

STUDENT # 1

EXAMPLE

1. Yes, the privilege would prevent Linda from testifying at Bobby's trial about the conversation she had with Bobby when she first found out he was selling marijuana to his client. Despite their apparent separation, Linda and Bobby are still legally married. A witness-spouse (here, Linda) can voluntarily testify against her spouse, but cannot testify about (a) confidences made during the privacy of marriage that (b) were made as a natural consequence of that marriage relationship. The marital communications privilege belongs to the communicating spouse (here, Bobby). Linda learned that Bobby was selling marijuana as a result of a private conversation between the two parties, that occurred in their shared home, and as a natural consequence of their marital relationship. Therefore, this communication is privileged, and prevents Linda from testifying at Bobby's trial about the communication.

2. No, the privilege would not prevent Linda from testifying about seeing Bobby package the chocolate-based marijuana baked goods in their home for sale to his clients. An act by one spouse is a privileged communication if made with the confidence of marriage in mind. However, the privilege does not apply to observations, therefore, even acts that are done in the privacy of the marital home are not covered if there was no intent to communicate. Linda's observation of Bobby packaging marijuana goods for his client is thus, not a privileged communication and Bobby cannot prevent Linda from testifying to this observation during his trial. Spousal testimonial privilege allows a witness-spouse to voluntarily testify against her spouse related to all matters not otherwise privileged. Therefore, here, Linda may testify about her observations, if she wishes to do so.

Issue: Should the court sustain D's objection that the evidence is inadmissible on 409/relevance grounds?

**Relevance:** Relevant evidence is admissible unless some other rule says otherwise. In other words, relevance is a threshold issue; irrelevant evidence is NOT admissible. (FRE 402). Evidence is relevant if it (a) has any tendency to make a fact more or less probable than it would be without the evidence (probative value); and (b) the fact is of consequence in determining the action (materiality). (FRE 401).

### **Fact trying to prove?**

Pete is offering Donna's statement in order to prove that Erin was driving recklessly at the time their vehicles collided.

### **Evidence offered?**

The evidence being offered is the statement Donna made to Pete at the hospital: "I'm so sorry, Erin isn't our best employee. But don't worry, if you need help with anything, then Donna's Pizza will cover it."

### **Probative value?**

P will argue that Donna's statement has significant probative value. First of all, Donna openly admits that Erin is not their "best employee." This admission in the first part of the statement alone tends to support a finding that Erin was not exercising reasonable care at the time of the accident. P will further argue that the second part of the statement: "But don't worry, if you need help with anything, then Donna's Pizza will cover it." has even more significant value, because it tends to show that Donna felt responsible for her employee's recklessness, and thus, sought to make things right by offering to pay Peter's medical expenses because she felt responsible for Pete's injuries.

### **Materiality?**

The evidence is material. Donna's statement, particularly her promise to pay for P's medical bills tends to support a finding that Erin was acting recklessly at the time of the accident and this recklessness did cause the accident. Erin's recklessness is a material to the issue of establishing Donna's Pizza's liability for the accident (and for P's injuries."

### **Conclusion:**

Donna's statement meets the low threshold for relevance. The statement is admissible on relevance grounds.

**FRE 409:** Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury

### **Furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses?**

Part of Donna's statement to P at the hospital does constitute an "offer to pay medical expenses." Specifically, the part of her statement: "But don't worry, if you need help with anything, then

Donna's Pizza will cover it" is an offer to pay P's medical expenses. However, the preceding portions of the statement: "I'm so sorry you were hurt. Erin isn't our best employee." do not constitute an offer to pay medical expenses, so these parts of D's statement do not implicate 409.

**Resulting from an injury?**

Yes, P's medical expenses stem from injuries resulting from P's car collision with an employee of Donna's

**Offered to prove liability?**

Donna's Pizza will argue that the statement should be excluded because it's being offered to prove liability. P seeks to offer the evidence to prove that Erin was driving recklessly. To do so, P will need to establish that (1) Erin owed a duty to P (to exercise reasonable care); (2) Erin breached that duty by failing to exercise reasonable care; (3) Erin's failure to exercise reasonable care caused P's injuries. Thus, in order to establish Erin's recklessness, P will be required to show that Erin is responsible for the injuries P suffered. Donna's Pizza will argue that establishing Erin's recklessness implies establishing her liability because it requires that P show Erin's recklessness caused his injuries. Therefore, the evidence should be excluded because the evidence of Donna's statement is being offered to prove liability.

**Conclusion**

The second part of Donna's statement: "But don't worry, if you need help with anything, then Donna's Pizza will cover it" should be excluded on 409 grounds because it is being offered implicitly to establish DP's liability for P's injuries. However, the first part of the statement is admissible.

**Overall Conclusion**

The first part of Donna's statement: "I'm so sorry, Erin isn't our best employee." should be admitted, because it is relevant and does not constitute an offer to pay P's medical expenses. However, the second part of Donna's statement: "But don't worry, if you need help with anything, then Donna's Pizza will cover it" should be excluded on 409 grounds. While this part of the statement is indeed relevant, it constitutes an offer to pay P's medical expenses, and P is seeking to offer this evidence to establish Erin's recklessness, and thus, her (and Donna's Pizza as her employer) liability for P's injuries.

STUDENT #2

EXAMPLE

1. Yes, under rule 29(a) the marital communications privilege would prevent Linda from testifying at Bobby's trial about the conversation she had with Bobby when she first found out he was selling marijuana to the client. A witness spouse can voluntarily testify against his or her spouse, but cannot testify about (a) confidences made during the privacy of marriage that (b) were made as a natural consequence of that marriage relationship. Here, the confidences – i.e. that he was selling marijuana to his clients – was made during the marriage as they were still living together at the time Linda became aware. Likewise, this statement was a natural consequence of the marriage because they were under the same roof and, as a married couple, presumably were abreast at how each other's business/finances were going.

Communicating spouses hold the spousal privilege, and in this case that communicating spouse is Bobby. The spouses do not need to be married at the time the testimony is elicited. Here, although they are no longer married, the statements were made while the parties were married. Overheard statements made to third parties, however, are not covered by the privilege but this circumstance is not relevant under this fact prompt. Thus, the privilege would prevent Linda from testifying against her spouse regarding the conversation where she was told he sells marijuana.

2. The privilege would likely prevent Linda from testifying about seeing Bobby package the chocolate-based marijuana good in their home for sales to his clients. Under the controlling common law, "acts" may count as a privileged communication if made in the confidence of marriage in mind. (Arnold v. State). Although the facts in that case differ in that they referred to a couple driving past a burned building to view damages, it is still applicable here because he packaged them in the presence of their home which suggests the privacy of marriage. This was not a conversation with a third party, which would not be confidential under the case law. Likewise, under rule 29(a), the communicating (or acting) spouse holds the privilege here.

**Relevance**

Relevant evidence is admissible unless another rule says otherwise (Rule 402). Evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence (probative) and (b) the fact is of consequence in determining the point at issue (materiality).

Here, the fact that Pete is trying to prove is that Erin was driving recklessly when the car crash occurred. To prove this fact, plaintiff is offering evidence in the form of Donna's statements.

- (a) Likewise, the plaintiff will argue that this fact has a tendency because the fact that the owner is expressing that she is sorry, and mentioning that Erin is not the best employee, could make it more likely that it is not completely unreasonable to conclude that Erin ran the light here.

The defense may counter that it does not have any tendency because him not being the best employee doesn't necessarily suggest that he is running a red light in an intersection. Likewise, they may argue that just because they said sorry doesn't mean it is more probable that Erin was reckless.

- (b) A reasonable judge could find the statement is material because the substantive law here speaks to whether or not Erin was driving recklessly. The statement that Erin is not their best employee may indicate that it is possible that because he is not the best employee, he did run that red light. If he ran that light, it would be of consequence in determining the fact at issue.

Because the threshold for any tendency is low, however, the evidence will likely be admitted.

**Rule 409**

The issue here is whether Donna's statements may be prohibited as established under Rule 409. Evidence of (1) furnishing, promising to pay, or offering to pay medical, hospital, or similar expense (2) resulting from an injury is (3) not admissible to prove liability for the injury.

- (1) The plaintiff may argue that, Because this rule only includes promises to pay medical or similar expenses, that the words "if you need help with anything, then Donna's Pizza will cover it" are admissible because it was in connection to the beginning of the statement "I'm so sorry you were hurt." As such, the statement was in reference to medical or hospital bills because it highlights the grief expressed regarding the injury that occurred and is not in reference to lost wages or property damages.

The defendant may counter, however, that the statement "if you need help with anything" is too broad and does include economic or property damages in the form of a totaled car or lost wages for work. Although defendant was obviously in the hospital, the statement "anything" literally does entail anything and is beyond the scope of only medical expenses.

Therefore, because sub-element one of the rule is narrowly construed, the last part of the statement should be omitted.

- (2) All of the statements are made as a result of the injury because they all reference the injury in some way and all occurred after the accident, to Pete, while the victim was in the hospital.
- (3) The defense will argue that the rest of the statement, "I'm so sorry you were hurt. Erin isn't our best employee" is not admissible because it was only to confess sympathy and as a preface to the words "don't worry" and the offer to pay the medical or hospital expenses. Further, they will argue that these statements are being used to prove liability because statements including "sorry" and he is not our best employee can be wrongly construed by the jury to mean that Donna's Pizza is at fault.

The plaintiff, however, will distinguish the second half of the statement from this one and mention that these statements are offered to prove fault. The plaintiff will say that because Rule 409 is narrowly construed, while the second part of the statement is overly broad, that "I'm so sorry" and "Erin is not our best employee" have nothing to do with medical or hospital expenses. Furthermore, while they are not permissible to prove liability, the plaintiff can argue that they are still statements of fault, which are not omitted by the Rule.

Thus, the judge can provide a limiting instruction and permit the first half of the statement as discussed.

Note\*

There are also hearsay issues, but I have omitted them per the essay prompt.