

Relevance



J. Max Wawrik
Nancy Rosado Colon
Law 16
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Always an honest word



Now it's how I view the world

Law of Evidence

KEY TERMS

Adversary System (U.S.)

A system of justice where the parties work in opposition to each other, and each party tries to win a favorable result for itself. The Court is primarily an impartial referee.

As Opposed to

Inquisitorial System – (France, South America, Africa & More)

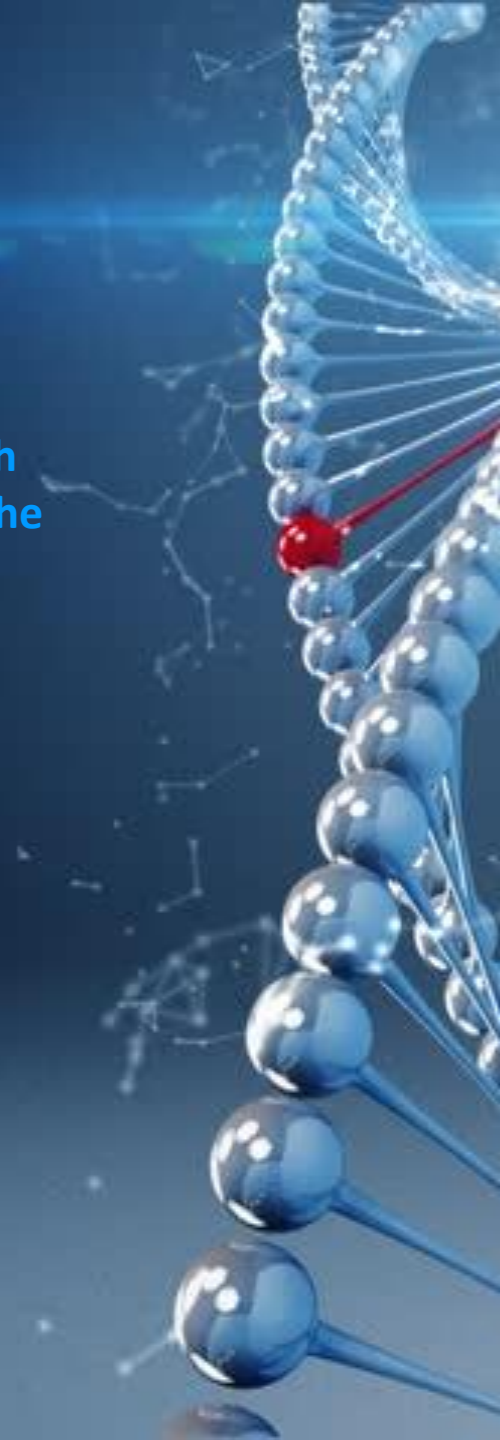
An inquisitorial system is a legal system where the court or a part of the court is actively involved in investigating the facts of the case.

Direct Evidence

Evidence that stands on its own to prove an alleged fact, such as testimony of a witness.

Circumstantial Evidence

Circumstantial evidence is evidence that relies on an inference to connect it to a conclusion of fact.



Law of Evidence

KEY TERMS

Proponent

The party who proffers (offers/presents) the evidence.

Premise

Any assumption or information which forms the basis of a conclusion.

Assumption

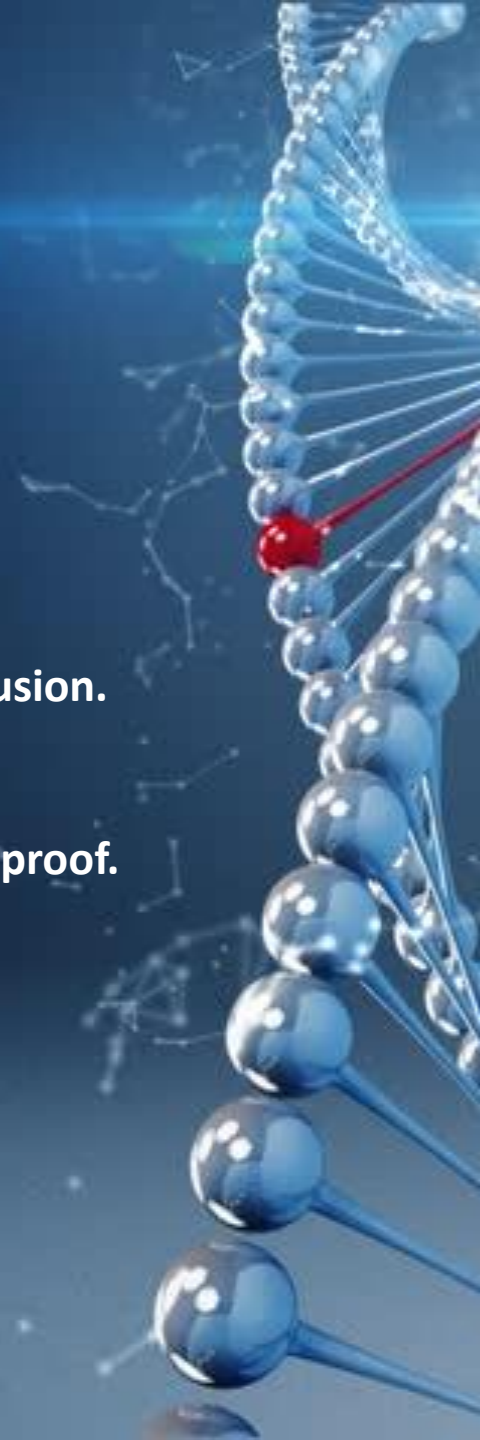
A thing that is accepted as true or as certain to happen, without proof.

Inference

A conclusion reached on the basis of evidence and reasoning.

Materiality

Fact you are trying to show matters to the outcome



Law of Evidence

KEY TERMS

Chain of Reasoning

How does “A” help show that “B” exists.

Probative

Assisting in the exploration for truth; informative
(Probativeness - It has a tendency to show a material fact)

Probative Value

Measurable indicator of whether your fact is admissible

Tendered Fact

Whatever Fact/Evidence you want to admit into evidence.

Inferred Fact

Whatever Fact you are trying to prove.



Relevance

Relevance

Relevance Has Two Components:

1. Tendency to prove or diminish the probability of a fact.
2. Materiality (the issue must matter in dispute between parties.)

Probative Value can vary by two factors:

- How important is material fact it proves
- How strongly does it make the case

Admissibility versus Weight:

Admissibility:

- Law of Evidence is really concerned with *admissibility*
 - *Admissibility is a question for the judge*

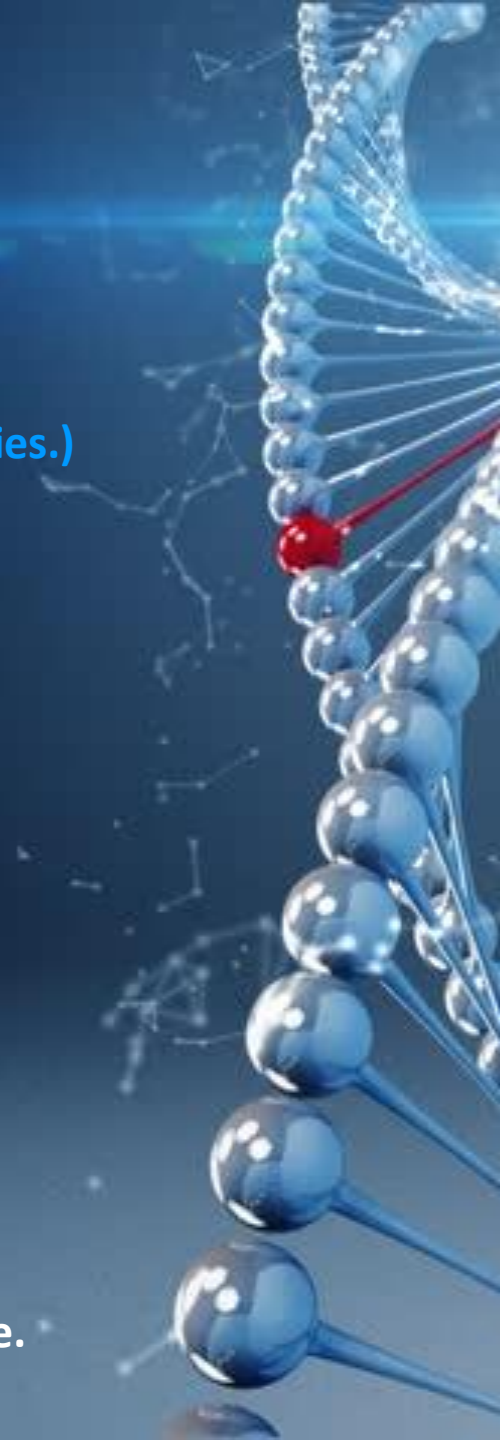
Weight

- Weight is for the trier –of-fact

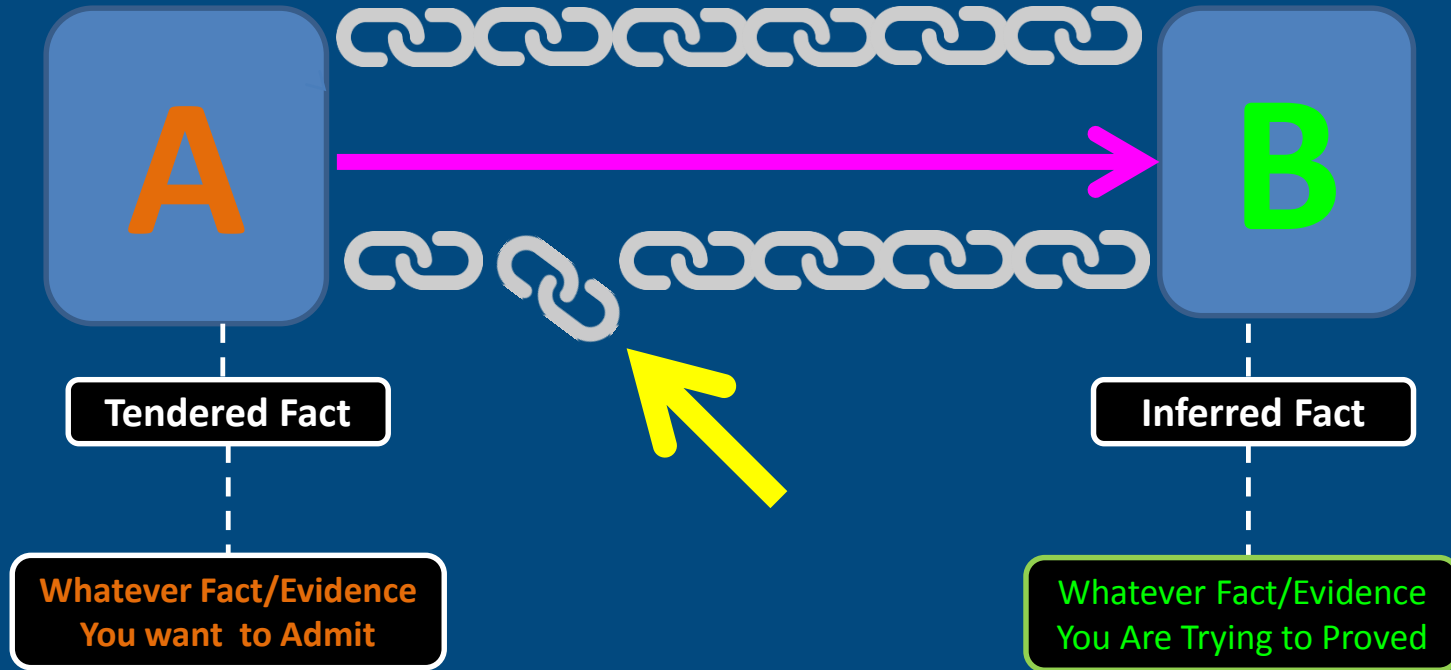
Irrelevant

- Irrelevant evidence is that evidence that is deemed

immaterial or not relating to the matter at issue.



Chain of Reasoning



Law of Evidence
Federal Rules of Evidence
Article IV. Relevance and Its Limits

401. Test for Relevant Evidence

Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action

Law of Evidence

Federal Rules of Evidence

Article IV. Relevance and Its Limits

Admissibility of Relevant Evidence

Rule 402. General Admissibility of Relevant Evidence

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.

Law of Evidence

Federal Rules of Evidence

Article IV. Relevance and Its Limits

Discretionary Provision

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

1 **G. Witness Statements**

2
3
4 **Statement of Leslie Moore, Witness for the Prosecution**

5
6 My name is Leslie Moore. I prefer to be called Les. I am a certified public accountant in
7 private practice in Irving, Oregon. A true and accurate copy of my curriculum vitae is attached
8 as Exhibit 1. I graduated from the University of Oregon in 1981 with a B.S. in Accounting, *cum*
9 *laude*. I was recognized as the top student in accounting and received the coveted Luca Pacioli
10 award. Just in case you didn't know, Luca Pacioli is considered the father of accounting. He
11 was a wandering Franciscan monk, who was also a friend and collaborator of Leonardo da Vinci.
12 He established the first known double entry bookkeeping system with debits on the left and
13 credits on the right, and the balance from the profit and loss accounts to be placed in a capital
14 account. He also required that a trial balance be prepared when the books were closed. Pacioli's
15 system, established in 1494, was remarkably similar to modern bookkeeping. To put it into
16 perspective, Pacioli was creating an accounting system at the time Christopher Columbus was
17 discovering America! Two discoveries that have shaped our lives forever!

18
19 After graduating from UO, I was highly recruited by what was then considered the Big 8
20 CPA firms. I went to work for Arthur Andersen in Chicago as an auditor; that was well before its
21 demise from the Enron and WorldCom debacles. Just in case you missed the headlines back in
22 2002, Arthur Andersen was convicted for obstruction of justice for shredding documents relating
23 to its audit of Enron, and the firm agreed to surrender its licenses. Although the United States
24 Supreme Court unanimously reversed Arthur Andersen's conviction in 2005, the firm had
25 already lost nearly all of its clients. I hate to even mention my prior association with Arthur
26 Andersen. However, when I was at the firm, it had the reputation of supporting the highest
27 standard in the accounting industry. I was quickly recognized as a star at Arthur Andersen. I
28 was promoted quickly and assumed the role of Manager after only 3 years; the usual tract for a
29 Manager position is 4-5 years.

30
31 I left Arthur Andersen in 1984 to establish a firm of my own, Account-Ability, ironic
32 given my Arthur Andersen connection. We are a 6 member firm, offering our clients full service
33 accounting expertise. In addition to audit work, I specialize in forensic accounting. The Arthur
34 Andersen headlines prompted my desire to pursue forensic accounting. The Enron and
35 WorldCom problems shed light on corporate scandals and the need for forensic accountants.
36 Forensic accountants are trained to look beyond the numbers and deal with the business reality of
37 the situation. According to research conducted by the Association of Certified Fraud Examiners
38 (ACFE), U.S. organizations lose an estimated 7 percent of annual revenues to fraud. Based on
39 the estimated U.S. Gross Domestic Product for 2008 – \$14.256 trillion – this percentage
40 indicates a staggering estimate of losses around \$994 billion among organizations, despite
41 increased emphasis on anti-fraud controls and recent legislation to combat fraud. My mission as
42 a fraud examiner is to reduce the incidence of fraud and white-collar crime and to assist the
43 client in detection and deterrence.

44
45 Willy Freeman contacted me on March 1, 2010 to employ my services. On that day, I
46 had made a presentation at the local Chamber of Commerce entitled "Realizing Your Full
47 Potential" and had touched on various business and financial practices that could increase

1 profitability, including stronger internal controls to prevent or deter employee embezzlement.
2 Willy came up to me after the meeting and asked if I would undertake a financial investigation
3 and make recommendations of increasing profitability for the business. I learned that Willy
4 Freeman and Devin Frost were partners in their restaurant, Shallots. At the time, there was no
5 suspicion of fraud or wrongdoing. Willy wanted to know why the business was in the red when
6 customers were steady and it seemed that business was good. Willy and Devin had been in the
7 restaurant business for 3 years. In a study reported in 1999, Ohio State University researchers
8 showed that the highest failure rate in the restaurant industry was during the first year, when
9 about 26 percent of the restaurants failed. About 19 percent failed in the second year and 14
10 percent in the third year, according to the analysis. So, while it is not unusual for a restaurant to
11 fail in the first three years, it was a bit surprising to hear that Shallots was in the red because I
12 was aware of Shallots' "good buzz" in the community and positive critic review in The
13 Oregonian.

14
15 I toured the restaurant facilities the following day, March 2, to get a feel for the day-to-
16 day management and to get an overview of the financial records and record keeping of the
17 business. I advised Willy that in order for me to do a complete financial review, audit and
18 forensic investigation, I would need complete access to all accounting records for a period of two
19 weeks starting March 8, for a flat fee of \$6,500. I would work on their premises, so that I could
20 have access to all of the records and they could continue business as usual. That arrangement
21 also gives me the opportunity to make observations of suspicious activity that I might not
22 otherwise know. Willy agreed to the arrangement. Because I knew that the restaurant was on
23 shaky ground, I demanded to receive my fees in advance. Willy paid me out of his/her personal
24 funds.

25
26 During my brief discussions with Willy, I could tell that he/she was accounting-
27 challenged. Willy has great creativity with food preparation, restaurant style, and service, but
28 more or less left Devin Frost to handle the financial matters of the business. I was not present
29 when Willy informed Devin that I had been engaged to do the forensic investigation, so I cannot
30 state what Devin's reaction was. I didn't notice anything particularly suspicious from Devin
31 when I was performing my forensic accounting work for the two-week period. Well, there were
32 two times when Devin would be back in the office area with me and I had some cancelled
33 checks, bank statements and ledger cards on the desk, and Devin accidentally spilled coffee all
34 over the records. At first, I thought it was an accident. The second time, I thought Devin was
35 either clumsy or perhaps was doing something more sinister in obliterating the records. Also, I
36 did overhear a few conversations that Devin had on the phone – once the first week I was there,
37 and then 2 or 3 times the following week. Devin told the person on the phone "I promised you I
38 would get the money, just give me time," and "There's no need to use threats, you'll get your
39 money" and "Yes, I remember what happened last time when the payment wasn't timely, please
40 don't, that won't be necessary. I'll pay you, I promise." She was upset by the calls, but didn't
41 seem scared. Initially, I thought Devin's conversations were with a vendor. In the restaurant
42 business, if you can't pay your bills, the deliveries stop, and the business will go belly up. In
43 retrospect, I think these telephone conversations were probably between Devin and Lou
44 Contralto. Lou was probably threatening Devin, if she didn't pay her gambling debts. I never
45 heard who was on the other side of the conversation or what the caller said, and Devin never
46 spoke about it with me. During the first week I was there, Devin came into the restaurant and
47 had a burn mark on her hand, and another time she had bruising on her neck, like someone had
48 grabbed her neck hard. I didn't ask any questions.

1
2 During the two-week period I was at the restaurant, I frequently saw a person in the
3 shadows in the alley across the street from the restaurant's back door. At the time, I just
4 assumed they worked at the business across the street and were taking a cigarette break. I now
5 recognize the person lurking in the alley to be Lou Contralto. If Contralto were in the same
6 position on the night of March 20, he/she would have a good view of anything going on outside
7 the restaurant's back door to the kitchen. Despite the darkness in the alley, there was a light right
8 above the back door's entrance to the restaurant.
9

10 Restaurants are notorious for losing money due to employee embezzlement. The most
11 common cash fraud scheme is skimming. Skimming is the process by which cash is removed
12 from the company before it enters its accounting system. Retail establishments and particularly
13 restaurants where cash is used frequently are vulnerable to this type of scheme. A related type of
14 scheme is to ring up a sale for less than the actual amount. The fraudster then pockets the
15 difference between the actual sale and the amount on the register tape. Employees may also ring
16 up a sale and then void the same sale, thereby pocketing the cash from the register.
17

18 If an employee collects the cash and also makes the bank deposit, they have an excellent
19 opportunity to misappropriate company funds. For example, an employee in the food services
20 industry may receive the daily receipts from the cashier, along with the cash register tapes. The
21 employee would then mutilate the register tapes so they could not be read. With the evidence
22 now destroyed, the employee would pocket a portion of the day's receipts and deposit the
23 balance. If the daily deposit amounts are not compared with the cash register tapes, the fraud can
24 go undetected.
25

26 Checks can also be the instrument of fraud. Employees with signature authority can make
27 checks payable to cash or to themselves personally. Someone with check signatory authority can
28 simply write the check to themselves or cash, mark the check as being void in the company's
29 check register and then inflate the amount of another check written to a company supplier for
30 inventory. When the bank statements are received, the employee merely removes those checks
31 and destroys them.
32

33 Kiting is the process whereby money is received but not recorded immediately on the
34 books and is then embezzled by an employee. As money continues to come in, the money that is
35 received subsequently is applied to the prior receipts that were not recorded previously. Thus
36 there is a continuing lag of funds from the actual receipts, but it is covered up because the money
37 is deposited later.
38

39 In performing my forensic investigation, I reviewed the following financial and business
40 records: general ledger, journal entries, adjusting journal entries, trial balances, checking
41 accounts, cancelled checks, deposit slips, cash register receipts, order tickets, and vendor
42 invoices. I also personally interviewed Willy Freeman and Devin Frost, as well as a couple of
43 the restaurant employees to understand the flow of money, and internal controls present in the
44 company. Although both Devin and Willy had authority to sign checks, Devin primarily
45 assumed that role. Willy managed the kitchen staff, the menus, ordering food supplies,
46 scheduling employees, reservations, and keeping the customers happy. Devin primarily operated
47 the cash register during business hours and managed the financial aspects of the business.
48

1 During the first week of my investigation, I started to strongly suspect that Devin Frost
2 had been stealing from the restaurant. I don't believe I mentioned my suspicions to anyone. I
3 seem to recall both Devin and Willy asking me how the investigation was proceeding, but I
4 typically would not verbalize any conclusions until my investigation was complete. I am all
5 about precision and accuracy, which is part of my draw to accounting. In my view, it is
6 important to have all your facts and figures together before any conclusions are announced.

7
8 After I had completed my two-week forensic investigation, it was evident that Devin had
9 been taking cash from Shallots for some time. I found evidence of each of the typical
10 embezzlement schemes mentioned previously. For example, skimming had occurred. There
11 were several instances where one of the waiters or waitresses had a carbon copy of an order
12 ticket in their book, but the order was not included on the cash register receipt for the day. An
13 example of this is shown on Exhibit 2. The check marks on the cash register receipt are my
14 notation for crosschecking the order tickets to the daily cash register receipt. I cannot say for
15 certain that the skimming is attributable to Devin. Someone else could have been managing the
16 cash register at the time. However, in looking at the events as a whole, there are events that I can
17 directly point to Devin. For example, certain daily cash register tapes did not match to the
18 deposit that was made. These deposit slips were written in Devin's handwriting, and were part of
19 her normal job responsibilities, and not the responsibility of any other employee. Thus, as you
20 will see from Exhibit 3, which has the deposit slip in the amount of \$587.93 on Monday,
21 February 11, 2010, even though the cash register tapes show receipts from Friday in the amount
22 of \$2299.61 and Saturday for \$3089.57. Finally, I encountered checks that were written to cash
23 or to Devin and were shown as void in the check register, but actually cleared the bank. In order
24 to balance the account, another check in the check register and ledger accounts were manipulated
25 to increase the payment to cover the amount of the "voided" check to Devin. Exhibit 4 is an
26 example of this occurrence.

27
28 In total, I uncovered 67 instances of embezzlement committed by Devin Frost totaling
29 \$273,958 over the past 2 years. It appears that no embezzlement occurred during the first year
30 that the restaurant was in operation. Of the 67 instances of embezzlement, more than half
31 occurred in the 6-month period prior to March, 2010. Unfortunately, the embezzlement has left
32 Shallots with little to nothing. Shallots is operating at a net loss of \$164,554 and a negative cash
33 flow. Vendors have refused to supply product to the restaurant until outstanding accounts
34 payable are brought current.

35
36 I broke the news to Willy on Friday, March 19, 2010 about 4:00 p.m. I informed Willy
37 that my forensic investigation revealed that Shallots was bankrupt due to numerous occasions of
38 embezzlement by his/her partner, Devin Frost, and that the amount embezzled was \$273,958.
39 At first, Willy appeared to be in shock, repeating several times, "How could this happen?" The
40 more I explained to Willy the specifics of the embezzlement and giving him/her examples of the
41 skimming, check fraud, and deposit manipulation, the more I saw pure rage in Willy's face.
42 Willy seemed consumed by his/her rage and said, "Well, I'll make Devin pay for this. She won't
43 make a fool out of me." Willy told me that I had done my job and could leave and that he/she
44 would confront Devin alone.

45
46 I had left the building when I realized that I had left my favorite mechanical pencil on the
47 desk in the office area. When I went back to retrieve my pencil, I overheard Willy talking to
48 Devin in strained, but controlled hush tones. I couldn't hear everything that was said clearly

1 because I was standing near the kitchen door to the hallway by the office and the kitchen
2 employees were pulling out pots and pans in preparation for the supper crowd and making loud
3 clanging noises. But, I'm pretty sure, I heard Devin say something about gambling and then
4 Willy said Devin had to come up with the money right now and threatened to kill Devin. I don't
5 know the exact wording Willy used because of the background noise. And then I heard Willy
6 say quite clearly, "You'll get your just desserts."
7

8 While I was reviewing the company records, I also came across a Buy-Sell Agreement
9 for the restaurant. The Buy-Sell Agreement provides that in the event of death of either partner,
10 that the other partner shall be the beneficiary of a \$500,000 insurance policy. A true and
11 accurate copy of an excerpt of the Buy-Sell Agreement is attached hereto as Exhibit 5. So, upon
12 Devin's death, Willy was the recipient of a \$500,000 payout from the insurance policy. It is not
13 unusual, however, for partners in a business to have a buy-sell agreement in place, funded by
14 insurance. Actually, it is a smart business practice because you are planning for contingencies of
15 someone's death and what happens to their partnership interest in the business. You don't want
16 the family coming in and trying to manage the business too. You want to be able to buy them
17 out.
18

19 I believe I have an excellent reputation among my peers in both audit work and forensic
20 accounting. All of my peer review examinations have yielded outstanding results. I did have
21 one malpractice action filed against me about 5 years ago relating to tax preparation work I had
22 performed, specifically with a car dealership's inventory. My insurance company paid a small
23 nuisance settlement to make it go away, but the settlement papers specifically state that I deny
24 liability. The case was dismissed against me.
25

26 I affirm under penalty of perjury that the foregoing is true and correct to the best of my
27 belief and knowledge.
28
29
30
31

Les Moore

LES MOORE, CPA, CFE

900 Market St.
Irving, OR 97652

Education

University of Oregon

B.S. in Accounting – May, 1981	Cum Laude, 3.75
Beta Alpha Psi - Accounting Major Honorary, Treasurer	Top Accounting Student
Beta Gamma Sigma – Business Honorary	Luca Pacioli Award

Certifications

Certified Public Accountant	June, 1981 to present
Certified Fraud Examiner	June, 2003 to present

Employment

Account-Ability, CPAs (owner) June, 1984 – present
900 Market St., Irving, Oregon

Full service accounting firm, providing a variety of accounting services to our clients including, bookkeeping, general accounting, audit, tax management and preparation, personal financial planning, and business valuation. Specialization in forensic accounting, conducting forensic investigations, utilizing my accounting, auditing, and investigative skills. Instrumental to numerous investigations detecting accounting fraud.

Arthur Andersen CPA May, 1981- May, 1984
33 W. Monroe, Chicago, Illinois

Manager. Consumer and Business Products Auditing Division. Audited financial statements of clients and responsible for management of audit team. Promoted rapidly.

Memberships

Association of Certified Fraud Examiners (ACFE)
American Institute of Certified Public Accountants (AICPA)
Indiana Certified Public Accountants (INCPA)

Continuing Education

E-Fraud: Preventing and Detecting Technology-Based Crimes (ACFE; July, 2010) *Co-presenter*
Money Laundering: Tracing Illicit Funds (ACFE; July, 2010)
Advance Fraud Examination Techniques (ACFE; July, 2006)
Computers in Fraud (ACFE; July, 2006)
Contract & Procurement Fraud (ACFE; July, 2005)
Auditing for Internal Fraud (ACFE; July, 2005)
Fraud Prevention (ACFE; July, 2004)
Investigating by Computer (ACFE; July, 2004)
Conducting Internal Investigations (ACFE; July, 2003)
Auditing for Internal Fraud (ACFE; July, 2003)
Principles of Fraud Examination (ACFE; July, 2002)
Building Your Fraud Examination Practice (ACFE; July, 2002)

Shallots	
01/14/10	
1 – Tuna tartar	\$8.95
1 - Bruschetta	\$4.95
2 -Lettuce Wedge salads	- \$9.90
1 - Pork Medallions w/ wine reduction	– \$19.95
1 - Macadamia crusted Chilean sea bass with Roasted red pepper coulis	- \$21.95
1 – side of Roasted Asparagus with Hollandaise	- \$5.95
1 -glass house Merlot	- \$6.95
1 - glass house chardonnay	- \$5.95
1 – Mini Baked Alaska	- \$4.95
1 - Flourless Chocolate cake & raspberry coulis	- \$5.95
Sub-total	\$95.45
Tax	<u>5.76</u>

01-14-10
✓ 96.34
✓ 83.24
✓ 164.32
✓ 54.80
✓ 97.66
✓ 123.76
✓ 114.93
✓ 82.54
✓ 66.44
✓ 79.91
✓ 85.56
✓ 99.33
✓ 58.75
✓ 93.99
✓ 65.00
✓ 74.45
✓ 92.34
✓ 123.98
✓ 78.78
✓ 116.43
✓ 224.56
✓ 95.87
✓ 183.24
✓ 48.56
✓ 64.34
✓ 114.56
✓ 2583.68

Allowable Evidentiary Objections

1. Facts in the Record
2. Relevance
3. Laying a Proper Foundation
4. Personal Knowledge
5. Character Evidence
6. Opinion/Speculation
7. Hearsay
8. Leading Questions
9. Argumentative Questions
10. Asked and Answered Questions
11. Compound Questions
12. Narrative
13. Non-Responsive Witness
14. Outside the Scope of Cross-Examination

Link to Full Objections

<http://missionparalegal.pbworks.com/f/rulesofevidence.html>

The End



J. Max Wawrik

Nancy Rosado Colon

Law 16

Spring 2017