

1)

=====**Start of Answer #1 (1915 words)**=====

1) Prosecution seeks to call the Bartender as a witness to testify that he observed Ace being rude to Velma.

Ace would object to admission of this evidence as being bad character evidence. Bad Character Evidence (1101(a)) is any evidence which shows that a person acted in accordance with a particular character trait and is generally inadmissible for that purpose.

The prosecutor would assert that the evidence that Ace was rude to Velma is being submitted for a non-character purpose under 1101(b), where evidence which seems to be bad character evidence can be admitted to show something other than a person's character traits. Here, the prosecutor would argue that Ace's treatment of Velma shows potential motive, interest in her generally (which goes to knowledge), intent to hit on her and/or treat her poorly, etc. Such non-character purposes all play a direct roll in the issues at hand and may be admitted for those limited purposes.

Therefore, it seems clear that due to the potential non-character purposes the evidence could be admitted for the purposes stated above.

Lastly, Ace could potentially claim the admission of this evidence is too prejudicial and should be excluded by the Judge under 352/403. This argument would likely fail because it is so important as to set up the initial meeting between the victim and Ace.

2) Prosecution seeks to enter into evidence that Ace told Velma, "I'll see you later" when he left the bar.

It's unclear whether Velma or the bartender would testify as to this statement, but it seems as though the bartender overheard it and would testify as to the statement from the facts.

Ace would object to the evidence as hearsay. Hearsay is an out of court statement submitted for the truth of the matter stated.

The prosecution would say that the hearsay falls within one of a couple of exceptions, the most applicable of which are future plans and admission. Admissions are exceptions to hearsay whereby a party admits to a particular fact relevant to teh case. A future plan is an exception to hearsay whereby a person makes a statement as to their intent to do something later.

The statement clearly meets both of those exceptions (as well as a couple of others), and as such the prosecutor is very likely to get the statement in through the exceptions.

Ace could object that the evidence is bad character evidence. The prosecution would again say the evidence is for the non-character purpose showing knowledge, motive, plan, awareness of her, etc. Thus, those and other non-character purposes would permit the evidence to be admitted to show as much.

3) Prosecution seeks to enter into evidence that Ace participated in a sex related crime 5 years earlier, as provided by Wanda and further provided by a conviction.

Ace would first object to the evidence as irrelevant. Generally, relevant evidence is any evidence which tends to, within reason, prove or disprove a fact necessary to determination in the action.

Here, Ace's previously sex crime seems potentially related to the current sex crime; therefore, Ace would further object to the evidence as bad character evidence.

In response to this objection, the Prosecutor would argue that the prior sex crime is an exception to the character evidence wherefore statute provides that a Defendant's predisposition to commit sex crimes, and specific acts showing such, are admissible.

While, on first blush, it would seem that the exception would apply, Ace would argue that the prior sex crime is completely unrelated from the current 'type' of sex crime for which he is being tried. Indecent exposure is far from coming close to rape and, despite both from being sex crimes, are so unrelated as to the types of sex crimes they are, should therefore be excluded and doesn't fall within the scope of the exception.

This argument is likely to win. Additionally, Ace may further rely on 352 to better this argument if the Judge is not initially persuaded, where the Judge could easily determine the prejudicial effect of an indecent exposure from 5 years ago would not be very probative.

Therefore, this testimony will likely not come in. He may get the misdemeanor conviction suppressed on the same basis.

4) Prosecution also seeks to enter into evidence Ace's convictions for larceny and selling cocaine.

Again, Ace would object to this evidence as irrelevant AND Bad character evidence. Here, it is potetially possible he will get it out on the matter of relevancy alone. If not, I do not see a Judge permitting such obvious bad character evidence which is so unrelated to the current crime to come in.

Therefore, this evidence is also likely not to come in. 352/403 could be invoked if the Judge is not initially persuaded and the prejudicial effect would be further weighed against the probative value of such evidence.

5) Ace calls Fred to testify that Velma made a prior false complaint of rape against him 2 years prior.

The prosecution would object to this evidence under Section 782, which prevents normally relevant character evidence as to credibility of a witness/victim to come in that relates to prior sexual history of the victim.

In response, Ace would claim that the prior false claims of Velma do NOT implicate 782 as a false claim of rape doesn't, as a matter of fact, relate to her sexual history, sexual tendencies, etc. While case law is not 100% settled, the argument that a prior false claim is 1) not part of what was banned under 782, and 2) is obviously necessary as to the veracity of the complainant regarding such claims, are both relatively winning arguments.

As such, it seems very likely a Judge would permit the evidence to come in as an exception as to credibility which is implicated to Velma's veracity/truthfulness in making such claims, or, more likely, simply not even implicating 782 because prior false accusations don't involve sexual conduct at all. Therefore, the prior false claim is admissible.

Lastly, depending on the types of evidence brought in with this testimony, other objections may be available to the prosecutor (i.e. hearsay)--but that is not in the facts.

6) Ace calls Velma's husband, Harry, to testify that Harry will testify that Velma admitted she was drinking beer with a friend. Harry doesn't invoke any privileges.

Firstly, the Prosecution would seek to prevent all of this testimony from being admitted into Court with Velma invoking the Spousal privileges and the Marital Communications privilege. The spousal privilege is a privilege held by the testifying spouse not to testify against a party, or non-party, spouse.

In regards to the spousal privilege, it is clearly inapplicable as to Harry's testimony as in this case the privilege belongs to Harry who is called to testify. Here, Harry has chosen to waive his privilege not to testify and, as such, he may proceed, at least generally, in testifying against Velma and in favor of Ace.

The Marital Communications Privilege, however, is a privilege which protects communications made between spouses during their marriage. This is a joint privilege, whereby each spouse is considered a holder and, as such, BOTH spouses must waive the privilege for a communication to come in.

Therefore, as to ACTUAL communications (not the subject matter itself) Velma could invoke the privilege for Harry not to disclose marital communications--and she does.

Thus, as to any and all statements that Velma makes to Harry admitting that she was drinking with a friend, those communications would be protected from disclosure under the marital communications privilege, and Ace would not be able to get them to come in.

Because the subject matter of the communication is not protected, it's possible that Ace may still obtain relevant and good testimony from Harry; however, the specific communications remain protected and the facts are unclear as to any other ways the subject matter itself could come in.

Additionally, when Velma invokes these privileges, she in turn becomes an unavailable witness for purposes of examining her and addressing the complaints made against Ace (or at least parts of the

complaints made against him which would potentially absolve him from the crime). At this point, Ace could potentially invoke his right to confrontation under the 6th Amendment, whereby a criminal defendant has been found entitled to confront a witness as to any claims made against him.

Here, Velma is not fully unavailable, as she must still testify. This is because, when a spouse is not a party, the the Spousal Privilege only permits the non-testifying spouse from testifying against the other spouse, but they must still testify generally. Therefore, the Court would have to determine that Velma's exercise of this privilege (and the marital communications privilege) is enough to make her SO UNAVAILABLE that Ace's confrontation rights are substantially impaired so that he is unable to properly confront the complaining witness.

While the laws are not clear on this issue, it seems that a reasonable court would inquire further. Clearly, Harry is willing to testify as to evidence that may absolve Ace. The Judge is likely to hold a 405 in camera hearing to make this obvious conclusion. In viewing it like that, and in light of *Chambers v. Mississippi*, etc., the Judge could determine that even though she is partially available, her unavailability in invoking the privilege as to absolving testimony is so severe that Ace's right to confrontation is clearly invoked.

Now that the Judge has determined that confrontation is an issue, he would need to determine whether or not the testimony could come in over the privileges still based on whether the testimony is testimonial or non-testimonial, and whether Ace had a prior opportunity to examine her. Here, it seems obvious that, under *Crawford*, the protected communications are testimonial. There were statements as to her state of mind, not made under pressure of investigation (see *Davis*), etc.; therefore, they are testimonial and such testimonial statements do invoke confrontation.

Additionally, the facts do not indicate that, at any time prior, Ace has had an opportunity to confront Velma. Therefore, as to the portions of the communications which were deemed previously protected under privileges invoked by Velma, Ace would be able to get Harry to testify as to Velma's statements that she actually met with a "friend" to get a beer. This is because her unavailability to testify as to such statements creates a confrontation problem, whereby testimonial statements made by Velma must come in if they may despite the privilege due to his right to confront. The statements are obviously relevant, are clearly part of the aim of *Chambers v. Mississippi*, and the like. Thus, through digging into an area still not yet dealt with by Court's, Ace is likely to (or at least potentially could) get the court to override the privileges invoked by Velma due to the confrontation issues that arise and therefore have Harry testify as to Velma's visit at the bar with her "friend." Such evidence that she was actually with another person is very important as to her credibility, the possibility of another witness, the inference that she was actually cheating with another person, etc., etc.

If a Court is not persuaded, Ace may still get Harry to testify as to the subject matter itself without discussing the communications specifically; although, the argument which calls into question Ace's confrontations rights seems to indicate he may get testimony he needs nevertheless through the spouse willing to waive the privilege as created by Velma's unavailability.

85

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

2)

===== Start of Answer #2 (1681 words) =====

1) Paul seeks to call Tom to testify as to his conversations with his patient, Dan.

As the holder of the privilege, Dan would object, or Paul on behalf of Dan would object, that these communications are privileged under the psychotherapist-patient privilege and therefore disclosure is inadmissible. The Psychotherapist-Patient Privilege protects communications made in confidence between a patient and psychotherapist in the relationship between the two.

Initially, Paul would might try to claim that parts of the communication were waived as they were made in the park (a public place). This is initial argument is weak, as Paul would have to be aware of how they met and also then use that as a basis for requesting an in camera hearing (no fishing expeditions), and therefore, the waiver argument is insufficient. Additionally, the facts state they were in a secluded part of the park.

Next, and more likely, Paul would say the communications are excepted under the privilege for 1) violating *Tarasoff* and 2) falling within the scope of the crime-fraud exception. *Tarasoff* is a case which sets forth that psychotherapists have a duty to warn named persons or groups for which they should reasonably believe harm may befall when listening to their patients. The privilege is lost for purposes of warning the potentially harmed parties and for subsequent purposes of disclosure in a potential trial (or in this case the actual trial). Thus, *Tarasoff* seems to be the best exception (as it creates the duty for which a basis is set for Dr. Tom to be sued for negligence as well).

Therefore, due to the *Tarasoff* exception, all communications made from the point Tom reasonably believed (or should have believed) Paul could be harmed will become unprivileged and admissible in Court over privilege objections.

As to seeking testimony from prior to that point, such communications are likely only admissible if the second exception named above applies, Crime-Fraud. Here, it doesn't seem from the facts that Dan was using Tom to enable or aid him in commission of his crime. Therefore, using *Tarasoff*, only those communications from which point Tom could have concluded Paul could be severely harmed would be admissible (against both Tom AND Dan).

Additionally, both Defendant's could then invoke any applicable hearsay objections as to such testimony. Hearsay is an out of court statement submitted for the truth of the matter stated. Paul could then rely on the various exceptions (admissions; statements against interest; etc.), which would likely apply given the nature of those communications. The facts, however, do not get into such evidentiary problems.

Lastly, Paul also tries to get communications from a prior relationship between Dan and Tom when Tom's house burned down. The course of the relationship is clearly in that instance is distinguishable between the subsequent relationship. Thus, the two employment periods will be likely bifurcated and considered separate. Therefore, any exceptions arising from the subsequent communications/relationship, are not applicable to the relationship period years prior involving Dan's own house fire.

If some exceptions did apply to the prior relationship, other objections would follow to such evidence would follow (see the same situations occurring below regarding those objections and resolution of those objections under item 2).

2) Paul seeks to call Larry to testify as to his conversations with his client, Dan.

Dan would object, or Larry on behalf of Dan would object, that these communications are privileged under the attorney-client privilege and therefore disclosure is inadmissible. The attorney-client privilege protects communications made in confidence between an attorney and his client in the course of the attorney client relationship.

Paul would claim the following exceptions: 1) Crime-Fraud and 2) Exception under a duty an attorney has to warn a person of a harmful crime that may befall them learned through communications which an attorney reasonably assumes to believe may actually befall.

As to crime-fraud, it seems like this is the best and most applicable exception. This exception eliminates the entire privilege any time a client seeks services of an attorney to enable or aid them in committing a crime or fraud. This includes mere solicitation and conspiracy crimes, which are crimes in and of themselves.

Here, after Larry is informed of Dan's ill-intent towards Paul, Larry nevertheless provides information to Dan that actually helps him carry out his subsequent illicit plans. Superficially, it would seem that any reasonable person (particularly an attorney) should know that disclosing such information after being informed about a potential crime could and would be used to carry out that crime, which creates a presumption that Larry was used to *enable and aid* Dan in commission of the crimes subsequently carried out. Therefore, at a minimum a conspiracy and/or solicitation to participate in a crime occurred and the crime-fraud exception applies as to all communications made between Larry and Dan during the course of their relationship.

Thus, all such communications are excepted from the privilege and may come in in Paul's cases against both Dan and Larry.

Additionally, both Defendant's could then invoke any applicable hearsay objections as to such testimony. Paul could then rely on the various exceptions (admissions; statements against interest; etc.), which would likely apply given the nature of those communications.

Lastly, as to those statements which relate to Larry's prior relationship with Dan as to Dan's prior house fire—these communications are likely considered outside the current attorney-client relationship for which all communications are now excepted from the privilege. Because they relate to another matter entirely and from a period of employment that is distinguishably longer ago, they are likely not to come in even using the crime-fraud exception.

Additionally, if they were to come, Dan would claim they are not relevant and that it is bad character evidence. Bad character evidence is inadmissible to show that a person acted in conformity with a particular character trait.

In response, Paul would claim that the evidence is submitted for a non-character purpose, such as to show knowledge as to how to burn down a house, etc. Therefore, if he gets over the privilege from the prior relationship in some manner, Paul will win the subsequent arguments as to relevancy and character issues.

3) Paul attempts to call Walt that Walt saw the fire and saw "a big fire, and a red man running away."

Firstly, Walt is a percipient witness and is fine to testify as to merely what he saw without any issues. Dan (and potentially the Tom and Larry) would/could object that Walt is incompetent to testify as to his age. Generally speaking, mere age is insufficient to find a witness incompetent; therefore, his/their first attempts to get rid of Walt would likely fail.

Thereafter, it's possible that they could impeach Walt, based on his age, and his ability to think and perceive what actually occurred. This would go to credibility, which may be considered by the jury if such impeachment is admitted.

As to the actual statement made, they would object as hearsay. Hearsay is an out of court statement submitted for the truth of the matter stated.

Paul would claim that the statement falls within the exception of Statement of Identification. A Statement of Identification is an exception to a hearsay statement that may come in if it purports to describe or explain a person or occurrence at or near the time it was witnessed. Here, the facts seem to indicate that Walt's statement does exactly that and it was made near the time he witnessed everything. Admissibility of the statement will greatly add to his credibility if previously impeached.

4) Paul attempts to call Meg, Walt's mother, to confirm Walt's statements and add that she had previously seen Dan wearing a red sweatshirt while working in his yard, and also called himself the "Human Torch."

Firstly, as to confirming Walt's statements, the hearsay has already been addressed and she may testify confirming it. If, for example, Walt was found incapacitated for some reason, she would be the sole

person testifying as to this statement and the same hearsay exception would apply and the statement would come in. This is not multiple hearsay, unless she were to forget--which isn't in the facts.

Secondly, Dan would object to admission of the statements that Meg has seen him wear a red sweater before as irrelevant.

Paul would argue that the person witnessed starting running from the engulfed house was wearing red; therefore, because Dan regularly wears red would be admissible to show that he is more likely to be the person who did it--which is relevant.

Dan would object to the same evidence as bad character evidence. Paul would claim the evidence is being submitted for a non-character purpose, particularly as to the identity of Dan.

Therefore, the evidence would likely be admitted, at a minimum to showing that Paul was partially identified, or it could be inferred as identification, by his red clothes.

Lastly, Dan could claim the admission of this evidence as too prejudicial and a Judge may rely on 352/403 to remove the evidence. This is not likely--in my opinion.

Thirdly, Dan would object to Meg's testimony that Dan's nickname is the "Human Torch."

Again, Dan would claim this irrelevant and bad character evidence. The same analysis as above would be performed. The evidence is potential, and inferentially, relevant as to the name giving ode to his fire starting abilities and is therefore relevant. While seemingly bad character evidence, it could be submitted for the non-character purpose of intent, motive, etc.

Here, the name doesn't easily fall within such non-character purposes as does the identification through the red sweater. Additionally, the 352/403 analysis seems to indicate that a Judge might determine the admission of such a nickname to be unduly prejudicial against Dan and lacking probative value. Knowing that someone merely has a name that relates to fire for some other reason would clearly be prejudicial and rather tenuous as to showing Dan might have been responsible on that small brick in the wall basis. Thus, it is far less likely his nickname would come in as compared to the red sweater testimony.

=====
===== End of Answer #2 =====

END OF EXAM