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Q1 80+
Q2 80-

84

=====**Start of Answer #1 (1470 words)**=====

Lara's Cross Exam

1) Mace argued with Ace, took away his key, and told him not to return.

Pete will object that this question calls for hearsay, an out of court statement offered for the truth of the matter asserted.

Ace will argue that this is not hearsay because he is not offering it to prove the truth of the statement, but is using the evidence to prove that Ace harbored ill will towards his brother and had a motive to cause him harm.

Pete will object on relevance. Evidence must be relevant to be admitted. Evidence is relevant when it is probative and material. It is probative when it makes the existence or non-existence of a fact more or less likely and it is material when it is directed at an issue properly provable in the action. Pete will argue that the information about this incident has no bearing on proving a burglary.

The judge may well exclude this information as irrelevant.

2) Is Ace the type that would commit a serious crime?

Pete will object that this question calls for character evidence. Character evidence is proper to impeach or support the credibility of a witness, but Pete will point out that good character evidence is not allowed until the witness has been impeached.

Ace will point that under Prop 8, he has a right to offer good character evidence showing that he is not likely to commit the charged crime.

The judge will allow this question.

Mace responds and Lara confronts with prior inconsistent statement.

Pete will object that this question also calls for inadmissible hearsay evidence (defined supra).

Ace will counter by stating that this qualifies as an exception to the hearsay rule. Prior inconsistent statements can be offered for impeachment and for the truth of the matter (only if the prior was sworn in federal court). Mace has stated that Ace is the type to commit serious crimes. Ace has good reason to believe, as required, that Mace has made a prior inconsistent statement. He has a right to confront Mace with his earlier statement to have him explain the inconsistency. Mace has personal knowledge of the statement, since he made it, and is therefore competent to relate it.

The judge will allow this question and answer.

3) Lara asks Mace if he has committed four burglaries in the past 4 years.

Pete may object that this question calls for irrelevant evidence. He will argue that any possible crimes committed by Mace have no bearing on the facts to be proved in this case.

Ace will counter by pointing out that the credibility of witnesses is always relevant. He has the right to impeach Mace's credibility. Here, that right comes from Prop 8 (Ace would not have this right in federal court). Under the broad right to present any relevant evidence under Prop 8, Ace has the right to impeach Mace with any prior bad acts that indicate a lack of veracity.

Pete will argue that burglaries, although a crime of moral turpitude, does not reflect on Mace's trait of veracity.

Ace will claim that it does. Although the crime itself does not really involve a dishonest act or fraud, it does demonstrate a willingness to do harm to others. This makes it more probably that he would harm others by committing perjury.

The judge may well exclude the evidence based on Pete's argument about not relating to veracity. Additionally, the judge may find that the evidences probative value is substantially outweighed by its prejudicial effect on Mace - the jury may not want to find in his favor because of how they view a person who is a habitual burglar. the judge could exclude this under 352/403.

Lara calls Ollie, asks about Mace's prior statement, Ollie confirms.

Pete will object that Ace is again offering hearsy (defined supra).

Ace will counter that he is offering hearsay under the exception for prior inconsistent statements (defined supra). Evidence of a prior inconsistent statement is allowed both for impeachment and for the truth of hte matter asserted (not in federal unless sworn). Ollie's statement as to Ace is clearly inconsistent. However, he said that he could not remember if he told Ollie that he had committed the burglaries because he was drunk when he spoke to him. This is not clearly inconsistent. The general rule is that failure to recall is not inconsistent with an early statement. However, when it appears that the failure to recall is feigned, it is considered inconsistent. There is reason to believe this forgetfulness is feigned. Mace is denying a statement that makes him look bad.

Since Ollie personally observed Mace make this statement, he is competent to testify to it.

So long as the judge believes, as he probably should, that the forgetfulness is feigned, Ollie's testimony should come in under the exception.

Pete calls Lou and offers statements about alleged threats by Ace.

Ace will object to this testimony on the basis of the attorney-client privilege. This privilege applies to communications made between a client and an attorney in the course of an attorney-client relationship. As required, it appears that Ace was communicating with Lou to obtain legal services or advice. The communications must also be made in manner that indicates an expectation of privacy, a fact that is presumed, and there is nothing in the facts to dispute this. Ace, as the holder of the privilege, can raise it himself. His former attorney Lou also has a duty to raise it even though their professional relationship had ended.

Pete will argue that the statement fits an exception to the privilege. When the lawyer has reasonable cause to believe that the client poses a threat of death or serious bodily injury to another person, and that disclosure of the threat is necessary to avoid the threat from being carried out, the communications giving rise to his belief lose the protection of the privilege. Pete will argue that the statement Ace made about his "plans" clearly constitute reasonable cause to believe. This is bolstered by the fact that Lou apparently felt the same way - he disclosed the threat to the person in danger. Not only should the statement to the lawyer be admissible, but so should the statements the lawyer made to Mace and Dawn.

The judge will find that the exception applies.

Ace can also argue that Pete is offering hearsay (defined supra) through Lou.

Pete will be hard pressed to fit the statements within an exception. However, he may argue that he is not offering the statements for the truth of the matter asserted. He will argue that he is using them to show consciousness of guilt. The fact that Ace is planning to deal with this case in a way other than preparing a defense is probative of the fact that Ace has no defense.

The judge will probably allow the statement to stand. It could be excluded under

352/403. Ace will argue that the jury will be unduly prejudiced against him for making these statements and that the probative value is slight.

Dawn's lawyer objects to statement that Lou made to Dawn.

Dawn is raising the psychotherapist-patient privilege. This privilege applies to statements made by a patient to his psychotherapist. A patient is someone who seeks the aid of the psych for purposes of diagnosing, preventing, or treating a mental condition. Psychs are defined in the evidence code. None of the facts presented allow for an analysis on these aspects of the privilege.

Pete will counter that the statement was not communicated between Ace and Dawn, as required to be protected by the privilege. There is no reason this statement should be protected.

Ace will also argue that the statements related to Mace and Dawn are hearsay (defined supra). They are being offered to prove that Ace made the threat.

Pete may make a similar argument as discussed above.

Lara Calls Officer Ed.

Pete will object that Ed's testimony is an inadmissible opinion.

Ace will claim that Ed is an expert witness.

Pete will point out that expert witnesses are only allowed when the jury needs one. Jurors need an expert when they are called to make a factual determination that requires knowledge beyond what they possess. The expert must be qualified on the basis of special knowledge, training, experience, and education.

Ace will argue that Ed is qualified to be an expert by virtue of his being an officer and of having witnessed several crime scene investigations.

The judge should strike all testimony from Ed. First, there is no reason the jury cannot decide for themselves if there was a breaking or if Ed was the guilty party. Second, Ed's experience hardly qualifies him as an expert in the field he is testifying about - burglaries.

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

2)

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===== Start of Answer #2 (1302 words) =====

Does Wendy have to testify?

Wendy raise 3 privileges to try to avoid testifying.

First, she may raise the privilege not to be called by the adverse party in a case where her spouse is a party. Second, she may raise the privilege not to testify against her spouse. This privilege requires that the two be in a legally recognized marriage. The facts state that Vic and Wendy have separated, but not divorced. Assuming they remain married, this requirement is met. The marriage just has to be valid, not viable.

As the witness-spouse, Wendy is the sole holder of the privilege and only she can claim it. Vic cannot claim it to keep her from testifying. Wendy can invoke the first privilege and refuse to take the stand. As to the second privilege, she will have to take the stand and then invoke.

Wendy may also raise the privilege protecting confidential marital communications. This privilege protects statements made in confidence between spouses. Confidence is presumed under. The statements need not be of a confidential nature, they simply must have been communicated in confidence. Since there is no indication that the 3 statements Ace wants to offer were made in a way that negates the presumption of confidence, the

basic requirement of the privilege is met.

Both Vic and Wendy are holders of this privilege. They can each claim it to avoid testifying, and can raise it against another person who has learned of the communication, but neither can invoke it against the other.

Ace will argue that the statements fall within an exception. Statements that are made to enable or aid any person to commit a crime or fraud are not protected. One of the statements fit this exception: the statement made after the accident where Vic asked Wendy to lie.

A judge is likely to find that the one statement fits the exception and is not protected by the privileges. However, only the statement that fits the exception is exempted from protection. Ace can not force Wendy to testify about them through this exception.

Ace may try to override the privileges based on his right to due process. He has a right to present evidence favorable to his case. If he can convince the judge that the statements are absolutely essential to his case and that he has no other comparable evidence, the judge could overrule the privilege. The judge will consider whether or not there are witnesses to the accident in evaluating this. Ace probably cannot override the privilege in this way.

Assuming Wendy's claim of privilege as to the one statement is overridden, Vic can still object that Ace is offering hearsay (defined supra).

Ace can counter that he is not offering the statement for the truth of the matter asserted. He is offering it as consciousness of guilt.

Vic will say that the statement only indicates consciousness of guilt if the statement is believed.

Ace can also argue that the statement fits an exception to the hearsay rule, excited utterance. He will argue that Vic made the statement in the excitement of the moment before he had recovered his powers of reflection. As required, he can easily prove the existence of the startling event even without using the statement itself (as allowed in federal courts).

Vic will counter by stating that under CA law, this statement does not fit the exception. In CA the statement must describe, narrate or explain the startling event.

If they are in Federal court, Ace can argue that the statement simply has to relate to the startling event.

Finally, Ace can argue that this statement fits the exception for party admissions. Vic is a party of the lawsuit. His statement implies that he knows he did not have the right of way.

Vic will argue that he was not making any admission in the statement.

As judge, I would be most swayed by the consciousness of guilt theory and the party admission. I would probably allow it under the first theory along with a limiting instruction to the jury that they are not to consider the statement for the truth of the matter asserted, but that they could infer from it that Vic knew he was in the wrong.

Dr. Ken the Expert

Expert witnesses are called for when the jury must make a factual determination that calls for knowledge beyond what they have. It is not appropriate for matters that the jurors are qualified to adjudicate without any outside guidance. The expert must be qualified by reason of special knowledge, training, experience, and education.

This showing is dubious here. Ken's special training is on the administration of justice.

Where is the relation to marriage and loss of consortium? His book adds little since there is no indication it was based on anything other than his own thoughts. His lectures also fail to indicate any special knowledge.

The judge may be reversed on his decision based on an abuse of discretion. It seems fair to infer that he allow his personal feelings to influenced his decision.

Since the expert is qualified by the court, we next look what he is basing his opinions on.

CA analysis

In California, the standard test for admitted expert evidence is that the expert must base his opinion on sufficient data or information of the type reasonably relied upon by experts in the field and that the expert must follow accepted protocols or methods.

When the opinion is based on a novel theory or technique, an additional showing is required. Under the Kelly test, the theory/technique must be sufficiently established to have achieved general acceptance in the particular field. This has been the standard test for some time. In the recent CA Supreme Court case Sargon, the court seemed to be indicating that judges should take on more of a gatekeeping test to exclude expert testimony based on unreliable techniques or theories.

Ace will point out that Dr. Ken's opinion is based on one conversation with Vic and on his special theory. This does not seem sufficient to form an opinion. It also does not meet the reasonable reliance by the particular field based on Ken's own statement that no one else was practicing in the field. Again, because of the newness of the theory, there do not appear to be any accepted protocols or methods. Ace will argue that the Kelly test must be satisfied.

Ace will again argue that the lack of acceptance in the field, based on there not being a

field, fails to satisfy the Kelly test. He will also argue that it fails the reliability test apparently promoted by Sargon.

All that Vic has to argue in support of the theory is that the book has received rave reviews, including from the judge. But who is reviewing the book? Experts on marriage?

A reasonable judge would exclude any testimony from Ken for failing to meet any of the required tests.

FED analysis

Federal courts follow a different approach. Under the FRE, expert opinions must be based on sufficient information of the type reasonably relied on by experts in the field, it must be based on reliable techniques or methodologies, and the expert must have followed accepted protocols. Under Daubert, reliability is tested under various factors: whether or not the theory or technique can be subjected to testing; are there known rates of error and proper methods or protocols; the general acceptance in the pertinent field; and whether or not it has been subjected to peer review.

For the same reasons discussed above, Ace will argue that Ken's opinion and theory fails all of these tests. There appears to be no testing of his theory. No other experts are relying on it. It may be subject to testing, but there is no indication it has been.

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

END OF EXAM