

MONTEREY COLLEGE OF LAW

EVIDENCE

Mid Term Examination

FALL 2016

Professor J. Davenport

INSTRUCTIONS:

There are three (3) questions in this examination.

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

QUESTION #1

Pacey was riding her bicycle in a marked bike lane when she was struck by a car driven by Dale. Thereafter, Pacey filed a negligence lawsuit against Dale in federal court for personal injuries sustained. The complaint alleges that Dale was speeding and drifted onto the right shoulder, hitting Pacey. The impact caused Pacey to be ejected from her bicycle. Her injuries were a fractured shoulder and a severe back injury. Dale counterclaims and denies he was speeding or drifted off the roadway into the bike lane.

Assume the following occurred in a federal jury trial. 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.

Answer according to the Federal Rules of Evidence.

1. During Plaintiff's case-in chief, Pacey was the first witness. She testified that while she was being treated by paramedics, Dale said, "I am so sorry I hit you!"
2. Officer Owen responded to the accident but was unavailable at the trial due to being in a coma. The court granted a motion to admit Officer Owen's accident report into evidence. Officer Owen's report states: "When I arrived on scene two minutes after the accident, an unnamed bystander ran up to me and stated that the driver of the car was speeding and hit the bicyclist after swerving into the bike lane!"
3. Next, Pacey introduced a letter from Drake that stated: "I offer you \$200,000 to pay for your medical expenses." The letter was dated one week after the collision. Pacey rejected the offer.
4. During Dale's case-in chief, Fred, a passenger in Dale's car was called to testify. Fred testified that he saw Pacey look at a cell phone, fall off her bicycle, and that Dale had no time to stop before the accident occurred. Also, Fred testified that Dale was driving the speed limit.

QUESTION #2

Palmer and Drake were rivals at the Pono Manufacturing Company and were seeking the same job promotion. Drake received the promotion after he sent the following text message to all employees of Pono:

“It is in everyone’s best interest to be informed that Palmer has a history of being violent. Watch out!”

Palmer filed a defamation lawsuit against Drake.

Assume the following occurred in a California state court. 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.

Answer according to California law.

1. During Palmer’s case-in -chief, he presented Elliot, an employee, who testified that she heard Brady, the boss, say: “I did not know that Palmer was a violent man. I am giving the promotion to Drake.” Brady died the next day.
2. Next, Palmer introduced the text message through Carl, the Vice President in charge of the Communications section at the Pono Manufacturing Company.
3. Next, Tess, a good friend of Palmer’s, testified in his case. She testified that Drake and Palmer were rivals. Further, she has known Palmer for ten years and he is a peaceful man.
4. During Drake’s case-in-chief, Wilson, a college classmate of Palmer’s testified. Wilson stated that it was well-known that Palmer had hit another student for talking to Palmer’s girlfriend.

QUESTION #3

David is charged with the murder of his father, Vic. Vic's body was discovered on October 1st after numerous complaints by neighbors about the smell coming from an RV located 15 feet from the entrance of David's property. Vic's body was found in the RV and was badly decomposed. The cause of death was blunt force trauma to the head. David was charged with Vic's murder.

The following occurred during the prosecution of David in the case of the *People of the State of California vs. David*. Discuss all 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. California law applies.

1. The prosecution seeks to introduce the testimony of a code enforcement officer who was contacted by Bob, David's neighbor. Bob called the code enforcement on September 1st complaining of a smell coming from David's RV. Bob told the code enforcement officer that 30 minutes prior to his call to code enforcement, he went to David's house and said jokingly, "David, you need to do something about the smell from your trailer. I haven't seen Vic in weeks. You didn't kill Vic and stuff him in there?" David did not respond and angrily slammed his door in Bob's face. At the time of trial Bob is out of the country.
2. The prosecution seeks to introduce a tissue sample taken from Vic's body to enable the jury to smell the stench emitting from it and photographs taken by police of Vic's body in the RV.
3. After Vic's body was discovered, pursuant to a lawful search of David's house, the police found a note which read, "make it look like he fell and remember to place air freshener's in the RV". The note was signed Derek. Derek is David's brother. The prosecution calls Derek as a witness and Derek asserts his Fifth Amendment privilege. The prosecution seeks to introduce the note. The note has been properly authenticated as Derek's writing.
4. The defense calls David's sister to testify that he had a good relationship with his father and that in her opinion David is a peaceful, non-violent person. In rebuttal, the district attorney offers the testimony of Sam, an acquaintance to testify that on May 1, 2015, David committed an assault with a deadly weapon against him.

QUESTION 1: ANSWER OUTLINE

PLEASE NOTE: in each section of the four part call of the question, both Logical Relevancy and Logical Relevancy should be discussed in full by the student.

1. PACEY'S TESTIMONY RE: DALE STATEMENT

LOGICAL RELEVANCE- Under the FRE, evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of material consequence. Here, the statement by Dale, the defendant, to Pacey is relevant to establish Pacey was hit by Dale's car and negligence liability for the accident.

LEGAL RELEVANCE- the Balancing Test in FRE 403, is the court's weighing of probative value verses the danger of unfair prejudice, confusing the jury or wasting time. There must be no policy exclusions. Here, the purported "sorry statement" by Dale supports an element in negligence, the breach of duty.

HEARSAY: is an out-of-court statement offered to prove the matter asserted and is inadmissible unless there is an exception. The declarant is Dale, the defendant, in this negligence case, however, the plaintiff, Pacey is repeating the statement in court and it seems to be offered for the truth of the matter, that Dale is at fault.

STATEMENT BY A PARTY OPPONENT- NON- HEARSAY: Under the FRE, statement by an opposing party is being offered against him, since Palmer is the plaintiff and Dale is the defendant. The "I am sorry I hit you!" is likely to be allowed by the trial court because it is akin to an admission and is admissible non- hearsay as a statement by an opposing party.

STATEMENT AGAINST INTEREST- a statement by an **unavailable** declarant if at the time it was made, and was against financial interest or subjected the declarant to criminal liability. This cause of action is for negligence, so the "the sorry statement" may place risk on the Dale for liability. However, Dale is available since he is a party and this specific exception to hearsay would not be admissible.

EXCITED UTTERANCE- is a hearsay exception if the declarant made the statement while under the stress of a startling event. Here, Dale's car hit Palmer, a bicyclist. The "sorry statement" was said by Dale to Palmer while the paramedics were on scene. The stressful event is the accident and the statement was made while Palmer was being treated. The trial court is likely to find this hearsay exception statement will be admissible as indicative of fault on the part of Pacey.

STATE OF MIND- is a hearsay exception if the statement is of the declarant's then existing state of mind. Here, Dale's "sorry statement" to Palmer indicates he believes he is responsible for the accident. The trial court is likely to admit the statement under this exception.

2. **OFFICER'S REPORT RE: BYSTANDER STATEMENT ABOUT SPEEDING AND CAR SWERVE-**

LOGICAL RELEVANCE- see definition above. Here, the police accident report contains a bystander's statement about the proximate cause of the collision as Dale's "speeding and swerving into the bike lane". The cause of the collision is actually in dispute in this negligence case.

LEGAL RELEVANCE- See definition above.

MULTIPLE LAYERS OF HEARSAY- ACCIDENT REPORT AND UNNAMED BYSTANDER:
Hearsay defined above.

BUSINESS RECORDS EXCEPTION- records of events, conditions made in the regular course of business, that are matters within the personal knowledge of a person with a duty to record the event or condition may be admissible.

Here, the problem is that the document is a police traffic report that may be filled with hearsay declarant statements and that the author, Officer Owen is unavailable. Generally, police reports are inadmissible as they contain multiple layers of hearsay. Owen's unavailability is due to a coma. The trial court admitted the police report in error and it is likely to be a prejudicial error and an abuse of discretion. The other layers of hearsay are examined below.

- **Unnamed Bystander Statements-** contained in Officer's report are two distinct hearsay statements: (1) "the driver of the car (Dale) was speeding; and (2) "(the driver, Dale) hit the bicyclist after swerving into the bike lane." Both of these statements assist Palmer in establishing that Dale's driving was the proximate cause of Palmer's fractures shoulder and back injury.

- **EXCITED UTTERANCE-** defined above. The two minutes after the officer arrived at a traffic accident scene would qualify as a stressful event. However the "speeding and swerving" is complicated because Officer Owen is unavailable to testify directly as to what the unnamed person said.

PRESENT SENSE IMPRESSION EXCEPTION- under the FRE is an exception the hearsay if the statement is the declarant's (bystander) then existing physical or mental state of mind that describes or explains an event or act immediately after the event or act is perceived by the declarant.

3. THE LETTER- OFFER TO COMPROMISE

LOGICAL RELEVANCE- see above definition. The letter from Dale to Pacey has a tendency to prove a disputed fact, that Dale was negligent in causing the collision, otherwise an offer of \$200,000 would not be made. However, the letter must be authenticated first and special relevancy rules apply.

AUTHENTICATION OF LETTER- authentication is when a proponent, here Pacey, seeks to introduce the contents of a document into evidence; it requires the document to be genuine and a chain of custody, of foundation to be established. Sufficient information to establish that Dale was the sender may be his address, handwriting signature or other indicia of trustworthiness that the letter is from Dale. Pacey may testify that she received the letter, and if there are specific details in the letter that only Dale would be privy to, the letter may be authenticated. However, there are special relevancy rules to consider.

SPECIAL RELEVANCE RULE POLICY EXCLUSION- Under the FRE, there is a prohibition against using an offer to compromise or settle lawsuits unless there is bias or prejudice presented. The reason is that the courts want to encourage settlement negotiations.

Here, the offer by Dale to Palmer was for “\$200,000 to pay for medical expenses” for Palmer’s injured shoulder and back in a letter is an offer to settle with an amount named. There is no exception of bias or prejudice apparent so the letter and offer of \$200,000 contained in the letter is inadmissible and would be excluded for public policy reasons.

4. FRED’S TESTIMONY

LOGICAL RELVANCY- see above for the definition. As the passenger in Dale’s car, Fred’s testimony may be relevant to establish a defense for Dale- that Dale was not negligent, and was not speeding and that Palmer was comparatively negligence by viewing a cell phone while cycling. The act of cell phone viewing by Palmer could alter the amount of damages awarded by the jury if Dale was found to be liable in part.

LEGAL RELEVANCY- see the above definition.

EYEWITNESS TESTIMONY- Fred is an eyewitness presented by Dale and had the capacity to observe, perceive, narrate and recollect the accident. Thus, his testimony is based on personal knowledge and his credibility and competency may be explored on cross-

examination as to any bias or any inconsistencies. Since Fred was a passenger in Dale's car, with the opportunity to perceive when the accident occurred, his testimony will be allowed. However, the testimony may be subject to limitations.

LAY OPINION RE: NOT SPEEDING - Fred as a lay witness may be able to testify that Dale was doing the speed limit if proper foundation is laid as to how he knew this. However, testifying that Dale had "no time to stop" may cause an objection.

SPECULATION OBJECTION: NO TIME TO STOP- or guessing on Fred's part. The objection as to no time to stop would likely be granted because Fred cannot get into the mindset of Dale.

QUESTION 2: ANSWER OUTLINE (PALMER – DRAKE)

PLEASE NOTE: in each section of the four- part answer, both **Logical Relevancy and Legal Relevancy** are issues to be discussed in full by the student.

1. ELLIOT’S TESTIMONY

LOGICAL RELEVANCE- defined under the CEC as having any tendency to prove or disprove make any fact of consequence. The text message is logically relevant because it constitutes the basis of the defamation lawsuit and it actually in dispute. It is clear that Brady, the boss, read the writing-text message (Libel) because he made reference to Palmer being violent. The remaining portion of the statement that he was giving the promotion to Drake shows that Brady believed the text message and it did influence the promotion decision.

LEGAL RELEVANCE- to be legally relevant, the evidence must be tested under CEC 352 that states that the probative value of the evidence must be weighed by undue prejudice, waste of time or jury confusion. There must not be policy exclusions. Here, the text message legally relevant because it supports the defamation allegation since character (violence) is directly in issue.

HEARSAY: Layered hearsay- out of court statement offered to prove the truth of the matter asserted. Generally, hearsay is inadmissible unless there is an exception. The declarant, Brady is now dead, so under the CEC, he is deemed unavailable.

Here, the promotion went to Drake over Palmer due to Brady believing that Palmer has a violent temper. However, it is Elliot that is testifying, not Brady. Thus, there may be multiple layers of hearsay to be considered.

A trial court may allow in the violent temper portion, but may redact the “Watch out!” portion unless it can be established that this was a “fear element” that may have resulted in Palmer being passed over for a promotion because Brady believed the test message, that Palmer was violent.

BRADY’S STATE OF MIND -is the underlying reason that Palmer was not promoted. Brady specifically voiced his concern to others (Elliot) about Palmer’s violent history and the fact that as a boss, he was unaware of it. Here, a declarant’s then existing state of mind is admissible to show the condition or mind set. It is likely a court will view the Brady statement as a state of mind.

LIMITING INSTRUCTION- Alternatively, the court may allow in the entire text message, but give a cautionary advisement to the jury that the text message should be considered for one purpose, but not another.

STATEMENT OF PARTY OPPONENT- EXCEPTION: under the CEC, a statement may be admissible if it is made by a party and offered by the opponent. It need not be against the declarant's interest. It may include statements against social interests making the declarant an object of "hatred, ridicule or social disgrace."

SPONTANEOUS STATEMENT - under the CEC, the statement must be made while under the stress of the event and be trustworthy. The "watch out!" statement is in a text message and may be argued as more of a caution than an actual relaying that Palmer is indeed violent. It is unlikely this exception will apply because the startling event is too vague, innuendo of Palmer's history of being violent.

INDEPENDENT ACT OF LEGAL SIGNIFICANCE- NON HEARSAY-Palmer may argue that the Brady comment and text message is not hearsay because it has an independent legal significance since the text, "Palmer has a violent temper" is allegedly a defamatory statement in a defamation lawsuit. This is likely to be successful. Also, it may be argued that Palmer was passed over for a promotion because Brady, his boss, believed that Palmer was prone to violent outburst.

2. **CARL'S TESTIMONY**

RELEVANCY DISCUSSION

BUSINESS RECORD EXCEPTION- TEXT MESSAGE- Business record exception requirements are: (1) recording of an act or event; (2) made by person with personal knowledge; (3) made at or near the time of the event or act; (4) by a person under a duty to keep the records in the ordinary course of business.

Since Carl is a vice-president in charge of Communications Department, he may well qualify as the custodian of records. However, it is unlikely that this text message from Drake to other employees would qualify under this exception because there was not duty on the part of Pono Company and this was not in furtherance of the business operations.

Thus, the text message does not qualify as a Business Records Exception, but may still be admissible as an Act of Legal Significance discussed above if the proper Authentication and Foundation are laid.

STATEMENT BY A PARTY OPPONENT-see above analysis.

3. TESS'S TESTIMONY

RELEVANCY DISCUSSION

CHARACTER EVIDENCE- is generally inadmissible to prove up conduct. However, in this civil case, it may be admissible since a character trait, violence, is directly in issue in defamation cases. Here, Tess's testimony is being offered to show the falsity of Drake's violence text message about Palmer.

BIAS- May be explored on cross- examination by Drake because Tess is a good friend of Palmer's for the past ten years.

4. WILSON'S TESTIMONY (DEFENSE)-

RELEVANCY DISCUSSION

SPECIFIC ACTS- CHARACTER EVIDENCE —other crimes or bad acts may be used as specific instances. Here, Wilson is giving an account from college that Palmer was violent. The hitting of a college student is a prior act of violence. Here, this testimony is being used to counter the testimony of Tess. Character of the victim, Palmer is offered by defense to rebut, etc. and may be deemed admissible since there was testimony that Palmer was a peaceful man. The college hitting incident may give rise to truth of violence and truth is a defense in a defamation lawsuit.

EVIDENCE QUESTION 3 - FALL 2016

EXAM QUESTION

David is charged with the murder of his father, Vic. Vic's body was discovered on October 1st after numerous complaints by neighbors about the smell coming from an RV located 15 feet from the entrance of David's property. Vic's body was found in the RV and was badly decomposed. The cause of death was blunt force trauma to the head. David was charged with Vic's murder.

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1. The prosecution seeks to introduce the testimony of a code enforcement officer who was contacted by Bob, David's neighbor. Bob called the code enforcement on September 1st complaining of a smell coming from David's RV. Bob told the code enforcement officer that 30 minutes prior to his call to code enforcement, he went to David's house and said jokingly, "David, you need to do something about the smell from your trailer. I haven't seen Vic in weeks. You didn't kill Vic ~~him~~ and stuff him in there?" David did not respond and angrily slammed his door in Bob's face. At the time of trial Bob is out of the country.

Relevance: To show consciousness of guilt

Hearsay: OOC Statement offered for the truth of the matter asserted. Bob's statement was made out of court. There are three statements:

David, you need to do something about the smell for your trailer – If offered to show that there was smell coming from the trailer, then it would be offered for the truth.

I haven't seen Vic in weeks – is being offered for its truth

You didn't kill Vic and stuff him in there – if offered as an admission on the part of David, it is being offered for its truth

Admission by a party-opponent: If a party fails to respond to accusatory statements where a reasonable person would have spoken up, his silence may be considered an implied

admission. For silence to be an admission the party must have heard and understood the statement. The party must have been physically and mentally capable of denying the statement and a reasonable person would have denied the accusation under the same circumstances. Here, silence was not motivated by advice of counsel or realization that anything that he said could be used against him. The statement was made in his presence. The issue presented is would a reasonable person have denied the statement? Here, the statement was made jokingly which argues against admitting it as an adoptive admission through silence. However, an argument can be made that a reasonable person under the circumstances would explain where Vic was and attempt to explain or investigate the smell coming from the trailer.

In California, an admissions are an exception to the hearsay rule (unlike under the Federal Rules, which excludes admissions from the hearsay definition).

Contemporaneous statement: This exception applies when the declarant is describing his own conduct as it is occurring. This exception does not apply because Bob called Code enforcement 30 minutes later and he is describing the conduct of David.

2. The prosecution seeks to introduce a tissue sample taken from Vic's body to enable the jury to smell the stench emitting from it and photographs taken by police of Vic's body in the RV.

Relevance: Relevant evidence is evidence that has some tendency to make a material fact more or less probable than it would be without the evidence.

Probative Value vs. Prejudicial Effect. A trial judge has discretion to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury undue delay, waste of time or needless presentation of the evidence. For both of the items of evidence below, the strongest argument for the defense is to exclude the evidence due to its prejudicial effect. Prejudice in this context means evidence that is likely to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged. It is an undue tendency to suggest decision on an improper basis, commonly, through not necessarily, an emotional one.

Tissue: Prosecution will assert that it shows that David would have been able to smell the stench and was aware of his father's presence in the camper. Under a CEC 352 analysis the evidence should be excluded. The probative value of the evidence is slight.

The prejudicial effect of the evidence is significant as the smell is likely to overcome the jurors.

Photographs: Photos of Vic are probative on the issues of the cause of death, the location and nature of the injury, and to show the condition of the body. Although the photographs could evoke an emotional response in the jurors, the probative value is not substantially outweighed by the potential of prejudice.

3. After Vic's body was discovered, pursuant to a lawful search of David's house, the police found a note which read, "make it look like he fell and remember to place air freshener's in the RV". The note was signed Derek. Derek is David's brother. The prosecution calls Derek as a witness and Derek asserts his Fifth Amendment privilege. The prosecution seeks to introduce the note. The note has been properly authenticated as Derek's writing.

Relevance: Note tends to show that David was involved in Vic's death due to the fact it was located in David's house and appears to reference the crime and how it was committed.

Vicarious Admissions Co-Conspirators: The admissions of one conspirator, made to a third party in furtherance of a conspiracy to commit a crime at a time when the declarant was participating in the conspiracy are admissible against the co-conspirators. The government need not demonstrate the unavailability of a non-testifying co-conspirator as a prerequisite to admission of the co-conspirator's out of court statements. The proponent is not required to establish the existence of the conspiracy and the participation of the declarant and party with evidence that is entirely independent of the statement itself.

Here, Derek's letter indicates that he was involved in the death of Vic. The presence of the letter in David's home, coupled with the manner of Vic's death, indicates that David was also involved in Vic's death. Thus, although the prosecutor is not required to establish the existence of the conspiracy and participation of David and Derek with evidence that is entirely independent of the statement, such evidence does exist. The statement of Derek in the letter is made in furtherance of the conspiracy and while Derek was participating in the conspiracy to commit Vic's murder as it is directing David as to how to commit the crime. Thus, the letter should be admissible as an exception to the hearsay rule against David under the co-conspirator exception.

Statement Against Interest: A statement of a person who is now unavailable as a witness may be admissible if it was against that person's pecuniary, propriety or penal

interest when made. To be admissible under this exception the statement must have been so against the declarant's interest when it was made, that a reasonable person in the declarant's position would have made the statement only if he believed it to be true. The declarant must have personal knowledge of the facts and no motive to misrepresent when he made the statement. In criminal cases corroborating circumstances indicating the trustworthiness of such statements are required. This statement could also be admissible under the statement against interest exception as it meets the elements of that exception.

4. The defense calls David's sister to testify that he had a good relationship with his father and that in her opinion David is a peaceful, non-violent person. In rebuttal, the district attorney offers the testimony of Sam, an acquaintance to testify that on May 1, 2015, David committed an assault with a deadly weapon against him.

Character: David has opened the door to his character by calling his sister as a witness. Once the defendant opens the door to his own character, the prosecution can rebut by asking the defendant's character witness whether they know of specific acts of conduct that are relevant to the trait raised by the defendant to show that witnesses' lack of knowledge about the defendant's character. The prosecutor also has the option of calling her own witnesses to testify about the defendant's bad character for the same trait. The prosecution's witnesses are limited to testifying about the defendant's reputation or their opinion of the defendant for that trait. No specific acts are allowed. Thus, this evidence would not be admissible under a character theory. The prosecutor could ask David's sister whether she knows of the assault David committed against Sam to show her opinion is not based on full knowledge of David's character. If David's sister states she did not know of that incident prosecutor would be precluded from introducing extrinsic evidence (such as the testimony of Sam or the record of conviction from the assault).

Prior Bad Acts: If a prior bad act is relevant on a theory other than character, it is admissible, subject to an analysis of whether the probative value is substantially outweighed by its prejudicial effect. Here, there is no theory upon which the evidence is relevant other than the defendant's propensity to commit violent acts.

1)

Pacey v. Dale

Great job!

This action for negligence took place in a federal civil court. The federal rules of evidence apply.

One

Relevance

Evidence can be testimony, real, documentary, or demonstrative. Evidence is admissible if it has any tendency in reason to prove or disprove a fact of consequence in an action, or if it has any tendency to reflect on the credibility of a witness or hearsay declarant. To be logically relevant, evidence must be material— it must relate to an issue of consequence in the case, and it must be probative— it must make a material issue more or less likely (brick not a wall.) To be legally relevant it must also be competent— it must not violate an exclusionary rule related to character, past acts, rape shield laws, hearsay, public policy, or discretion under 403.

Great!

Logical Relevance

Here, Pacey wants to introduce a statement of Dales, in which he said, " I am so sorry I hit you." This is material because it relates to fault, something that must be shown in a negligence action. It is also probative as it advances the issue of Dale's fault from his own mouth. This is certainly a brick!

Good!

Legal Relevance

Here, the competency of the evidence is in question because the statement is hearsay. D will object on those grounds.

Hearsay

Hearsay is an out of court statement offered to prove the truth of the matter asserted. Here, Dale's statement was out of court— it was made outside of the present proceeding at the scene of the accident, and he was not testifying to the statement, P was. His

statement was assertive conduct— he was stating that he was in fact sorry for what had occurred. It is arguable whether it was offered for the truth of the matter asserted however. The issue is not whether Dale was sorry, the issue is whether he was guilty of hitting Pacey. P would argue that it was not hearsay for this reason— D would argue that it is circumstantial evidence towards Dale's guilt, and was therefore offered to prove the truth of the matter asserted. It will likely be held to be hearsay. *Good!*

Exceptions and Exemptions

Evidence that is hearsay may still be introduced if it falls within an exception or exemption. Here, Dale's statement might be introduced under the following exceptions: excited utterance, present sense impression, state of mind, or admission by a party opponent (an exemption from hearsay under the federal rules).

An excited utterance is a statement that is made while a person is under the stress of a startling event, which they themselves have observed or experienced. Here, P would argue that Dale was under the stress of having just struck someone with his vehicle, a startling event. He had not had time to fabricate anything while under the stress of the event and therefore his words were trustworthy. The statement could come in under this exception.

A present sense impression is a statement made by an individual while or immediately following their perception of an event. Here, P would argue that the striking of P was an event, and that D was speaking immediately after the event. The statement could come in under this exception.

Admission by a Party Opponent is when a party makes a statement that is an admission of guilt or wrongdoing. They need not know that it was against their interest at the time that it was made. Here, P would argue that D's statement was a personal admission— one that he made in his own capacity, as opposed to vicarious or adoptive. She would argue that it was against his interest and he had no reason to fabricate it at the time. The statement could come in under this exception.

- can be any statement of a party opponent doesn't need to be an admission of guilt/wrongdoing

Discretion To Exclude Under 403

As the statement would come in under an exception or exemption, P could ask the court to exclude the statement under 403, which allows the court to exclude probative evidence if it is substantially outweighed by the risk of prejudice, confusion of the jury, or undue



consumption of time. Here, D could argue that it was more prejudicial than probative (it would lead the jury to decide the case based on something other than the facts and law at hand) because the fact that he said he was sorry that he hit her could be construed to mean that he hit her based on his own fault, not hers.

Excellent job on this question!

Limiting Instruction

Since the statement will still likely come in, D should ask for a limiting instruction— that the jury not take his admission that he hit P as evidence that it was due to his own negligence.

Two

Relevance (see above)

Logical relevance (see above)

Here, Officer Owen's report was material because it included information that tended to show that D was responsible for striking P when he swerved into the bike lane. It is probative because it advances her claim that he was negligent and makes it a little more likely.

Hearsay (see above)

Here, there are two layers of hearsay.

Good!

The first is from the bystander to the officer. The Officer in his report wrote that the bystander stated the car was speeding, and that it swerved into the bike lane. P could object to this as inadmissible opinion of a lay person— that he was not qualified to give an opinion about the speed of the car. P could respond that the speed of a moving object is one of the things about which a lay person may testify in the form of an opinion. Next D would object that the statements made to the officer were hearsay because they were made out of court and offered to prove that the car swerved and was speeding. P would say that this could come in under the excited utterance or present sense impression exceptions. (See above for rules.)

Great!

The next level of hearsay is getting the police report into the record. As the officer was in a coma he was unavailable. Because he was unavailable all of the exceptions applied to him — both those for which availability is immaterial, and those for which availability is material. P would try to claim that the reports should come in under the official records exception. The official records exception applies when someone has a legal duty to record something that is within the scope of their official business, it is not made at or near the time it is discovered, and it is not made for litigation. D would argue that this does not apply here since it was created for litigation— that is what all police reports are prepared for. He would be correct and the records would not come in under that exception.

Excellent job!
- Business records has the litigation exception
- official records is a separate exception

P could also try to get the records in under a residual exception: there is an indicia of reliability, the evidence goes to a material issue, the evidence is more probative than any other available evidence, and the other party has notice. P could claim that the reports are reliable because they are made by a cop; that the evidence goes to how the event occurred which is material; that it is the only way to get in the evidence of the swerving; and that the other party had notice. D could respond that they were using the exception in violation of the near miss rule— they just wanted to get in something that they could not get in through the records exception.

Three

Relevance (see above)

Logical relevance (see above)

Legal Relevance (see above)

Here, the offer to pay for medical expenses is material because it is circumstantial evidence of responsibility. It is probative because it advances the theory of D's responsibility.

It's competency depends on the application of exclusions of evidence for public policy reasons, and those of authentication.

Public Policy

Some evidence that is otherwise admissible may be excluded for policy reasons. Two such reasons are offers to pay medical expenses, and offers to compromise. Here, D would



object that the offer to pay expenses is not admissible since it would discourage people from being compassionate. As the expenses were clearly related to P's injuries because of the incident, the letter would not be admissible. Hand in hand would be the exclusion of offers to compromise. Because courts want people to settle things between themselves, they do not want to hold people responsible for such attempts. Here, the offer could be viewed as an attempt to settle the case. This can not be used to show fault or the amount in controversy, so it cannot come in here.

*Good policy
Statement*

Authentication

Here, there would also be an issue for the authentication of the police report. Someone would need to come and testify regarding the authenticity of the document— something that officer could not do.

Great!

Four

Relevance (see above)

Logical relevance (see above)

Legal Relevance (see above)

Here, Fred's testimony is material because it has to do with fault, which is an issue in the case. It is probative because it advances a lack of D's fault in the case. Whether it is competent depends on Fred's ability to give opinion testimony as to D's ability to stop, and D's speed.

Great

Opinion Testimony (See above)

Because Fred's testimony was related to the speed of a moving object— the car— his opinion for that can come in. However, because D's ability to stop is not within that exception, that portion of the testimony cannot come in.

END OF EXAM

2)

Question 2 Palmer v. Drake

This is a civil case in a CA court for defamation. IN defamation, character evidence is admissible as it is at issue.

ROG 1

Relevance:

Evidence is relevant if it tends to make a material fact more or less likely that is would be without it. Relevant evidence may be exluded under a balancing test if it probative value is substantially outweighed by danger of unfair prejudice, confusing the issue, misleading the jury, wasting the court's time, causing undue delay, or being unduly cummulative. In CA, the material fact MUST be one in dispute.

Palmer (P) is introducing this evidence to show that P was damaged by D's text. Damages are a required element for defamation. It is also relevant to show that P's boss did not have knowledge of P being violent. It is also relevant circumstancially (making an inference from one set of facts to prove another) to show that D was motivated by the competition to get the promotion.

Good!

Hearsay:

An out of court statement offered for the truth of the matter asserted (TOMA). This is an out-of-court statement since it was not made in the current court setting. It is being offered for the truth of the matter, that the boss did not know about P being violent, and that P did not get the promotion becasue of D's text. P will counter that the statements are either non-hearsay or excepted.

Statement #1: "I did not know that Palmer was a violent man" -

State of Mind Exception to Hearsay Rule:

If the statement goes to the state of mind of the declarant, and the state of mind is at issue, then it is non hearsay. Here, P will use this statement to show that P's boss was in a good position to know about P's character and any specific acts of violence (character is at issue in a defamation case, and reputation, opinion, and specific acts may be brought in

Great job!

as evidence); however, he is surprised, and states that he did not know about P being a violent man. As Boss is unavailable (he is dead) this statement may come in as State of Mind Exception.

Effect on Listener

Another hearsay exception is the use of out of court statements used to assert the TOMA are effects on the listener. Here, Boss "heard" through the text that P was violent, and it caused him to give the promotion to Drake. It would therefore be admissible under effect on listener.

Verbal Acts - Legally Operative Words

To show Defamation, P must prove damages, which include damage to reputation in business community. Here, P will use Boss's words to show that he (P) was damaged by not getting a promotion, to satisfy an element of the cause of action, therefore it is words of legal operation as they will have a consequence in law.

Great!

Intent-exception to hearsay

P may also use this statement to show Boss's intent not to give him the promotion.

ROG 2:

Relevance:

This first part of the text is highly relevant as it is the statement that was made that gives rise to the cause of action. Without it, there would not be a court hearing. D will argue that the second part of the text, "watch out!" is not relevant at all, as it does not tend to prove or disprove any material fact in the case - it is simply a histrionic "warning" meant to inflame the emotions of the jury (see below)

Balancing Test on 2nd part of text:

D will argue that "Watch Out!" is unfairly prejudicial. It is a warning that may cause the jury to believe that D's history of violence is so severe that he is a danger to those who work with him, and therefore a danger to the community. They may make a decision based on a sense of fear, disgust, worry, and anxiety rather than a cool calculation of the facts.

Hearsay (defined above):

D will raise a hearsay objection as the text is an out of court statement (a writing may be

a statement) made to prove the truth of the matter (that D has a history of violence).

Multi-layer Hearsay:

Hearsay within hearsay occurs when a document records another's statement, or when one person makes an out of court statement about what someone else told him. All layers must be able to come in under a hearsay exception to be cured.

Great job!

Business Record - hearsay exception

Requires that the record is made by someone with a duty to make the record, that it is part of the businesses regularly conduct to make such a report, the record is made by someone with personal knowledge of the facts/event or gets the information from a person who has personal knowledge that works for the business, and there is someone available to testify (custodian of records or a supervisor) that the record was made in accordance with business policy, and if the record is trustworthy.

Since the text was sent to all employees at Pono, it is likely that it was sent on and/or to work phones - there would be no other reason for the VP of communications to testify otherwise. Here, the VP is a person with knowledge of the company's methods of maintaining internal records. D will argue that eavesdropping on employee texts is not keeping a record in the regular course of business. However, in order for this exception to work, P will have to show via VP's testimony that it is the common business practice of Pono to maintain a record of all text messages. Usually, a record showing numbers called is all that is kept in a phone log. However, there may be a certain or special reason that Pono keeps a record. The VP is trustworthy as he is a high manager in the company, and it is likely that a company that gives out cell phones is high tech enough to keep proper records.

Great analysis

It is likely that this would be considered a business record IF keeping a record of employee texts was part of the regularly conducted business. As the facts do not specifically state such, it is likely that P would fail on this exception to hearsay.

Authentication:

The proponent of the document must prove that it is what it purports to be.

If the text is being offered solely for its appearance on the phones as a document, then P will offer VP to authenticate that the phones are indeed company phones, that they have

a valide text provider, and that the text came from D's assigned phone. D may try to raise a defense that he did not send the text-if so, he would attach the authentication fo the record. It is likely that the VP would be able to authenticate the text, since it went from ONE source to ALL the employees, and would be able to show that the phone that sent it was assigned to D. If D did not use a company phone, another "authenticator" would be necessary to show that the text came from D's private telephone. D may then raise a defense that while it may have come from his phone, he didn't send it.

Great!

The text would likely be authenticated, and this would solve this layer of hearsay.

THE TEXT ITSELF.

As this is the defaming statement that gave rise to the cause of action, it is legally operative words (see above) adn therefore a hearsay exception.

ROG 3

Relevance (defined above):

This evidence is being offered to show that D & P were rivals, and this would create an inference via circumstantial evidence that D had a motive to defame D. However, as the facts state that they are rivals, this is not a fact in discpute, and therefore under the CEC not relevant. D would successfully claim that this statement on its face is irrelevant. HOwever, P may counter that it is foundational to showing motive on P's part. If offered to prove that D&P are rivals, this evidence would be excluded and stricken, but if offered to show motive, it may be admitted as relevant, excluding other exceptions.

California would allow this evidence to be admitted. Although the language states a fact must be in dispute, Courts are very liberal in allowing the evidence in. Practically speaking, the CA Rule is applied in the same manner as the Federal rule.

Character Evidence:

ad statement

Generally, character evidence is inadmissible to prove that the D acted in a particular manner at a particular time in according with his character (propensity). Character evidence may be shown by reputation, opinion, and specific acts. In a civil case, as here, character evidence is inadmissible unless charachter is at issue. Defamation is one such cause of action, and therefore Witness Tess's statement that she know P for ten years (foundational to her ability to have an opinion and/or know about his reputation) and that he is a peaceful man is admissible as opinion and reputation evidence. HOWEVER!!!

D may object that Tess's testimony FORMS a CONCLUSION and is not stated as an opinion nor as to P's reputation. He may also raise the objection that it assumes facts not in evidence (that P is a peaceful man, or that she knew him for ten years). The judge

would likely strike the answer about P being a peaceful man, but would allow P to reframe the question or allow the Witness to answer the question again in the form of opinion and/or reputation.

ROG 4

Relevance:

Here, D puts Wilson (W) on the stand to show a defense to defamation - TRUTH - by showing that P had hit another student while in college. This is relevant.

Prior Bad Acts

Prior bad acts are inadmissible in this setting unless they show Motive, Intent, Modus Operandi, Identification, or common plan or scheme, or anything else other than to prove propensity. Here, this prior bad act is being used to show that D's text was accurate - that P has a "history of being violent", and would therefore be admitted.

It would not be admissible under a prior bad act theory because "accuracy" is the same in this context as propensity. However, as you noted below, it IS still admissible

Character Evidence (defined above):

If the specific act were asked in a way that it was shown to inform W's knowledge of P's reputation, it is admissible as character evidence (as character evidence is at issue in this civil case) - here, W states that it was a "well known fact" showing reputation and provided the specific act (hitting another student).

Good

D may counter that a single act is far from a "history of violence."

END OF EXAM

Excellent job on this question!

3)

This is a criminal case for homicide in CA so the CEC will apply.

Great job on question 3!

1. Code Enforcement Officer's Testimony

Logical Relevance

Evidence is logically relevant if it has any tendency in reason to make a material fact more or less probable. Here, David's (D) lack of response when asked if he killed Vic (V) tends to show that he could have possibly killed him since he doesn't deny it so it is logically relevant

Legal Relevance

All relevant evidence is admissible unless it is it comes under a policy exclusion or if the judge finds that the probative value is outweighed by its prejudicial effect which could be prejudicing the jury, misleading the jury, cumulative evidence, waste of time etc.. Here, there is some danger that the probative value will be outweighed by the jury being misled because they may assume immediately that his lack of response is an admission. The defense should ask for a limiting instruction to inform the jury that D's lack of response is not itself an admission but only goes to show that he didn't not do it.

Statement by Party Opponent (Adoptive Admission)

A statement by a party opponent is exempted from the hearsay definition even though it would otherwise be hearsay. The reasoning behind this is that a party opponent would not make a statement to intentionally harm themselves. Statement by a party opponent can be a personal admission, adoptive admission, or a vicarious admission. In this case Bob's (B) statement/question to D may be an adoptive admission. An adoptive admission requires that someone other than the defendant made a statement in the defendant's presence, the defendant heard the statement and understood it and either expressly adopted it or when they had an opportunity to object to the statement as a reasonable innocent person would, they remained silent or made an evasive or unequivocal reply.

Here, D does not expressly adopt the statement but when B asks D if he killed V and stuffed him in the RV, D doesn't respond and slams the door in B's face. This could be an adoptive admission that D killed V and stuffed him in the RV. After B asks the question a reasonable, innocent person would reply in the negative because that is a serious accusation, even if it was offered jokingly. The way D responds tends to show that he didn't take the question as a joke, there was no laugh, not even a grin. In fact, D was angered by the question and slammed the door in B's face which would be an evasive

Great job!



maneuver to avoid the question and is easily construed as assertive conduct. Defense will argue that the lack of response and slamming of the door was not assertive conduct and there was no intention to communicate that the D's actions were an adoption admission of guilt. Prosecution will argue that a reasonable, innocent person would have simply denied the accusation and said they didn't kill V so D's lack of a reply and evasive maneuver is an adoptive admission. A court will likely admit the evidence with a limiting instruction that the adoptive statement is not conclusive evidence of guilt but that it makes it more likely that D killed V.

2. Tissue Sample and Photographs

Logical Relevance

Evidence is logically relevant if it has any tendency in reason to make a material fact more or less probable. Here, the tissue sample smell may be relevant to show the length of time V may have been dead but it does not tend to show that D killed V. The photographs of V's body in the RV is relevant to show that V is dead, the length of time he was dead, where he died, and possibly even how he was killed (blunt force trauma would likely leave signs on the body despite decomposition). Both items of evidence are logically relevant, albeit weakly.

Good!

Legal Relevance

All relevant evidence is admissible unless it is it comes under a policy exclusion or if the judge finds that the probative value is outweighed by its prejudicial effect which could be prejudicing the jury, misleading the jury, cumulative evidence, waste of time etc..

Although logically relevant, the tissue sample and photographs are not legally relevant. A judge would find the tissue sample's probative value is outweighed by the fact that it is cumulative evidence (it's logical relevance is weak) and the jury's emotions could be inflamed by the smell and gory nature of the evidence and may not logically evaluate the evidence but instead try to punish D out of disgust for his actions. A judge would also find that the photograph's probative value is outweighed by its prejudicial effect because the photographs would be gory in nature and the jury could easily be prejudiced against D for the same reasons they would be prejudiced against D for the tissue sample-they would want to punish him for the grotesque nature of his crime. A court would not admit either items of evidence due to their prejudicial effect outweighing their probative value.

3. Derek's Note

Logical Relevance

Evidence is logically relevant if it has any tendency in reason to make a material fact more or less probable. The note is being offered to show that D was at least involved in the killing of V because he received body disposal instructions from Derek. This is logically relevant.

Legal Relevance

All relevant evidence is admissible unless it is it comes under a policy exclusion or if the judge finds that the probative value is outweighed by its prejudicial effect which could be prejudicing the jury, misleading the jury, cumulative evidence, waste of time etc.. Here, there is no danger that the probative value will be outweighed by the prejudicial effect.

This is legally relevant.

Statement by Party Opponent (Vicarious Admission)

A statement by a party a opponent is exempted from the hearsay definition even though it would otherwise be hearsay. The reasoning behind this is that a party opponent would not make a statement to intentionall harm themself. Statement by a party opponent can be a personal admission, adoptive admission, or a vicarious admission. In this case, B's letter is a vicarious admission because B is part of a conspiracy with D. Under a vicarious admission, a conspirator's statement can be admitted as long as the statement was made by the decalarant during the conspiracy and in furtherance of the conspiracy and the defendant was part of the conspiracy. Here, B and D are in a conspiracy because they are planning to dispose of a body from a murder. The letter is giving disposal instructoins to further the conspiracy and it is during the conspiracy. D is also part of the conspiracy. In this case, B's statement would be a vicarious admission of D and would be admissible.

Great Job!

4. D's Sister's Testimony and Prosecution Rebuttal

Logical Relevance

Evidence is logically relevant if it has any tendency in reason to make a material fact more or less probable. This evidence is being offered to show that D is a peeaceful person and therefore did not commit the violent crime of murder. This is logically relevant.

Legal Relevance

All relevant evidence is admissible unless it is it comes under a policy exclusion or if the judge finds that the probative value is outweighed by its prejudicial effect which could be prejudicing the jury, misleading the jury, cumulative evidence, waste of time etc..

Character Evidence

Character evidence is generally inadmissible for propensity purposes. However, in a criminal trial for homicide it can be used to show the defendant's good character for the pertinent trait (in CA) but only reputation and opinion evidence is allowed in (no specific acts). If a defendant does this, it opens the door for prosecution's rebuttal in which they are allowed to cross examine the character witness using reputation, opinion or specific acts, or bring in their own witnesses to testify to the defendant's bad character for the pertinent trait (only allowed reputation and opinion). Here, D's sister (S) offered evidence that D was peaceful which is pertinent because it shows he is not violent and likely didn't commit murder so this is admissible. The prosecution offered evidence through a character witness in the form of a specific act which is not allowed. The defense can object to this and the judge will not admit the evidence. The court will admit S's character testimony, but not the prosecution's.

Great Job!

END OF EXAM