### **Authentication**

The real issue here is authentication. Because the label is a manufactured is a routinely-made document adhered to a manufactured good, the presumption will be that the label is authentic. Barring any other evidence by Ladder Company that it *isn't* authentic, the issue will go to the jury as a presumption, which will allow the jury to find as a matter of fact that the label is indeed authentic. This would most likely be an example of CEC 603-604 Thayer presumptions, which are made in the interest of trial efficiency. The facts surrounding the label are so strong as to create the presumption that the label is authentic. If the Ladder company is able to produce any evidence that meets a sufficiency standard (the burden of production) - the issue as to the ladder's authenticity will go the jury unbiased by a judicial instruction to find a presumption. If the issue is seen as a Morgan-style presumption, then the burden of persuasion will also shift to the ladder company. Even if they do come up with evidence showing it is not their ladder, the Jury will still be instructed to presume it is unless the Ladder company convinces them by a preponderance of the evidence that it isn't.

#### **Best/Secondary Evidence**

The code and the rules require that in order for oral testimony to be given regarding the contents of a recorded writing, that evidence sufficient to show the existence and accuracy of the writing is necessary. Because this document is the original label, it will satisfy not only the CA secondary evidence standard but also the more stringent FRE Best evidence standard, and oral testimony on the label will be allowed.

#### **Howard Find Howard Motion**

##### **Atty-Client Priv - Atty vs. Client exception**

Defined supra. The atty-client privilege, indeed all professional-client privileges, include an exception that provides that the privilege is waived by the client when he institutes litigation against his attorney. The policy reason is that because the relationship needs to be sorted out through litigation, it is no longer worth protecting and the information pertaining to it is necessary to the new malpractice action. Because the client is holder of the privilege, and the attorney only has the duty to assert it on the client's behalf, the attorney cannot withhold material falling under the exception for his own benefit... once the holder has waived the privilege, the attorney can be compelled to disclose the matter at issue. Therefore, any information that was

protected via Atty-Client privilege surrounding the mediation or it's contents would be available.

### **Work Product**

Defined supra. Pablo, as the client, is not however the holder of the work product privilege. That is held by the attorney, therefore, it can only be waived by the attorney. Because this privilege contains two privileges, Pablo may have some luck with this one as well. Although any work product stemming from the mediation that contained an attorney's thoughts, impressions, strategy, or legal research would be absolutely protected, all other information that was "untainted" by attorney opinion would be subject to the qualified privilege only. Because the only way for Pablo to get at much of that evidence would be by disclosure of his attorney, he will qualify for the circumstances of unfairness that overcome the qualified privilege, and he would be allowed to compel discovery of this material.

### **Evidence of Settlement Offers**

Normally, evidence of settlement offers are not allowed to show awareness of fault per CEC and FRE public policy rules. However, because the evidence of the settlement offer is not being used against a party to the settlement, and is not being used to show his fault, it would be admissible in this new action. Evidence of this would not however be admissible in action between Pablo and Ladder co.

### **Hearsay**

Supra. Again, because Pablo will be bringing in evidence of out-of-court statements, the hearsay rule could be implicated. Under the FRE, because the declarant is a party, it would be exempted, and under the CEC, the statement would be an opposing party admission and would come in.

Motion to exclude denied, except as to absolutely-privileged work product.

**END OF EXAM**

MOTION  
DENIED?