

Question 3

Dustin has been charged with participating in a robbery in California on the morning of March 1.

(1) At Dustin's trial in a California state court, the prosecution called Wendy, who was married to Dustin when the robbery took place. Dustin and Wendy divorced before the trial and Wendy was eager to testify.

During the direct examination of Wendy, the following questions were asked and answers given:

(2) Prosecutor: You did not see Dustin on the afternoon of March 1, is that correct?

Wendy: That is correct.

(3) Prosecutor: Did you speak with Dustin on that day?

Wendy: Yes, I spoke to him in the afternoon, by phone.

(4) Prosecutor: What did you discuss?

Wendy: He said he'd be late coming home that night because he had to meet some people to divide up some money.

(5) Prosecutor: Later that evening, did you speak with anyone else on the phone?

Wendy: Yes. I spoke with my friend Nancy just before she died.

(6) Prosecutor: What did Nancy say to you?

Wendy: Nancy said that she and Dustin had "pulled off a big job" that afternoon.

(7) Prosecutor: Did Nancy explain what she meant by "pulled off a big job"?

Wendy: No, but I assume that she meant that she and Dustin committed some sort of crime.

Assuming all proper objections, claims of privilege, and motions to strike were timely made, did the court properly allow the prosecution to call the witness in item (1) and properly admit the evidence in items (2) - (7)? Discuss.

Answer according to California law.

Question 3

Dustin has been charged with participating in a robbery (A robbery is defined as a “serious felony” within the California Evidence and Penal Code) in California on the morning of March 1. (Criminal Case in California)

(1) At Dustin’s trial in a California state court, the prosecution called Wendy, who was married to Dustin when the robbery took place. Dustin and Wendy divorced before the trial and Wendy was eager to testify. (This interrogatory deals with privileges. In California, the two privileges applicable to be discussed here are the “Privilege Not to Testify against a Spouse” and the “Privilege for Confidential Marital Communications”)

During the direct examination (CEC §760 defines “direct examination” as the first examination of a witness upon a matter that is not within the scope of a previous examination of the witness) of Wendy, the following questions were asked and answers given:

- (2) Prosecutor: You did not see Dustin on the afternoon of March 1, is that correct? (Leading question on direct)
Wendy: That is correct.
- (3) Prosecutor: Did you speak with Dustin on that day? (Personal Knowledge)
Wendy: Yes, (Non-responsive – Motion to strike) I spoke to him in the afternoon, by phone.
- (4) Prosecutor: What did you discuss? (Narrative)
Wendy: He said (Admission) he’d be late coming home that night because he had to meet some people to divide up some money. (Admissible as a statement of Dustin’s then existing state of mind (mental state) to prove his intent or plan; Also possibly a specific incident of misconduct of character evidence to prove intent, plan or knowledge)
- (5) Prosecutor: Later that evening, did you speak with anyone else on the phone?
Wendy: Yes. (Non-responsive – Motion to strike) I spoke with my friend Nancy just before she died. (Unavailable)
- (6) Prosecutor: What did Nancy say to you?
Wendy: Nancy said (Hearsay) that she and Dustin (Statement by a co-conspirator which brings up possible confrontation clause problems) had “pulled off a big job” that afternoon. (Declaration against interest subjecting Nancy to criminal liability)
- (7) Prosecutor: Did Nancy explain what she meant by “pulled off a big job”?
Wendy: No, but I assume (Speculation – Lack of personal knowledge) that she meant that she and Dustin committed some sort of crime. (Possibly opinion testimony)

Assuming all proper objections, claims of privilege, and motions to strike were timely made, did the court properly allow the prosecution to call the witness in item (1) and properly admit the evidence in items (2) - (7)? Discuss.

Answer according to California law.

(1) Did the court properly allow the prosecution to call Wendy?

The court improperly allowed the prosecution to call Wendy *if* the communication that took place that afternoon on the phone was made by Dustin **in confidence** to Wendy.

Here, the facts state the prosecution called Wendy, who was married to Dustin when the robbery took place. Dustin and Wendy divorced before the trial and Wendy was eager to testify.

Privilege Not to Testify Against Spouse

California Evidence Code (CEC) § 970 states a married person has a privilege not to testify against her spouse in *any* proceeding. CEC § 971 goes on to state that a married person whose spouse is a party to a proceeding has a privilege not to be called as a witness by an adverse party to that proceeding without the prior express consent of the spouse having the privilege under this section. California follows the federal rules.

Here, Wendy holds the privilege not to testify against Dustin, but the facts state she is eager to testify. In addition, she and Dustin have divorced even though Dustin was her husband when the robbery took place. Thus, this privilege does not apply due to the end of the marital relationship and Dustin cannot foreclose her testimony.

Privilege for Confidential Marital Communications

CEC § 980 states a spouse, whether or not a party, has a privilege during the marital relationship **and afterwards** to refuse to disclose, and to prevent another from disclosing, a communication if he claims the privilege and the communication was **made in confidence** between him and the other spouse while they were husband and wife.

Here, Dustin has a privilege to prevent Wendy from disclosing the phone conversation *if* the communication was made “in confidence” between him and Wendy. The fact that the married couple spoke by phone that afternoon could well indicate the communication was made in confidence as most marital communications made on the phone are private.

Thus, it is up to the court to determine whether the communication falls under this privilege.

Did the court properly admit the following evidence?

(2) Prosecutor: You did not see Dustin on the afternoon of March 1, is that correct?

Wendy: That is correct.

*Witnesses – Method and Scope of Examination - Examination of Witnesses –
Leading Questions*

CEC § 767(a)(1) states that except under special circumstances where the interests of justice otherwise require a *leading question* may not be asked of a witness on direct or redirect examination.

Here, this question by the prosecutor suggests the answer. Thus, it is leading and should be rephrased.

(3) Prosecutor: Did you speak with Dustin on that day?

Wendy: Yes, I spoke to him in the afternoon, by phone.

Witnesses – Competency – Personal Knowledge; Speculation

CEC § 702(a) allows the testimony of a witness only if she has personal knowledge of the matter. Such personal knowledge must be shown before the witness may testify concerning the matter. A witness's personal knowledge may be shown by her own testimony.

Here, Wendy has personal knowledge of her conversation with Nancy and may testify about the contents of that discussion.

Non-responsive; Motion to Strike

CEC § 766 states a witness must give responsive answers to questions, and answers that are not responsive shall be stricken on motion of any party.

Here, this question calls for a yes or no answer and nothing more. Thus, the answer is not responsive and it shall be stricken.

(4) Prosecutor: What did you discuss?

Wendy: He said he'd be late coming home that night because he had to meet some people to divide up some money.

Narrative

CEC § 765(a) states the court shall exercise reasonable control over the mode of interrogation of a witness so as to make interrogation as rapid, as distinct, and as effective for the ascertainment of the truth.

Here, the court should exercise control over the question as it could lead to a slow, long-winded, ineffective answer to the interrogation by the prosecutor. Asking what the married couple discussed is open-ended and could lead to confusion. However, since the response was terse, the objection should be over-ruled.

*Admitting and Excluding Evidence - General Provisions -
Relevance*

Under CEC § 350 no evidence is admissible except relevant evidence. Here, the evidence is relevant to prove whether Dustin was a participant in the robbery.

Statements of Mental State

CEC § 1250(a) states that evidence of a statement of the declarant's then existing state of mind (including a statement of **intent, plan, motive or design**) is admissible by when: (1) The evidence is offered to prove the declarant's state of mind at that time or (2) The evidence is offered to prove or explain acts or conduct of the declarant.

Here, the evidence is offered to prove Dustin's intent or plan to divide up the money. It may also be used to prove Dustin's conduct on the day of the robbery. Thus, it is admissible as a statement of the defendant's mental state.

Evidence of Character

CEC § 1101(a) deals with the evidence of a person's character or a trait of his character (whether in the form of evidence of specific instances of his conduct) and is inadmissible when offered to prove his conduct on a specified occasion. However, this section allows the admission of evidence that a person committed a crime when relevant to prove **motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident**, but not one's disposition to commit such an act.

Here, the fact that Dustin was going to meet some people to divide up money is a specific act and may be relevant to show his knowledge of the robbery and his intent in planning to divvy up the proceeds. This would not be relevant to prove his conduct on this specific occasion but would be relevant to show how the plan was carried out. The better reason for admitting the evidence would be as statement of Dustin's mental state.

Hearsay Evidence

CEC §1200 (a) defines "Hearsay evidence" as evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated and is inadmissible.

Here, the statement by Dustin is offered to prove the truth and is inadmissible unless an exception applies.

Exceptions to the Hearsay Rule – Admission

CEC§ 1220 allows evidence of a statement when offered against the declarant in an action to which he is a party.

Here, Dustin's own statement that he had to meet some people to divide up some money is being offered against him at his robbery trial. It is admissible as an admission.

(5) Prosecutor: Later that evening, did you speak with anyone else on the phone?
Wendy: Yes. I spoke with my friend Nancy just before she died.

Non-responsive; Motion to Strike

CEC § 766 states a witness must give responsive answers to questions, and answers that are not responsive shall be stricken on motion of any party. This item of evidence should have been stricken after the word yes.

Words and Phrases Defined - Unavailable

Under CEC § 240(a)(3) a declarant is "Unavailable as a witness" when that declarant is dead. Here, Nancy died and is therefore unavailable.

(6) Prosecutor: What did Nancy say to you?

Wendy: Nancy said that she and Dustin had “pulled off a big job” that afternoon.

*Hearsay Evidence – General Provisions – Exceptions to the Hearsay Rule –
Declarations Against Interest*

CEC § 1230 states evidence of a statement by a declarant having sufficient knowledge of the subject is admissible if the declarant is *unavailable* as a witness and the statement, when made, was ***so far contrary to the declarant’s*** pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.

Here, Nancy, who is unavailable, stated she and Dustin had just “pulled off a big job.” Dustin has been charged with participating in a robbery in California on the morning of March 1. Since Nancy made the statement on March 1, a statement like that could effortlessly subject her to criminal liability. It is a statement that is so far contrary to Nancy’s interests and freedom. Thus, it is a declaration against interest.

Confessions by Co-conspirators

CEC §1223 allows evidence of a statement offered against a party if: (a) The statement was made by the declarant ***while participating in a conspiracy*** to commit a crime and in furtherance of the objective of that conspiracy; and (b) The statement was ***made prior to or during*** the time that the party ***was participating*** in that conspiracy.

Here, the statement was arguably made while Dustin and Nancy were participating in the closing stages of the conspiracy to commit robbery and in furtherance of the objective to split the money. This exception is not likely to apply as Nancy made the comment after the crime had been pulled off.

Confrontation Clause problems

Nancy is unavailable and Dustin had no opportunity to cross-examine her regarding the statement. Hence, it is possible that the statement made by Nancy, implicating herself and the defendant, Dustin may not be admissible. The court should exercise discretion and possibly redact the part of Nancy’s statements that relate to Dustin’s actions.

Contemporaneous Declarations

CEC § 1241 allows a statement if the statement: (a) Is offered to explain, qualify, or make understandable conduct of the declarant; and (b) Was made while the declarant was engaged in such conduct.

Here, it's possible that Nancy's comment is being offered to explain to the jury the lingo used when committing robbery, but it's arguable whether Nancy was engaged in such conduct. Since there is a better exception to admit the evidence, this is unlikely to apply.

Spontaneous Declarations

Under CEC § 1240 a statement is admissible if the statement: (a) Purports to narrate, describe, or explain an act or event perceived by the declarant; and (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

Nancy's statement narrated, described and explained what she and Dustin did that afternoon. It could be admissible if she was still under the stress of the excitement caused by the robbery. Still, other exceptions fit better.

(7) Prosecutor: Did Nancy explain what she meant by "pulled off a big job"?

Wendy: No, but I assume that she meant that she and Dustin committed some sort of crime.

Personal Knowledge; Speculation

Here, Wendy should not be allowed to explain what Nancy's statement meant because Wendy is assuming its meaning without having personal knowledge of the matter. Thus, it is speculation and likely inadmissible.

Opinion Testimony

CEC § 800 states if a witness is not testifying as an expert, her testimony in the form of an opinion is limited to an opinion that is: (a) Rationally based on the perception of the witness; and (b) Helpful to a clear understanding of his testimony.

It is possible that Wendy's testimony is rationally based on her perception and is helpful to understanding her testimony as a whole.

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To submit any comments, corrections, suggestions, etc... Please direct them to jtlaws@gmail.com or call (949) 500-7627. Thank you for your interest and best of luck on the California bar exam.

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Answering each interrogatory and laying them out in a cohesive fashion while properly applying California's Evidence Code **7%**

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| (1) | <i>Privilege Not to Testify Against Spouse
Privilege for Confidential Marital Communications</i> | 21% |
| (2) | <i>Leading Questions</i> | 10% |
| (3) | <i>Personal Knowledge
Non-responsive; Motion to Strike</i> | 8% |
| (4) | <i>Narrative
Relevance
Statements of Mental State
Evidence of Character
Hearsay Evidence
Admission</i> | 17% |
| (5) | <i>Non-responsive; Motion to Strike
Unavailable</i> | 6% |
| (6) | <i>Declarations Against Interest
Confessions by Co-conspirators
Confrontation Clause problem
Contemporaneous Declarations
Spontaneous Declarations</i> | 20% |
| (7) | <i>Personal Knowledge; Speculation
Opinion Testimony</i> | 11% |