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----- QUESTION ONE -----

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Q 2 85

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The Prosecution calls Officer Ollie (Expert)

Defendant's Objection: Lack of Foundation as an Expert as to Qualificaitons; Ollie should be classified as a layperson

Prosecution's Rebuttal: The prosecution will argue that Ollie is not a lay person providing a lay opinion, but instead an Expert. As an expert, Ollie will have to pass foundational requirements that demonstrate to the judge by a preponderance of the evidence that he possess the requisite qualificaitons to sit and testify as an expert. Here, Ollie has been a policeman for twenty years, and be trained by other officers with regard to illegal drugs, and spent time on the Narcotics Task Force. Furthermore, "police experts routinely testify in drug cases." This is enough evidence to convince a judge by a perponderance of the evidnece that Ollie is an Expert. Therefore, the defendant's objection will be overruled, and Ollie will be permitted to testify as an expert.

Defendant's Objection: Louis as a Witness -- Impeach for Bias, Confrontation violation

The Defendant will object to evidence provided by Louis because Louis should be impeached for Bias. Louis is being arrested for the same crime as Ace, which means that Louis has an absolute stake and advantage in not being prosecuted for the charge. Furthermore, case specific facts relied on by Expert Ollie will be hearsay under *Sanchez*. Hearsay is an out of court statement offered for the truth of the matter asserted. If Louis is unavailable as a witness during the trial, Ace's will have a confrontation violation. A confrontation violation occurs when an unavailable witness offers testimonial hearsay and the defendant did not have the prior opportunity to cross examine that witness. Here, case specific hearsay is being related to Officer Ollie, Louis is not being called to testify, and Ace has no meaningful chance to cross-examine Louis as to that hearsay. The hearsay related by Louis is testimonial in nature, because it being offered to Expert Ollie principally to aid in litigation. Therefore, the judge should sustain the defendant's objection as to a violation of his right to Confrontation.

Prosecution's Rebuttal: Hearsay exception for Co-Conspirator Declarations

The Prosecution may try to overcome the Confrontation violation by arguing that any hearsay provided by Louis re: Ace is admissible for the truth of the matter asserted as a co-conspirator declaration. The Defense will argue that a co-conspirator declaration must be made prior to or during the commission of the conspiracy--not after the conspiracy has terminated. Here, the conspiracy had already terminated since Ace and Louis were already arrested. Therefore, the judge should uphold the Confrontation violation.

Defendant's Objection: Expert inappropriately relates ultimate issues of law

The Defendant will object to Officer Ollie's testimony that "Louis told the truth." That issue is for the jury to determine, not for the expert. Ollie's testimony that "Ace was guilty as charged" is an ultimate issue of law, which an expert may not relate nor comment on. Experts can help determine ultimate factual issues, but never issues of law such as guilt--that determination is for the jury.

Defense Calls Dr. Ed (Expert)

The Defense calls their own Expert, Dr. Ed. After laying a proper foundation for Dr. Ed's credibility as an expert witness (Ph.D, dissertation on drug experts, professor), Dr. Ed concludes that the NTF's methods were based on unreliable information and speculation. Dr. Ed does not provide any information in

support of his expert opinion. If NTF's methods were those reasonably relied on by others in the field (assuming they're not so novel as to qualify for analysis under *Kelly*), then it's unlikely that NTF's methods will be found unacceptable. The Prosecution will argue that Officer Ollie's opinions were the result of the same tests that are reasonably relied on by other experts in the field. Federally, under Daubert, the prosecution would have to show that Officer Ollie relied on methods that were both reliable and relevant. There are not enough facts to support a determination that under Daubert, Officer Ollie's testimony was reliable. Furthermore, the prosecution will argue that Ed is subject to impeachment for bias because he makes most all of his income testifying as a defense expert in drug cases. At the very least, the bias goes to Dr. Ed's credibility as a defense expert.

Defense Calls Louis' Wife Wilma

Prosecution's Objection: Spousal Privilege not to testify against spouse; Confidential Marital Communications

The prosecution will argue that Wilma has a privilege not to testify against her spouse in any hearing. While true, Wilma is the holder of this privilege, *not* Louis, and thus when Wilma agrees to testify, she has effectively *waived* her right to invoke this privilege. Next, the prosecution will argue that anything said between Louis and Wilma is privileged under the privilege for Confidential Marital Communications.

With regard to confidential marital communications, both spouses are holders of the privilege, and either make invoke the privilege, even against the other. However, an exception to the confidential marital communications privilege is when one spouse seeks the aid or involvement of the other spouse in the commission of a crime or a fraud. In this case, Louis is seeking Wilma's help to commit fraud against the court for any statements he's made to her regarding drugs. The defense will argue that Louis' requests fall within the crime-fraud exception, and the court will likely agree and allow the evidence in.

Furthermore, the defense will also try to fit Louis' comments regarding being the "big man in waiting" and "setting up" Ace for a fall under the crime-fraud exception, since setting someone up for a crime would be criminal, however, Louis is not seeking Wilma's help to commit this crime or fraud, and thus these statements will not be admissible under the crime-fraud exception. The defense will also try to get them in under the completeness doctrine, but this too will fail, since the comments don't really provide any meaningful context for Louis' other statements. Finally, the prosecution will argue that even if Louis' comments *do* come in, it is hearsay. The defense will argue that they are being offered under the declaration against interest exception, because Louis is unavailable as a witness, and Louis' comments are a statement against penal interest. Therefore, the judge will allow Louis' comments over a hearsay exception.

Defense Calls Walt

Finally, the defense calls Walt, Ace's neighbor. Ace seeks to offer Walt's statements regarding Louis' drug use. The prosecution will argue that this is bad character evidence under CEC 1101, which is evidence offered to prove that because Louis engaged in this kind of behavior in the past, Louis engaged in that behavior in the present. The defendant will argue that they're not seeking a character propensity purpose, but rather seeking to admit the evidence under 1101(b) to show a common plan or scheme with regard to selling cocaine, or absence of mistake or accident, or perhaps even knowledge and familiarity with cocaine. Thus the judge should allow the evidence under 1101(b). The prosecution will also argue that the "offer" to share cocaine is assertive conduct that falls within hearsay. The defense will overcome the hearsay objection by admitting evidence for the non-hearsay purpose of showing that Louis has knowledge and familiarity with cocaine. The prosecution will then rebut that the evidence, including the evidence of Louis hitting Walt with a chair, are prior bad acts. The defendant will rebut this by arguing that prior bad acts are admissible in California criminal court for crimes that evince "moral turpitude," or a readiness to do evil. The prosecution will argue that these prior bad acts do not show a readiness to do evil. The defense will argue that offering drugs for sale shows a "readiness to corrupt others," which qualifies as a readiness to do evil, as does hitting someone with a lawn chair. The judge should allow the evidence. Under the federal rules (FRE 609), the defense would have to show that the bad acts related to Louis' bad character for honesty. The defense would probably be able to get in Louis'

attempts to share drugs, which might be construed as a dishonest act, but not hitting Walt with a lawn chair, federally.

Plaintiff's Lawyer Sally's Disclosures

Sally invokes the Attorney-Client privilege, which protects confidential communications between a client and a person the client believes to be an attorney. Sally need not disclose any confidential communications transmitted by her clients. Here, however, the communications that the State seeks are not communications by Sally's clients, but rather interviews with percipient witnesses. Therefore, Sally's attorney client privilege will fail. Sally will next argue that she has an absolute work-product privilege to part of the information contained in the interviews, and also the information on the tapes. An absolute work-product privilege will prevent an opposing side from discovering an attorney's thoughts, impressions, ideas, and strategies. If the information contained on the interviews and on the tapes are questions that Sally asked, which *could* provide insight into her strategy, and form her ideas or impressions, she will have an absolute privilege not to disclose the information, especially where the witnesses are known and the State can simply conduct their own interviews. The State will argue that Sally only has a qualified work-product privilege, and argue that, by not having access to the information, they suffer an unfair disadvantage in the litigation that will result in substantial injustice. This argument is likely to be a winning argument since the witnesses and Dan are refusing to provide the State with the necessary information to provide a defense. Therefore, the Court will likely compel the disclosures.

Finally, Sally will argue that the disclosure violates her clients' right to privacy, a state constitutional right. In order to overcome with assertion, the State will need to demonstrate a compelling purpose for the disclosure, which it likely *can do*, since it has a compelling purpose in defending itself against potentially meritless lawsuits. The court will compel disclosure.

Plaintiff's Lawyer Sally calls Student Louise

The State will object to Louise's testimony as *lay opinion*. Lay opinion is admissible if it is rationally based on the perception of the witness, and helpful to a clear understanding of the testimony. Sally will argue that Louise's testimony is rationally based on Louises' perception on that day, and provide context which is helpful to her testimony. The judge will allow Sally's lay opinion.

The State will next object to Louise's testimony as character evidence, *supra*. Sally will seek to admit Louise's statements describing Ace as a strong swimmer under CEC 1101(b) for a non-character purpose of showing that Ace did know how to swim, and not that he was fit to swim on that occasion.

The State will further object to this testimony as hearsay (*supra*) for the statements by Louise that "Ace called out that the river's current was too strong." Sally will overcome the hearsay objection by offering the statement under the exception for a dying declaration, or perhaps even an excited utterance. A dying declaration is a declaration made by an unavailable declarant that describes the circumstances of their death upon a belief of imminent death. Here, it's possible that Ace did think the current was too strong, and believed he would not be able to make it back to shore, thus believing in his imminent death.

Alternatively, Ace may have shouted the statement out as an excited utterance--a spontaneous statement made during a moment of shock or surprise without the opportunity for reflection. Either way, Sally will be able to overcome the hearsay objection.

State's cross-examination of Sally

Sally will object to the Louise's testimony about Ace being in "no shape to go swimming" as hearsay (*supra*). The State will counter that it's offering the statement as a prior inconsistent statement, both for the truth of the matter asserted, and for impeachment purposes. Under Sally's direct of Louise, Louise claimed that Ace looked sober and was a strong swimmer. Her statement to Ace that he "looked to be in no shape to go swimming" and was a "wimp swimmer" is a prior inconsistent statement. As long as Sally is given an opportunity to explain or deny her prior inconsistent statement, it will be admissible. Here, it seems she had the opportunity to explain or deny it, but there are no facts to support that she explained or denied it. Therefore, Sally's credibility as a witness is especially suspect given her prior inconsistent statement.

Sally also objects to State's questioning of Louise re: preparing for testimony. Sally again cites the attorney-client privilege and work-product doctrines. Here, Sally is *not* Louise's attorney, and thus her communications fall outside the scope of the attorney-client privilege. Sally's work-product privilege objection have greater merit, because anything discussed between Sally and Louise might provide insight into Sally's trial strategy. Therefore, the court should uphold Sally's work product claim.

The State also asks Louise if she had a crush on Ace in school. Sally's first objection will be relevance. Relevance is evidence having a tendency in reason to prove or disprove a dispute fact that is of consequence to the determination of the action. Although generally Louise's feelings toward Ace are not relevant, in the context of whether Louise is biased as a witness, they may be relevant. Therefore, the court should allow this to come in for the purpose of bias, contributing to impeachment of Louise.

Sally calls Dr. Dan (Physician)

The State will first argue that Dr. Dan's testimony falls under the physician-patient privilege. the information being provided by Dan is not the result of communications between Ace and Dan, but instead his expert opinion based on his knowledge of Ace. Therefore, this information will come in.

Sally attempts to prohibit the State from asking Dan on cross whether or not Sally had threatened to put Dr. Dan out of business. There is no attorney-client relationship between Dr. Dan and Sally, so that privilege is unavailing. Furthermore, the work-product privilege will also be unavailing. If Dr. Dan is being called as an "expert witness," which he likely is, then Sally will not be able to prohibit this line of questioning. Once an expert witness is irrevocably designated or called by a party, then the other party has the opportunity and right to fully cross-examine that party. Therefore, the judge should allow the State's line of questioning.

Nor may Sally argue the Physician-Patient privilege, since the questioning is not about matters between a Physician and Patient, nor do the disclosures have anything to do with diagnosis or treatment.

Sally calls Jane (Ace's Mom)

The State will object to Jane's testimony as irrelevant (*relevance*, *supra*). However, Ace's behavior prior to his death is relevant in a wrongful death claim. Next the state will object to this testimony as character evidence. Sally will overcome this objection by using the statements for the 1101(b) purpose of showing that Ace's drowning was due to an absence of mistake or accident on Ace's part.

When the State cross-examines Jane, Sally will object to the evidence as being irrelevant. However, the testimony may be relevant for the purpose of impeaching Jane's comments that the entire family was wonderful. Next, Sally will cite Jane's privilege not to testify against her spouse in any proceeding, but the State will counter this argument by showing that Jane already waived that privilege by testifying for Sally. (If being convicted of drunk driving is a felony) The State will attempt to offer evidence of felony drunk driving conviction to impeach Jane's statement that everyone was wonderful, and potentially to show alcoholism in the family, or potentially for the 1101(b) purpose of showing Ace had access to alcohol. Sally will argue that, under Beagle, only felonies that say something of the witnesses' veracity are admissible. If this fails, Sally will urge the judge to exclude evidence of the father's alcoholism on CEC 352/FRE 403 grounds, meaning that the prejudicial effect of the evidence substantially outweighs

its probative value. Ultimately, the judge should exclude this evidence either under Beagle, or 352/403. As a last ditch effort, Sally can also invoke Jane and Tom's state constitutional right to privacy, which would force the State to show a compelling purpose to override their privacy interests.

END OF EXAM