KERN COUNTY COLLEGE OF LAW

EVIDENCE

Mid Term Examination

FALL 2019

Professor H. Starr

INSTRUCTIONS:

There are three (3) questions in this examination.

You will be given three (3) hours to complete the examination.

QUESTION #1

Payne was injured in a slip and fall accident at the Dreamer Resort when he dove off a diving board into the swimming pool. He struck his head on the bottom of the pool, rendering him unconscious. Prior to the dive, Payne had put on on a pair of aqua shoes (swim shoes) for stability in the preparation for the dive.

Larry Lifeguard rescued Payne and Manager Max called for medical assistance. Once the ambulance arrived, Payne had regained consciousness and declined medical help.

Payne brings a cause of action against Dreamer Resort, contending the resort was negligent in permitting food to be served in the pool area. Further, Payne alleged he slipped and fell on ketchup that was on the diving board. This caused Payne to slip on the ketchup and not make a proper dive.

One month after Payne's accident, the Dreamer Resort removed the diving board from the pool area and posted "No Food" signs in the pool area. However, the Dreamer Resort denies liability stating that the Food Court had a lease on the pool area and is solely responsible for the accident, not the resort.

Assume the following occurred in a jury trial in a California state court. Discuss all evidentiary issues and arguments that would likely arise in each section below. Assume proper objections were made.

Answer according to California Law.

1. During Payne's case-in -chief, he testified that he placed aqua shoes on for stability. Also, that he received a **properly authenticated letter** from Manager Max of Dreamer Resort offering him $75,000 to resolve the lawsuit. He declined the offer.

2. Next, Larry Lifeguard testified that months before Payne's accident, he observed six people slip and fall on a food items on the diving board. He filled out accident forms and gave them to Manager Max, of the Dreamer Resort.

3. Over objection, Payne introduces into evidence a **properly authenticated** Dreamer Resort premises liability coverage policy. The policy includes coverage of the pool area, the diving board area, the Food Court and the surrounding area.

4. Then, Payne introduces a **properly authenticated** paid invoice from Manager Max from Dreamer Resort. The paid invoice was for the diving board removal in the pool area. The invoice was for services rendered one month after Payne's fall.

QUESTION #2

Mike is federally prosecuted for robbery and money laundering. Mike is the founder and CEO of the non-profit "Robbin' Hood" foundation. Prosecutors allege Mike created the Robbin' Hood foundation in January 2018 as a vehicle to launder money he obtained from robbing banks. Mike is alleged to have committed two bank robberies – one on July 1, 2018 and one on September 1, 2018. During each robbery, the person who robbed the bank wore a Robin Hood costume and a mask.

Assume the following occurred in the jury trial of Mike. Discuss all the evidentiary issues and arguments that would likely arise in each section below, including objections, if any, and the likely trial court ruling on the admissibility of the evidence. **Apply the Federal Rules of Evidence, but do not discuss Hearsay objections.**

1. In her case in chief, the Prosecutor seeks to introduce evidence that in February 2018 Mike was arrested for stealing a Robin Hood costume and a Mask from a costume store.

2. A witness who suffers from schizophrenia says that he witnessed Mark come out of the bank in the Robin Hood costume and a mask on the July bank robbery. He saw Mark take off the mask and clearly saw his face. At the time of his proposed testimony, he is unmedicated and experiencing hallucinations. He believes that he is the pope and has magical powers.

3. Next, the Prosecutor calls Investigator Ramirez. Investigator Ramirez testifies that she watched the surveillance video from the pizzeria across the street from the September bank robbery. Investigator Ramirez saw Mark run across the street from the bank after the robbery and get into a white sedan. The license plate, visible in the surveillance, matches the one on the white sedan Mark drives on a daily basis. Investigator Ramirez did not seize the surveillance, and it was automatically deleted two months later.

4. Next, the Prosecutor calls Mark's mother. The Prosecutor asked Mark's mother to identify Mark's handwriting in a letter received by the bank manager two weeks before the September bank robbery. The letter stated, among other things, "If you don't stop your corruption, I will take you to court and fleece you! I will empty your bank vaults." The letter was signed, "Robbin' Hood" at the bottom. The Prosecutor offers the sentence, "I will empty your bank vaults," and the signature only.

MIDTERM EXAMINATIONFALL 2019 EVIDENCE

QUESTION #3

Danielle is 36 years old, has no medical training whatsoever, and opened a doctor's office at the beginning of 2019. She pretended she was a physician. She advertised locally as a family practice doctor. Several families took advantage of her extremely low rates and group discounts. In order to keep up appearances, Danielle gave injections, gave physicals, and even drew her patients' blood, providing made-up blood test results. Toward the end of the summer, Danielle advertised that she offered discounts for physicals for high school athletes. A number of local parents took advantage of the discount and brought their high school students for physicals.

During this time, Danielle used the intimate environment created by the physical to make overtures to the male high school students. She had sex with several of her male patients, including two thirteen year olds and one fifteen year old. One night, the police were called to Danielle's house regarding a domestic disturbance. When police arrived, they found Danielle's husband suffering severe injuries from where Danielle, according to her husband, had beaten him with a tire iron about his head and shoulders. The subsequent investigation brought to light all of Danielle's illegal activities in her alleged illegal practice of medicine.

Danielle was charged with practicing medicine without a license, battery on the theory that each injection, physical exam, and blood draw constituted a battery, sexual molestation of several minors, and spousal abuse.

Several months prior to trial, the prosecution informed Danielle's attorney that they intended to introduce the following evidence at trial:

1) A 2015 conviction for spousal battery in which the arresting officer responded and found Danielle's husband suffering from a minor stab wound. Danielle pleaded no-contest and was found guilty.
2) A 2012 conviction for fraud and forging a prescription in which Danielle had posed as a nurse practitioner under the pseudonym "Dane," and wrote opiate prescriptions to anyone who paid her to do so. She pleaded not guilty but was found guilty by a jury.
3) Testimony from a former high school student, Will. In 2008, Will, who has the mental development of a six year old, was in a special education class where Danielle was a teacher's aid. Will's mom noticed Will drawing sexual positions and when she asked Will about it, he said he had sex with Danielle. Police arrested Danielle, but the District Attorney declined to prosecute.

Please analyze the admissibility of each item of evidence under **both** the Federal Rules of Evidence and California Rules of Evidence. **Do not discuss use as witness impeachment or hearsay.**

Answer Outline -EVIDENCE-Amended for KCCL students

MIDTERM EXAMINATION FALL 2019

QUESTION #3

1) Item 1
    a. Relevance:
        i. Conclusion: it is relevant
    b. Character evidence:
        i. Rule against propensity
        ii. MIMIC/MIAMI COP exceptions
            1. More likely exceptions are intent, common scheme or plan
    c. 403
        i. Exclusion:
            1. Impermissible inference for propensity
            2. Both are theft crimes
        ii. Admission
            1. Shows desire for Robin Hood costume
            2. Ties him directly to perpetrating crime
            3. Limiting instruction
            4. Not similar events, despite similarity of offense
        iii. Conclusion: Likely admission

2) Item 2
    a. Relevance:
        i. Conclusion: it is relevant
    b. Competence:
        i. Presumption of competence
        ii. May not be competent because cannot tell reality from fiction, which will hinder accurately relating details
            1. As long as his fantastical beliefs do not affect the evidence he proffers, it should not be a major issue
        iii. Conclusion: Likely competent, but issues with reality subject to cross exam

3) Item 3
    a. Relevance
        i. Conclusion: it is relevant
    b. Best Evidence Rule
        i. Video surveillance is a writing under the rule
        ii. Description of the contents of the writing without producing it violates the rule
        iii. Exception to the rule: destruction with lack of fault
            1. May be argued it is Ramirez's fault for not seizing evidence
    c. 403
        i. Exclusion: No ability to question/review what is on the video

ii. Admission: Highly probative
iii. Conclusion: Depending on force of arguments over exception

4) Item 4
   a. Relevance
      i. Conclusion: it is relevant (motive/plan)
   b. Identification:
      i. Mark's mother has presumably seen Mark's handwriting before. If so, she can recognize it and identify it as his writing
      ii. Foundation must be laid to establish she recognizes his writing.
   c. Rule of Optional Completeness:
      i. Defense can ask that other parts of letter be read
      ii. Other parts of letter suggest the meaning of the letter was through legal process, not robbery
      iii. This rule cannot be used to exclude the portions admitted, only to give them context
      iv. Conclusion: other portions of letter will be admitted
   d. 403:
      i. Exclusion:
         1. Letter seems to be threatening legal process, so it could be considered violative of 407
      ii. Admission:
         1. Tends to show a motive/intent
      iii. Conclusion: Likely to be admitted

EVIDENCE -ANSWER OUTLINE
MIDTERM EXAMINATION-FALL 2019 -
QUESTION #3

1) Item 1
    a. Relevance:
        i. Conclusion: it is relevant
    b. Character evidence:
        i. Rule against propensity
        ii. MIMIC/MIAMI COP exceptions
            1. More likely exceptions are intent, motive, absence of mistake
            2. Not enough information to know whether they will apply.
        iii. Statutory exception in CA – 1109
            1. Notice requirement met
            2. Not outside 10 year window
            3. FRE doesn't have DV statute (must use MIMIC)
        iv. Conclusion: will likely be admitted under CA
        v. Conclusion: more likely to be excluded under FRE
    c. 403/352:
        i. Exclusion:
            1. Impermissible inferences of propensity
        ii. Admission:
            1. Not remote in time
            2. Under CA – 1109 contemplates admission for policy reasons
            3. Limiting instruction as to how it can be used
        iii. Conclusion: will like be admitted in CA
        iv. Conclusion: more likely to be excluded under FRE

2) Item 2
    a. Relevance
        i. Conclusion: it is relevant
    b. Character evidence:
        i. Rule against propensity
        ii. MIMIC/MIAMI COP exceptions
            1. Most likely theories are Common scheme, Intent, Motive
        iii. Conclusion: admissibility likely depends on 403/352 analysis
    c. 403/352:
        i. Exclusion:
            1. Impermissible inferences of propensity
            2. Somewhat remote in time (7 years old)
            3. Confusing of issues due to similarity
            4. Confusing of issues due to pseudonym
            5. No MIMIC use particularly effective

Mike is federally prosecuted for robbery and money laundering. Mike is the founder and CEO of the non-profit "Robbin' Hood" foundation. Prosecutors allege Mike created the Robbin' Hood foundation in January 2018 as a vehicle to launder money he obtained from robbing banks. Mike is alleged to have committed two bank robberies – one on July 1, 2018 and one on September 1, 2018. During each robbery, the person who robbed the bank wore a robin hood costume and a mask.

Assume the following occurred in the jury trial of Mike. Discuss all the evidentiary issues and arguments that would likely arise in each section below, including objections, if any, and the likely trial court ruling on the admissibility of the evidence. **Apply the Federal Rules of Evidence.**

1. In her case in chief, the Prosecutor seeks to introduce evidence that in February 2018 Mike was arrested for stealing a Robin Hood costume and a Mask from a costume store.

Prior Bad Act Evidence that is Independently Relevant:
Evidence of other crimes or misconduct is admissible if these acts are relevant to prove some issue other than the defendant's character or disposition to commit the crimes charged. Such crimes or acts may be admissible for other purposes (such as to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, ect.) whenever those issues are relevant in either a civil or criminal case. (FRE 404(b))
Evidence that Mike was arrested for stealing a Robbin Hood costume and mask would be relevant to show a plan/preparation to commit the bank robberies. It could also be relevant in establishing Mike as the bank robber if it could be established that the costume and mask Mike stole is the same costume and mask used in the bank robberies.
403 Analysis:
Mike will argue that the probative value of the evidence is substantially outweighed by the risk of unfair prejudice of allowing the prior arrest for theft. Although there is a risk that the jury could use the arrest for the theft of the costumes for a propensity theory, the probative value of the evidence is strong and a court would allow it to come in.

2. Next, the Prosecutor calls Betty. Betty was outside the bank on September 1, 2018 when she saw a man in a Robin Hood costume and mask run out of the bank with a bag of money. She saw the man's face when he took off his mask while running away. A week later, a police officer came to her house and showed her a photo lineup. She identified the robber but testifies at trial that she cannot remember the man she identified in the lineup. The prosecutor then calls the police officer and represents that the officer will testify that when he showed Betty the photo lineup, she pointed to Mike's photo and said, "That's the bank robber." The defense objects to the police officer's proposed testimony.

Relevance: The police officer's testimony is relevant because it connects Mark to the bank robbery.

Prior Identification

1. The declarant testifies and is subject to cross examination about the statement, and
2. The declarant identifies a person as someone the declarant perceived earlier

Under the Federal Rules, a prior statement of identification that meets these requirements is not considered hearsay. Betty made the prior identification a week after the robbery. Betty was on the witness stand and subject to cross examination. Although Betty has no present recollection of the man she identified, she does verify that she made a prior identification of the robber. Thus, the statement of identification is admissible.

3. Next, the Prosecutor calls Investigator Ramirez. Ramirez spoke to Ed, the Chief Financial Officer for Robbin' Hood Foundation. Ed told Ramirez that on July 2, 2018 and September 2, 2018 (one day after each of the bank robberies occurred), Mike brought Ed a duffle bag full of money and instructed Ed to deposit the funds into various different foundation accounts. Ed asked Mike where the money came from. Mike said, "I robbed a bank". Ed thought Mike was joking and deposited the money as Mike requested. Ed was subpoenaed by the prosecution to testify at Mike's trial. However, at the time of trial, despite the diligent efforts of police, Mike cannot be located. The prosecutor establishes that a $50,000 payment was made to Ed from the Robbin' Hood foundation a week prior to Ed's scheduled testimony in this trial. The Prosecutor seeks to introduce:
    a. A properly authenticated text message from Mike's phone to Ed's phone that says: "I hope you take a well-deserved, very long vacation." and
    b. Ed's statements to Investigator Ramirez.

Text Message:

This statement is being offered to show that Mike procured the unavailability of Ed so that he would not testify against him at trial. It is an out of court statement, being offered for the truth of the matter asserted.

Statement of a Party Opponent: The text message was made by Mike, who is a party opponent of the Prosecution. Thus, it would be admissible as an exception to the hearsay definition.

EVIDENCE-FALL 2019-QUESTION #1 ANSWER OUTLINE PAYNE – S.LIZARDO

PLEASE NOTE: Student answers may argue different outcomes but should determine the issues. This Payne essay concerns Special Relevancy Issues and Public Policy Exclusions as per CEC. The students should know CEC 352 and 250, but specifically listing code sections numbers is not required.

Also, Authentication is not intended as an issue because that is covered next semester. This is the reason the call of the question may state "properly authenticated."

1. THE DREAMER RESORT LETTER: OFFER OF $75,000 to Payne

(1) Logical Relevancy/CEC 250 Tendency Test

As per CEC 350, only relevant evidence is admissible

Evidence is logically relevant of there is a tendency to prove or disprove any disputed fact that is of consequence in the determination of the cause of action.

To promote the policy of encouraging settlements in civil cases, CEC 1152 prevents the use of settlement offers or negotiations to prove liability in a negligence claim.

The offer by Dreamer Resort of $75,000 to Payne may be considered a settlement offer and has a tendency is to establish that the resort was negligent in not removing the diving board from the pool premises. The letter is highly relevant to establish fault or negligence of the Dreamer Resort.

(2) Legal Relevancy/Balancing Test CEC 352

The trial court has the discretion under CEC 352 to exclude evidence if the probative value is substantially outweighed by the danger of unfair prejudice. Here, the danger of unfair prejudice exists because the jury may equate the $75, 000 offer to Payne as a signal that the resort is liable.

(3) Special Relevancy

The offer by Dreamer Resort by Manager Max is likely an offer to compromise or settle the negligence lawsuit. The general rule is that settlement offers, offers to compromise or negotiations are inadmissible for the purpose of proving the validity of a claim or an amount of a disputed claim. Also, any statements made during the settlement negotiations are excluded as against public policy. The public policy is to have litigants settle cases and not be in fear of discussions or letters to be disclose to the jury.

Here, the letter offer by Dreamer Resort by Max was for $75,000 in settlement of Payne's negligence claim. There is a reasonable inference that Max is an authorized person to deal with

the resort's issues. The fact Payne rejected the claim and the offer should be inadmissible as it is against public policy.

Payne's testimony about the letter would be deemed inadmissible.

PAYNE'S COMPETENCY AS A WITNESS

Competency – for a witness to be competent to testify, under CEC it states that all people are qualified unless there is a disqualification due to: perception, memory, or the witness does not understand the "truth" or cannot communicate. In short, witnesses must have capacity to observe, recollect, communicate and affirm to be truthful.

Here, although Payne was initially unconscious, it does not appear this injury affected his memory. His testimony is relevant because he is a **percipient witness** and is the plaintiff in this civil negligence cause of action. His testimony is based on **personal knowledge of the diving fall.**

Lay opinion must be based on rationally based perceptions. The fact that Payne put on aqua shoes or swimmer shoes was because he was aware of the diving board associated conditions will be admissible.

Comparative Negligence – some students may argue that Payne was partially at fault. This is not a required issue, but it is acceptable. Damages could be offset or mitigated.

2. LARRY LIFEGUARD 'S TESTIMONY

Logical Relevancy- defined above.

Larry's testimony as a percipient witness has a tendency to establish that Payne was injured by an diving board with ketchup on it. fraudulent claims or that he is comparatively negligent by not being diligent in his diving form. The resort may argue that Payne was careless by not investigating the diving board beforehand. The resort may be able to make an offer of proof that it was the ketchup from the Food Court, not the resort that caused Payne to slip and fall off the diving board.

Legal Relevancy- CEC 352 defined above.

The trial court has discretion to weigh the probative value of the 2018 prior insurance claim against unfair prejudice.

See Special Relevancy below.

Similar Happenings: Six Claims and Prior Claim by Payne

Six Prior Claims: Notice of Dangerous Diving Board

In general, similar happenings are when a business has had numerous other claims for a similar accident, fall, etc. The fact of other six accidents may establish the business has notice or knowledge of a dangerous situation, the diving board, and did nothing to prevent any future injuries. Thus, these similar claims could help establish the business breach a duty of c

3. THE DREAMER RESORT PREMISES LIABILITY INSURANCE POLICY

As per CEC 350, only relevant evidence is admissible.

Logical Relevance/ CEC 250 Tendency Test- evidence is logically relevant if there is a tendency to prove or disprove any disputed fact that is of consequence in the determination of the action.

Here, the insurance policy has a tendency to establish that the Dreamer Resort does in fact own or control the pool premises. Part of a negligence claim includes duty, breach of a duty, causation and damages. Therefore, the policy may assist in proving the control of the pool area. . Since the insurance policy has a tendency to establish a duty, it may be significant in the disputed claim.

See below under Special Relevancy, where some relevant evidence has limitations.

Legal Relevance/Balancing Test CEC 352- the trial court has discretion under CEC 352 to exclude evidence if the probative value is substantially outweighed by the danger of unfair prejudice. It does not seem likely that the premises liability insurance policy would confuse, mislead or be a substantial danger of undue prejudice or a waste of time for a jury.

Special Relevance-Relevant Policy Exclusions

The general rule is that an insurance policy cannot be admissible to establish negligence. However, there is an exception where a party is denying "ownership or control" over the premises.

Here, Dreamer Resort, a party, is denying that the business has any dealings with the maintenance of the pool area and diving board. To prove otherwise, the policy will be admitted in since the premises maintenance is disputed. The Resort is "blame shifting" to the Food Court. Which leased the area. The premises liability policy is highly relevant because it tends to establish that Dreamer Resort is in fact doing business and since the business is denying liability, the policy may help establish "ownership or control" of the pool area.

However, the Dreamer Resort may argue that it is not the owner or manager of the pool area and pool area is the responsibility of the Food Court company. This is a weak argument because a business does not insure premises where it has no business interest.

In the alternative, if the invoice is used to establish the Dreamer Resort, because the business paid for the removal of the diving board, the court could allow the invoice in for the **limited purpose of establishing ownership or control.**

1)

1)

EVIDENCE: PAYNE'S TESTIMONY ABOUT AQUA SHOE

Dream Resort (DR) should object to the Payne's testimony about the aqua show as not relevant.

Evidence is relevant if it has any tendency make a fact of consequence more or less probable.In California, the fact must be in dispute. Additionally, the Prop 8 the Truth in Evidence law gives the presumption that all relevant evidence should is admissible subject to a 352 balancing.

In the instant case, the claim is negligence in allowing food to be the pool area, which the fact that Payne was wearing aqua shoes doesnt make more les likely. However, because Payne is also contending that he slipped because ketchup was on the diving board, having aqua shoes can make it easier to grip the ground and not loose your footing, it does make it more probable that if Payne did slip, it was because he slipped on the ketucup, which is a fact of consequence in this cause of action.

Thus, a court is likely to overrule the objection.

Dream Resort (DR) should object to the Payne's testimony about the aqua shoe under 352.

Under CEC 352, relevant evidence can be made inadmissible if its probative value is substantially outweighed by its prejudicial effect. Prejudicial effect means: unfair prejudice, confusing the issue, misleading the jury, undue delay, waste of time, and needlessly presenting cumulative evidence. Evidence is unduly prejudicial if it is either so inflammatory that the jury is swayed by passion or prejudicial rather than rational thinking or if the evidence is admitted for one admissible purpose and the jury misuses for another inadmissible purpose.

In the instant case, the shoe is probative, and the prejudical effect is not that high for misuses. The prejducie does not substantially outweigh the probative effect.

Thus, a court is likely to overrule the objection and admit the evidence.

EVIDENCE: PAYNE'S TESTIMONY REGARDING OFFER TO SETTLE

Dream Resort (DR) should object to the Payne's testimony about the offer to settle as not relevant.

Evidence is relevant if it has any tendency make a fact of consequence more or less probable.In California, the fact must be in dispute. Additionally, the Prop 8 the Truth in Evidence law gives the presumption that all relevant evidence should is admissible subject to a 352 balancing.

In the instant case, Manager Max's offer to settle does have suggests that he and DR knows that if this goes to trial, this will be bad for their reputation, or that they may actually be liable, which in a negligence claim, is a fact of consequence.

Thus, a court is likely to overrule the objection.

Dream Resort (DR) should object to the Payne's testimony about the offer to settle under public policy reasons.

Under the CEC, offers to settle, evidence of an offer, or related statement are not admissible to prove validity or liability of the claim or dispute. This protection extends to mediation as well. To trigger protection of this rule, there needs to be a dispute about the validity or liability of the claim.

In the instant case, there was a claim and a lawsuit by Payne against DR, which suggests that it triggered protection under this rule that there be a dispute about liability. DR offered Payne $75,000 to settle the lawsuit, meeting the requirement event though Payne declined.

Thus, a court is likely to sustain the objection and exclude the evidence.

2)

EVIDENCE: LARRY LIFEGUARD'S TESTIMONY

(DR) should object to the Larry's testimony as not relevant.

Evidence is relevant if it has any tendency make a fact of consequence more or less probable.In California, the fact must be in dispute. Additionally, the Prop 8 the Truth in Evidence law gives the presumption that all relevant evidence should is admissible subject to a 352 balancing.

In the instant case, Larry's testimony that he saw six other people slip and fall from food on the diving board, has a very high tendency to prove that the fact of consequence, the very same actions, is more probable to have occurred.

Thus, a court is likely to overrule the objection.

(DR) should object to the Larry's testimony as impermissible character evidence.

Under CEC, character evidence is opinion testimony, reputation testimony, or specific acts used to draw an opinion of someones character. The use of character evidence is inadmissible to prove that and individual acted in conformity therewith.

In the instant case, Larry's testimony of what he saw are specific acts, and because payne will most likely use it as circumstantial evidence that he already happened six time, it is very likely to have happened here, that it is propensity evidence, which is inadmissible.

Thus, a court is likely to sustain the objection.

Payne should counter that Larry's testimony of specific acts is offered to prove other wrongs and not propensity.

Under the CEC, evidence of specific acts can be admissible if it is offered to prove something other than propensity like, motive, intent, knowledge, plan, preparation, mistake or accident, or absent of mistake or accident, identity, or common scheme or plan.

In the instant case, Larry's testimony can that he observed six falls that are factually the same as this case, and that he reported to Manager Max, can show that Manager Max and DR had knowledge of this and failed to live up to their standard of care to correct it. Additonally, because Larry's teismony shows that this has happened six times before, it can help prove that there is absent of accident, and point to liabilty to DR. Knowledge and absence of mistake are indepdnent enough from proving propensity that it is admissible.

Thus, a court is likely to overrule the objection.

(DR) should object to the Larry's testimony under 352

Under CEC 352, relevant evidence can be made inadmissible if its probative value is substantially outweighed by its prejudicial effect. Prejudicial effect means: unfair prejudice, confusing the issue, misleading the jury, undue delay, waste of time, and needlessly presenting cumulative evidence. Evidence is unduly prejudicial if it is either so inflammatory that the jury is swayed by passion or prejudicial rather than rational thinking or if the evidence is admitted for one admissible purpose and the jury misuses for another inadmissible purpose.

In the instant case, the probative value of Larry's tetimony is relatively high, because in a negligence claim, it shows that DR failed to live up their standard of care after they had knoweldge. However, there is a danger that the six previous slips could confuse jury, and cause them to seek guilt, and use evidence of those acts not as the admissible forms for knowledge and absence of mistake, but a propensity in an unfair way. The prejdudicial effect, however, because of the probativeness of the testimony, that danger does not substantially outweigh the probativeness of larry's testimony.

Thus, a court is likely to overrule the objection and admit the evidence.

3)

EVIDENCE: DR'S LIABILITY INSURANCE COVERAGE

(DR) should object to the liability insurance coverage as not relevant.

Evidence is relevant if it has any tendency make a fact of consequence more or less probable.In California, the fact must be in dispute. Additionally, the Prop 8 the Truth in Evidence law gives the presumption that all relevant evidence should is admissible subject to a 352 balancing.

In the instant case, proof of insurance has a tendancy to prove that DR is worried about an accident and a lawsuit is likely to happen.

Thus, a court is likely to overrule the objection.

(DR) should object to the liability insurance coverage under public policy reasons

Under the CEC, evidence of liability insurance, or lack thereof, is not admissible to prove ability to pay or liability for the injuries in question.

In the instant case, Payne is attempting to use proof that DR had liabilty insurance to prove liability for the injuries, as prohibited by the CEC.

Thus, a court is likely to sustain the objection.

Payne should counter that evidence of liability insurance is admissible to prove ownership or control.

Under the CEC, evidence of insurance liability is admissible to prove ownership or control when the issue is in controversy.

In the instant case, DR has placed the issue of control in control by saying that the food court had a lease and is solely responsible for the accident, thus allowing Payne to introduce the evidence to show that DR did in fact control or own the premises.

Thus, a court is likely to overrule the objection.

(DR) should object to the liability insurance coverage under 352

Under CEC 352, relevant evidence can be made inadmissible if its probative value is substantially outweighed by its prejudicial effect. Prejudicial effect means: unfair prejudice, confusing the issue, misleading the jury, undue delay, waste of time, and needlessly presenting cumulative evidence. Evidence is unduly prejudicial if it is either so inflammatory that the jury is swayed by passion or prejudicial rather than rational thinking or if the evidence is admitted for one admissible purpose and the jury misuses for another inadmissible purpose.

In the instant case, the liability insurance is probative to show who is in control. However, because there is additional evidence, the paid invoice below, to show control, the evidence can be cumulative. However that does not rise to the level where it substantially outweiths the probative value.

Thus, a court is likely to overrule the objection and admit the evidence .

Payne should counter with a limiting instruction.

4)

EVIDENCE: DR'S PAID INVOICE

(DR) should object to the paid invoice as not relevant.

Evidence is relevant if it has any tendency make a fact of consequence more or less probable.In California, the fact must be in dispute. Additionally, the Prop 8 the Truth in Evidence law gives the presumption that all relevant evidence should is admissible subject to a 352 balancing.

In the instant case, the fact that improvement to the property were made and that they placed a sign that said no food near the pool has a tenency to show that they failed to live up to their standard of care and don't want to be held lible for it int he future.

Thus, a court is likely to overrule the objection.

(DR) should object to the paid invoice under public policy exemption of Subsequent Remedial Measure (SRM)

Under the CEC, evidence of remedial measures taken subsequent to injuries are inadmissible to prove negligence, culpable conduct, or need for warning or inspection. This does not apply to strict product liability cases.

In the instant case, DR payed to remove the diving board, which was a remedial action taken one month after the accident. So, the paid invoice, as evience of this SRM is inadmissible.

Thus, a court is likely to sustain the objection.

Payne should counter that evidence of SRM is admissible to prove ownership or control.

Under CEC, SRM are admissible to prove ownership or control where it is an issue in dispute.

In the instant case, DR has placed the issue of control in control by saying that the food court had a lease and is solely responsible for the accident. Because the invoice for

improvment sto the diving area, which DR disputed control or ownerhsip over, names DR, it is evidence that hsows that they did in fact control or own the premises

Thus, a court is likely to overrule the objection.

(DR) should object to the liability insurance coverage under 352

Under CEC 352, relevant evidence can be made inadmissible if its probative value is substantially outweighed by its prejudicial effect. Prejudicial effect means: unfair prejudice, confusing the issue, misleading the jury, undue delay, waste of time, and needlessly presenting cumulative evidence. Evidence is unduly prejudicial if it is either so inflammatory that the jury is swayed by passion or prejudicial rather than rational thinking or if the evidence is admitted for one admissible purpose and the jury misuses for another inadmissible purpose.

In the instant case, the invoice is probative to show who is in control. However, because there is additional evidence, the liability insurance above, to show control, the evidence can be cumulative. The jury can misuse the evidence and not use it for control, but use it to assign culpability. However that does not rise to the level where it substantially outweiths the probative value.

Thus, a court is likely to overrule the objection and admit the evidence

Payne should counter with a limiting instruction.

END OF EXAM

2)

Defense should object to the 2018 arrest under FRE 404(b). *Under FRE 404(b), prior bad acts may not be used to show that the defendant acted in conformity with those acts on this occasion.* Here, the charge of robbery is similar to the alleged act of stealing for which the arrest was made. The prosecution hopes that the jury will draw the conclusion that if he stole the prior items, he is guilty of robbery in the current case. **Unless an exception can be found, the prior bad acts should be suppressed under this rule.**

Plaintiff should respond that the prior arrest shows intent and planning. *Under FRE 404(b), prior bad acts can be used to show motive, intent, absence of mistake, identity, control, opportunity, planning or knowledge.* The prior arrest does not show motive. The prior arrest involved the taking of a disguise to be used in a later robbery, which shows intent. The prior arrest does not show absence of mistake. The prior arrest involved taking items that would complete the "Robin Hood" persona and can be used to show identity. The prior arrest does not show control. The prior arrest does not show opportunity. The prior arrest can be used to show planning, because the stolen items would later be used, which indicates prior thought about the items' purpose. The prior arrest does not show knowledge. **Because the prior arrest can show identity, planning, and intent, it should not be suppressed under rule 404(b).**

Defense should object to the prior arrest under 403. *Under FRE 403, otherwise admissible evidence can be made inadmissible of the prejudicial value substantially outweighs the probative effect.* Here, the arrest did not lead to a conviction. Because no conviction occurred, it is possible that the defendant was wrongly arrested or wrongly accused. No jury ever heard the evidence to make a decision, and if it did, it decided against his guilt. This jury is likely to hear about the arrest and presume his guilt wrongfully. The damage to the defendant is substantially greater than the probative value offered by the arrest. **Because the prejudicial value is substantially greater than the probative value, the prior arrest should be suppressed under FRE Rule 403.**

Defense should object to the schizophrenic witness on the grounds of competency. *Under the Federal Rules of Evidence, all witnesses are presumed competent. The defense can challenge competency and exercise vior dire, but the bar of proof is set very low. In vior dire, the defense must show that the witness is not capable of understanding the oath or affirmation, is incapable of remembering events, or is incapable of communicating those memories to other persons.* Schizophrenia is a communicative disorder. Schizophrenics often have trouble relating the thoughts in their heads to other people. The defense may have success on challenging the Schizophrenic's

competency at trial. However, the bar is set very low, and it is more likely that during the brief *vior dire* that the Schizophrenic witness will successfully pass all tests. **It is unlikely that the court will find the Schizophrenic witness to lack competency.**

Defense could object to the schizophrenic witness on the grounds of lack of personal knowledge. *Before a witness may testify, evidence must be proffered that shows the witness has personal knowledge regarding the testimony. The evidence may come from the same witness that needs to show personal knowledge through that witness's own testimony.* Here, the witness hallucinates and cannot be certain that he ever actually saw the defendant. The plaintiff's offer of proof that the witness was present at the time and the witness's own testimony that he was present at the time. **The judge is not likely to find a lack of personal knowledge and the witness will not be excused on this ground.**

Defense could object to the testimony of Investigator Ramirez on the grounds of lack of personal knowledge. *Before a witness may testify, evidence must be proffered that shows the witness has personal knowledge regarding the testimony. The evidence may come from the same witness that needs to show personal knowledge through that witness's own testimony.* It is important to identify what the person is testifying to. Here, the Investigator is not testifying to witnessing the events first hand. He or she is testifying that he or she saw a video. As long as the investigator does not go beyond the events that the investigator personally observed, the investigator has the requisite personal knowledge and can proffer the evidence of that knowledge through testimony. **The judge will not excuse Investigator Ramirez for lack of personal knowledge.**

Defense should object to the testimony of Investigator Ramirez regarding the content of the video under the "best evidence rule." *When the contents of a recording, writing or other document are at issue, the original document is the evidence that must be proffered to prove its content. When the original is not available, a copy of the document may be admitted, unless the original was lost through the negligence or intent of the proffering party.* Here, the investigator is not testifying about what she saw as much as she is asserting what the content of the video contained. The content of the video is what is at issue, which subjects this evidence to the best evidence rule. **Because the original video (or a copy) is not available, the testimony about the content of the video should be suppressed under this rule.**

Plaintiff should respond that the video was not lost through the fault of the proffering party. *The best evidence rule can be nullified if the best evidence was destroyed or made unavailable through no fault, negligence or intent of the proffering party.* Here, the video is automatically deleted by a process outside of the prosecutions control, and the prosecution is the proffering party. **Because**

the evidence was deleted by an automated process, the prosecution should not be held to the requirements of the best evidence rule.

Defense should respond that the video was lost through the fault of the proffering party because the proffering party had opportunity to make a copy and chose not to. *The best evidence rule can be nullified if the best evidence was destroyed or made unavailable through no fault, negligence or intent of the proffering party.* After the prosecution claims that it is not at fault, the defense must point out that the prosecution made negligent choices that led to the destruction of the evidence. The Investigator chose not to collect the security footage, which means the Investigator caused it to remain in the control of the automated process. The Investigator chose not to make a copy of the video, which means that the Investigator negligently lost an opportunity to preserve the evidence in the event of a disaster. Because the Investigator made choices that could have preserved the content of the video but negligently chose actions that led to the complete destruction of the video, the proffering party was negligent, and that negligence led to the destruction of the original evidence. **The testimony of Investigator Ramirez regarding the contents of the video should be suppressed, because the prosecution failed to act responsibly and to protect the original video or make copies for trial.**

Defense should object to the admission of the partial letter under 403. *Otherwise admissible evidence can be made inadmissible if the prejudicial value substantially outweighs the probative value. Undue prejudice can occur when evidence confuses the jury, confounds the issues or leads the jury to make inferences based on emotion rather than logic.* The jury is likely to hear the single sentence of "I will empty your bank vaults" and perceive this as a confession, which it is not. This evidence, therefore, acts to confuse the jury and lead them astray of the logical conclusions from the facts. Although this is a risk, it is not a risk that substantially outweighs the probative value. **The partial letter should not be suppressed under 403.**

Defense should object to the partial admission of the letter on the grounds that it is out of context. *When part of a written document is admitted into evidence, and the adverse party needs to admit remaining parts for the content to be understood in fairness and proper context, the remaining parts of the document must be admitted at the same time.* When the prosecution proffers only the signature and the single statement "I will empty your bank vaults," they are admitting only part of a written document. The additional statements change the meaning of the statement "I will empty your bank vaults [through a criminal act currently at trial]" to "I will empty your bank vaults [through legal action that involves no crime at all]." This is a substantial difference in meaning that must be clarified

by the admission of the full context of the document. **If the document is admitted in part, it should be admitted in whole.**

Plaintiff should not respond that they have the right to strike parts of the letter that are not relevant. *When a document is proffered into evidence, the adverse party must have a chance to review the document and strike portions that are not relevant to the present case.* Here, the prosecution is the proffering party, so **this rule does not apply to them.**

Both the Plaintiff and the Defendant should move for limiting instructions on the content of the letter. *When there is a risk of undue prejudice, but there is also permissible uses from the same piece of evidence, a party may request the court to issue a limiting instruction that informs the jury how the evidence can and cannot be used.* The plaintiff must mitigate the risk that the jury will see the statements about "If [the bank] does not stop its corruption" as an indication that the bank actually was corrupt or that they "deserved" to be robbed. The defense similarly must mitigate the risk that the jury will hear the statement "I will empty your bank vaults" as an admission of guilt for a robbery. **Because impermissible inferences are possible and because the letter does have some probative value for both parties, the court should permit limiting instructions for both sides.**

END OF EXAM

3)

Should the defense object to the prosecution proferring evidence of the 2015 spousal battery conviction as a prior bad act under federal rules?

Prior bad acts are not admissible to show propensity, but may be admitted to show knowledge, common scheme, lack of accident, preparation, or some other non-propensity use.

The spousal battery conviction is a prior bad act under the rules. As such it may not be used to show propensity to commit battery. There is no other non-propensity use that could be shown from the facts. If, however, Danielle attempts to claim that the husband had suffered an "accident", the prior conviction could be used to show a lack of accident.

The defense should object and the court will most likely sustain the objection under federal rules.

Should the defense object to the prosecution proferring evidence of the 2015 spousal battery conviction as a prior bad act under california rules?

Under california rules, prior instances of spousal abuse may be introduced in a spousal abuse case to show propensity.

The prosecution can use the prior conviction for spousal abuse to show the defendant's propensity for spousal abuse.

The defense should not object and the court should overrule any objection under state rules.

Should the defense object to the evidence of prior spousal abuse on the grounds of undue prejudice under the federal rules?

Relevant evidence may be made inadmissible if its probative value is substantially outweighed by its prejudicial effect. Prejudicial effect includes impermissible uses by the jury.

Because the federal rules forbid propensity evidence in spousal abuse cases, and this is a spousal abuse case, propensity is an "impermissible inference" that the jury could make about the

defendant's prior conviction for spousal abuse. The risk of this inference is great and the probative value (for permissible uses) is quite low, so it is most likely that the prejudicial effect substantially outweighs the probative value and the evidence will be kept out by FRE 403.

The defense should object and the court will most likely sustain the objection under federal rules.

Should the defense object to the evidence of prior spousal abuse on the grounds of undue prejudice under california rules?

Relevant evidence may be made inadmissible if its probative value is substantially outweighed by its prejudicial effect. Prejudicial effect includes impermissible uses by the jury.

the use of prior convictions for spusal abuse as propensity evidence is admissible in california in spousal abuse cases, which makes propensity not an "impermissible use" by the jury. There is no other impermissible use suggested by the facts and the probative value is unlikely to be substantially outweighed by prejudicial effect.

The defense should object and the court should overrule under califonia rules.

Should the defense object to the plea of no contest in reference to the spousal abuse conviction under either state or federal rules?

Under both state and federal rules evidence of a plea of no contest is not admissible in either civil or criminal court. Convictions are not Pleas.

The plea itself is inadmissible under both the state and federal rules, however the conviction itself is not made inadmissible on the grounds that the defendant pled no contest. However, it would be tactically beneficial to the defendant to have it be known that the defendant pled no contest.

The defendant should not object and the court should sustain any objection.

Should the defense object to the prosecution proferring evidence of the 2012 conviction for fraud and forging prescriptions on the basis of prior bad acts under the federal or califomia rules?

Evidence of prior bad acts is inadmissible to show propensity, but is admissible to show knowledge, common plan or scheme, intent, or preparation.

The prior conviction for fraud and forging prescriptions is a prior bad act under the rules. The evidence is not admissible to show a propenstiy to defraud or to forge, but is admissible for other purposes. The evidence could be proffered to show that this was a common scheme of hers to convince people that she was a medical expert and deraud them of money. The evidence could be admitted to show that she knew that she required a medical license to practice medicine (or pretend to.) The evidence could be offered to show that the defendant had intended to defraud the families or that she hadn't made a "mistake" in not going to medical school or doing any actual medicine.

The defense should object and the court should overrule the objection based on both state and federal rules.

Should the defense object to the evidence of thedefendant's plea in the 2012 conviction on the grounds of FRE 410 under either state or federal rules?

Evidence of a guilty plea later withdrawn, or of a plea of no contest, is inadmissible in a civil or criminal court. A conviction is not a plea.

The defendant pled not guilty and was convicted, so the rule does not apply. Only guilty pleas later withdrawn, pleas of no contest, and plea negotiations are protected. THis objection would have no grounds.

The defense should not object and the court should overrule any objection.

Should the defense objective to the testimony of Will on the grounds that Will is incompetant to testify under federal rules?

all witnesses are presumed competant to testify. if a witness's competancy is chellenged, a court may voir dire the witness to determine competancy. Witness competancy is a very low bar.

Will has the mind of a six year old, so a challenge to his competancy would be warranted and the court would most likey voir dire Will to establish his competancy to testify. However, there is no

"mental age test" to testify and so long as Will can properly recall and convey facts, he will most likely be presumed competant.

The defense could object and the court will most likely overrule the objection.

Should the defense objective to the testimony of Will on the grounds that Will is incompetant to testify under federal rules?

State courts may require a minimum age to be presumed competant. If a witness's competancy is chellenged, a court may voir dire the witness to determine competancy. Witness competancy is a very low bar.

Will is an adult, thus is not subject to any age related state minimum age requirements. However, his competancy as a witness may be challenged on the basis of his mental handicap and the court should then voir dire the witness to establish compentancy.

Should the defense object that the witness cannot give a meaningful oath or affirmation?

prior to testifying, a witness must give an oath or affirmation sufficient to impress upon the witness the requirement to tell the truth and the penalties for not telling the truth. For children and individuals with mental handicaps, a promise to tell the truth on its own may suffice.

Will's mental handicap does not automatically disqualify him from being able to take an oath or affirmation. Because he has a mental handicap, the court may find that a simple promise to tell the truth may, on its own, suffice.

The defense could object and the court should overrule any objection.

Should the defense object to the evidence of sexual abuse of a minor as propensity evidence under FRE 404(b)?

Under FRE 404(b), prior bad acts by the defendant are not admissible to show propensity. FRE 414 says evidence of prior sexual abuse of a minor is admissible as propensity evidence in cases

involving sexual abuse of children. A child under this rule is any person under the age of 14. Under FRE 413, in a sexual assault case, evidence of another sexual assault is admissible.

a previous instance of sexual assault is a prior bad act.

Will was a highschooler at the time the abuse he will be testifying about occured. It is therefore possible that he was under the age of 14 and qualifed as a child under the rule. If he was a child at the time of his sexual abuse by the defendant, then his testimony is admissible as propensity evidence because the defendant is accused of sexual molestation of minors, including two thirteen year olds.

If will was over the age of 14, he was not a child under FRE 414 and FRE 413 applies. Because one of the minors the defendant is accused of assaulting is 15, evidence of prior sexual assualts may be admitted against the defendant to prove propensity. Regardless of which side of the line Will fell on, his testimony is not made inadmissible by FRE 404(b)

The defense should object and the court should overrule the objection.

Should the defense object to the testimony of Will on the grounds of impermissible propensity evidence under california rules?

Under California rules, prior bad acts are inadmissible to show propensity, but prior sexual assault is admissible to show propensity in a sexual asssault case.

Will is testifying about his sexual assault in a sexual assault case, so the evidence is not made inadmissible by the general rule against character evidence.

The defense should object and the court should overrule the objection.

Should the defense object for undue prejudice under california or federal rules?

Relevant evidence may be made inadmissible if its probative value is substantially outweighed by its prejudicial effect. Prejudicial effect includes impermissible uses by the jury.

There is no impermissible use by the jury that could be reached here. The general impermissible use is propenstiy, but that is explicitly allowed in sexual assault cases.

The defense could object, but the court will overrule the objection.

END OF EXAM