

MONTEREY COLLEGE OF LAW

EVIDENCE

Mid Term Examination

FALL 2017

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

Piper ordered a cup of coffee from a deli in a supermarket. While the coffee cup trying to put the lid on the coffee cup, she spilled coffee on her hand and on the floor. She then slipped and fell on the spilled coffee. She cried out, "Help me, I've fallen!" Mark, the supermarket manager, heard Piper's cry for help, but he did not see her actual fall. As he was helping her up, he said, "We really should get properly fitting lids for the hot coffee."

Piper sued the supermarket for negligence. Her injuries included second-degree burns on her hand and a back injury. The supermarket denies liability, on the ground that the deli was operated and maintained by a separate entity.

Assume the following occurred in a jury trial in 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. Assume proper objections were made.

Answer according to California Law.

- 1 During Piper's case, her counsel called Mark, the manager, as the first witness. Mark was in the office when he heard Piper's cry for help. Further, he testified, that the coffee lids needed to be replaced, but the store was not responsible.
- 2 Then, Piper's attorney called the Insurance Agent for the supermarket. The agent testified that the supermarket was insured for all negligence claims that occurred within the store's premises. Also, the Insurance Agent testified that he offered Piper \$100,000 to settle the lawsuit. Piper had rejected the offer.
- 3 Next, Piper's attorney introduced a photograph of Piper's hand depicting her blistering, swelling and skin loss.
- 4 Next, Cooper, the custodian of records, for the supermarket testified. He testified: that the supermarket had submitted claims to the insurance company from ten (10) customers who were scalded, then slipped and fell on coffee spills in the delicatessen. Also, he testified that after the lawsuit, the deli started placing properly fitting lids on the coffee cups and lowering the temperature on the coffee.

QUESTION #2

Drake was charged with the arson of his business. The prosecutor's theory was that Drake burned down his failing business to get the fire insurance proceeds in the amount of one million dollars. At a jury trial the following occurred:

Prosecutor called Sonny, the son of a business owner who had a store in the same complex as Drake. Sonny testified that ten minutes before the fire started, his dad Ned, told him, "Look at that Mercedes speeding with no headlights are on!" Sonny did not see the vehicle. Ned was not available to testify at the jury trial because he had suffered a massive stroke.

Next, Prosecutor called Detective Collins. The detective testified that he verified information with the Department of Motor Vehicles custodian of records. A red Mercedes was registered to Drake. The Detective presented a certified copy of the vehicle registration. Also, the detective testified that he has seen this Mercedes parked in Drake's driveway.

Then Prosecutor called Baker, the bookkeeper for Drake's business. Baker testified that for five months before the fire, Drake told Baker to record some fraudulent accounts receivable hoping to increase Drake's opportunity for a bank loan. Baker complied. However, the bank denied the loan anyway.

The prosecution called Owen, the business owner next to Drake's. Owen testified that the day before the fire, as he was walking past Drake's Mercedes, he heard a voice state, "Gasoline is the best for starting a fire." Owen recognized the voice as Drake's.

Answer according to the Federal Rules of Evidence.

Should the court have admitted:

- 1 Sonny's testimony? Discuss.
- 2 Detective Collins' testimony? Discuss.
- 3 Baker's testimony? Discuss.
- 4 Owen's testimony? Discuss.

Question 3

Doug and Bill are involved in illegal narcotics trafficking. Victor is a rival drug dealer. Doug and Bill devise a plan to burglarize Victor's home and steal money, firearms and narcotics located at Victor's house. Two weeks later, Doug and Bill execute their plan. As they are in the process of stealing Victor's property, Victor enters his home and Doug shoots Victor one time in the abdomen. Doug and Bill leave the residence.

A neighbor calls 911. Victor is unconscious when medics arrive. He is taken to the hospital and treated for his injuries. The next day, at 10 a.m., Victor regains consciousness and is serious but stable condition. An hour later, Victor tells Walter, who is a patient in the same hospital room as Victor, "I can't believe Doug shot me! I was in agony when I got shot. I hope I make it".

Later that day at 3:00 p.m., a Police Officer interviews Victor about the crime. Victor tells the police officer that Doug and Bill were stealing his money, drugs and guns when he interrupted the burglary. Victor tells the officer it was Doug who shot him. The Police Officer shows Victor a photo lineup and he circles Doug's photo to identify Doug as the shooter. Victor dies later that day due to his injuries.

On June 17, 2017, Bill sees on the news that Victor died of his injuries. Bill sends a text message to Doug stating, "I can't believe you shot Victor! I just saw on the news Victor died. I'm getting out of town". Police arrest Doug.

Doug is prosecuted for the crime of first degree murder and home invasion robbery in the case of People of the State of X vs. Doug. At the time of Doug's trial, Bill is still on the run. Doug's defense is that he was not involved in the crime and Bill, who is responsible, is trying to frame him.

The State of X has adopted the federal rules of Evidence.

Assume the following occurred in the jury trial of Doug. 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.

Question 3continued

1. The Prosecutor calls Walter as a witness. The prosecutor seeks to introduce the statements Victor made to Walter.
2. The Prosecutor calls Police Officer as a witness. The prosecutor seeks to introduce the Statements Victor made to the Police Officer during his interview at the hospital.
3. The Prosecution subpoenaed Doug's cell phone records prior to trial. The Prosecution establishes that on two days after the incident the cell phone Doug owned received a text message from the cell phone Bill owned. The Prosecutor seeks to introduce Doug's cell phone records containing the text message from Bill to Doug as People's Exhibit 1. The records show that Doug never replied to the message from Bill. Doug disconnected his cell service an hour after receiving the message.
4. In the Defense case, Doug testifies that he was not involved in the burglary or murder. Doug further testifies that he barely knows Bill and believes Bill is trying to frame him. In rebuttal, the Prosecutor seeks to introduce evidence that Doug and Bill were previously arrested and charged as co-defendants for assaulting a rival drug dealer.

QUESTION # 1: ANSWER OUTLINE**1. MARK, THE MANAGER'S TESTIMONY**

Logical Relevance- evidence is logically relevant if there is a tendency to make the existence of a disputed fact more or less probable than it would be without the evidence. Mark's testimony is that he assisted Piper after the fall and said comments about the improperly fitting coffee lids. This has a tendency to show that Piper did in fact fall within the store's premises and that coffee spillage may be part of causation. Mark's acknowledgement about the coffee lids and spillage has a tendency to establish the store's duty to customers and breach on part of the store.

Mark's testimony is logically relevant.

Legal Relevance-the court has the 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 jury will be confused or misled, so Mark's testimony is legally relevant.

Hearsay- is an out-of-court statement or assertion offered for the truth of the matter asserted. The real problem with Piper's statements is that she is the declarant, not Mark who is repeating what she said. It will be inadmissible absent an exception under the CEC.

Spontaneous Statement Exception, "Help me, I fell!" by Piper to Mark-

This exception applies when the declarant (Piper) makes statements under the stress of a startling event. Here, Piper fell and cries out for help. The fall qualifies as a stressful event and is admissible.

Present Sense Impression Exception- when a declarant is describing an event (like a fall) while the declarant (Piper) is experiencing the event. The statement will be admissible.

State of Mind Exception – the declarant (Piper) then existing physical or mental condition is admissible to show that condition (the fall.) Piper's cry for help when she fell in and could not get up is an emotional response to slipping and falling. The statement will be admissible.

2. INSURANCE AGENT'S TESTIMONY/ PREMISES LIABILITY & SETTLEMENT OFFER

Logical Relevance- defined above. The premises liability coverage has a tendency to show that the store does have "ownership and control" over all premises within the store despite what the manager believes. Part of the negligence claim includes duty and breach, so the liability coverage tends to negate what the manager believes.

The insurance coverage has limited admissibility for "ownership and control," but not to show for fault.

Legal Relevance- defined above. The court has the discretion to exclude evidence if the insurance coverage demonstrates a danger of unfair prejudice. Special relevance rules may mandate a Limiting Instruction. See below.

Settlement offer of \$100,000- offers to settle are inadmissible to prove liability or the amount of the disputed claim, or the validity of a claim. Any statements made during settlement negotiations are excluded as against public policy.

Here, the Insurance Agent's settlement offer to Piper is inadmissible to prove her damages or medical expenses amount or the store's liability for negligence.

Premises Liability – Evidence of liability insurance is not admissible to prove negligence. However, it is admissible to prove "ownership or control" of the premises.

Here, the manager denied that the store is liable because the deli area is operated by another entity. However, the insurance policy provides that **all the store premises** is covered against negligence claims.

Limiting Instruction- The trial court will instruct the jury that they may consider the insurance coverage for the "ownership and control" issue, but not for fault.

3. THE PHOTOGRAPH/ DOCUMENTARY EVIDENCE- Injuries to Piper

Logical Relevancy – defined above. The hand photo is relevant because it has a tendency to establish Piper's injuries due to the hot coffee, spillage and fall. Since damages are a part of the negligence claim, the photo is logically relevant.

Legal Relevancy – defined above. Under CEC 352, the Balancing Test, the defense will argue that the injury photo of Piper's hand is highly prejudicial and too gruesome for the jury to consider. Also, it will inflame the jury and heighten jury sympathy. However, Piper will argue that the photo shows the extent of her injuries due to the negligence of the supermarket.

The photo is legally relevant.

Authentication- the photograph falls under documentary evidence and must be a fair and accurate representation concerning Piper's hand injuries. Here, Piper, the plaintiff may testify as to this representation. It is not necessary for the photographer to testify or authenticate.

4. COOPER'S TESTIMONY – SUBSEQUENT REMEDIAL MEASURES & KNOWLEDGE

Logical Relevance - defined above. Cooper's testimony has the tendency to establish that the supermarket knew of the problem with the coffee lids and spillage.

Legal Relevance- defined above. The trial court has discretion to weigh the probative value of the other claims against the unfair prejudice to the supermarket.

Here, there is a great likelihood that the jury may weigh the ten other claims as the sole basis of finding the store liable for negligence. See below for special relevancy.

Special Relevancy- Similar Happenings (10 other claims)-

The fact that the supermarket had ten previous slip and fall claims does not by itself establish fault. However, the fact that there were ten complaints of slips/falls due to coffee spills in the same area where Piper fell may establish that the store had knowledge of the causation and did nothing, or breached the duty of care.

Limiting Instruction- the court may instruct the jury that the ten claims be used as putting the store on notice that there was a problem with the coffee lids and spillage. However, the claims cannot be used as a basis for fault.

Subsequent Remedial Measures- evidence of safety measures or repairs after an accident is inadmissible to prove negligence. This is due to public policy concerns. The fact that the store started placing proper fitting coffee lids on the cups after the lawsuit is inadmissible to prove fault.

Hearsay- defined above. If the claims are offered to prove the truth of the matter, that the store was negligent, the evidence is hearsay. However, if the proponent is offering the prior claims as a basis that the store was well aware of the improperly fitting lids that lead to spillage and injury, the court may use a limiting instruction.

Business Records Hearsay Exception- Cooper as the Custodian of Records, has access to the records of events in the "regular course of business" at the store. He is under a duty to record events at or near the time of the event. As such, the records may be admissible, however, there may be another avenue of exclusion, the special relevancy issue stated above.

Official Records Hearsay Exception- this exception will fail because Cooper, a custodian of Records for a store is not a public official and the records does not describe the activities or policies of public office.

QUESTION #2: ANSWER OUTLINE /Evidence/Fall 2017

1. SONNY'S TESTIMONY

Logical Relevance- evidence is logically relevant if it tends to make the existence of any material fact of consequence more or less probable than it would be without the evidence. Here, the statement by Ned may assist because it may be tied into Drake owning the Mercedes and speeding way. The court may admit the Ned statement under **Conditional Relevancy**. The hearsay issues, discussed below.

Legal Relevancy- The FRE 403 Balancing Test- the court may exclude relevant evidence if its probative value is outweighed by the danger of unfair prejudice, confusing issues or misleading the jury. Here, the probative value of Sonny's testimony about the declarant seeing a Mercedes speeding away with no headlights on from the arson crime scene is suggestive of "consciousness of guilt" and likely will be allowed, subject to being tied in to other relevant evidence.

Hearsay- is an out of court statement offered to prove the truth of the matter asserted. A statement may be assertive verbal, written or non-verbal conduct if intended as a statement.

Statement by Ned to Sonny

The issue is that Sonny is not the original declarant and Ned is now unavailable due to suffering a stroke. Sonny did not see the vehicle, so he is not an eyewitness, Ned is. The Ned statement, "Look at that Mercedes speeding and no headlights on!"

Excited Utterance Hearsay Exception- is a statement made under the stress of a startling event. Here, Ned is the original declarant (not Sonny). The stressful event is the speeding Mercedes being driven without any headlights on. The fact that Ned said it with an exclamation point shows he was excited when the statement was made to Sonny.

The Ned statement will be admissible as an excited utterance.

Present Sense Impression- is a statement describing an event while the declarant was perceiving the event, or immediately thereafter.

The statement by Ned to Sonny is likewise admissible as a Present Sense Impression.

Personal Knowledge/Opinion- Since Sonny did not see the Mercedes, he cannot have the competency for basing the observation on personal knowledge, only Ned can. However, the hearsay exceptions listed above are likely to be held admissible. Speeding may be deemed personal observation by Ned, so that may be excluded.

2. ADMISSIBILITY OF DETECTIVE COLLINS' TESTIMONY

Logical Relevance – see definition above.

Detective's testimony regarding verifying the DMV records ownership is admissible because it tends to make it more likely that Drake was the one who committed the arson. Sonny has already testified to statements by Ned that link Drake to the Mercedes and that it is likely that Drake was the driver speeding from the crime scene. Also, the speeding and the headlights out is indicative of "consciousness of guilt."

Detective Collins' testimony about seeing this Mercedes in Drake's driveway is also admissible. Since a witness (Ned) saw a Mercedes speeding away without headlights on and that Drake owns the vehicle, it makes it more likely that Drake committed the arson of his business.

Legal Relevance- defined above.

Here, the evidence is legally relevant because it has some probative value that Drake was the arsonist. Evidence is prejudicial only if it is likely to lead the trier of fact to draw unreasonable conclusions about Drake's guilt. The establishment that Drake owned a Mercedes may result in the jury believing Drake was the driver, however, this is not prejudicial effect because it is based on a reasonable inference.

Therefore, Detective Collin's testimony is both logically and legally relevant.

Personal Knowledge-

For this evidence to be admissible, Detective Collins must be competent, or have personal knowledge about the facts.

Here, Collins is competent to testify that he saw the specific Mercedes in Drake's driveway, because he observed it himself. However, the DMV records are not based on personal knowledge and may need to be satisfied under hearsay exception rules.

Hearsay- defined above.

The DMV records are hearsay because they are an out-of-court statement offered to prove the truth of the matter, that Drake owned the vehicle because it is registered to him.

The prosecution must make an offer of proof regarding the DMV records, otherwise the item in is inadmissible.

Business Records Exception-

The DMV records may be admitted under Business Records exception if they are “regularly prepared in the ordinary course of business” and there is a duty to record accurately at or near the time of the act. There must be a duty to maintain the records. As part of the business of regulating vehicles, the DMV has a duty to maintain accurate records of who owns specific vehicles. Therefore, these records are admissible so long as the proper foundation is laid.

Official Records Hearsay Exception-

The contents of the DMV records may comply with the Official Records hearsay exception , if the record establishes the activities of the agency and there is a duty to properly maintain the records.

Here, DMV records would qualify because when vehicle ownership changes or registration fees are paid, the records are relied on. California imposes a duty to maintain said records at the DMV agency.

Here, under both hearsay exceptions, the DMV records are admissible.

3. ADMISSIBILITY OF BAKER’S TESTIMONY- Fraudulent Accounts Receivable

Logical Relevance- *defined above. The request by Drake to his bookkeeper may have a tendency to show the motive for the arson, for Drake to collect one million dollars from fire insurance proceeds. The testimony by Baker is logically relevant.*

Legal Relevance- *defined above. The trial court may consider the statements by Drake to Baker as probative of Drake’s criminal intent. On balance, the unfair prejudicial effect on the jury is de minimus given it is not likely to confuse or mislead a jury. The testimony is legally relevant.*

Hearsay- *defined above. The request by Drake is being offered to prove up the truth of the matter asserted- that Drake was involved and directed fraudulent activities in order to collect insurance. For his failing business.*

An option for the proponent is that the records are nonhearsay and are verbal acts of legally operative facts. In effect, they have an independent legal significance. However, this argument is likely to fail.

Admission by a Party Opponent- Hearsay Exemption-

Under the FRE, admissions are admissible nonhearsay. A statement by a party, offered by the opponent.

Here, Prosecutor Perry may be offered at the request by Drake to alter the books as criminal intent to defraud the insurance company and provides a motive in the arson of Drake's business.

Declaration/Statement Against Interest-

If Drake is deemed unavailable due to asserting the Fifth Amendment, then he is unavailable to testify. As such, the request by Drake to Baker to record false accounts receivable may be a declaration against interest since at the time the statement was made by Drake, it was against his financial interest and does subject him to criminal liability.

4. ADMISSIBILITY OF OWEN'S TESTIMONY- "Gasoline is best for starting a fire."

Logical Relevancy- *defined above. The gasoline statement is relevant because it has a tendency to establish that Drake has knowledge of what can be used to commit arson- gasoline. Thus, the statement is logically relevant.*

Legal Relevancy- *defined above. The court is likely to weigh the probative value of the gas statement by Drake against the danger of unfair prejudice. There does not appear to be any danger of confusing or misleading the jury. The statement is legally relevant.*

Hearsay- *defined above.*

Hearsay Exemption- Statement by Party Opponent- *the FRE criteria is the statement made by a party and offered by an opponent. It need not be against the speaker's interest and is admissible nonhearsay.*

Here, the "Gasoline is best for starting a fire," may be construed as Drake having the knowledge and criminal intent to destroy his failing business by fire and collecting insurance. The original declarant is Drake, not Owen who testified. However, the Prosecution will offer the statement and since this is the opponent and it is offered against Drake, it will be admissible.

Statement Against Interest-

If Drake pleads the Fifth Amendment, he will be deemed unavailable. In a criminal case, the opponent must offer corroborating circumstances showing trustworthiness. The gasoline

statement by itself does not seem like it is against interest and could be taken as a common fact that gas can start fires.

However, given the totality of circumstances, the gas statement provides a reasonable inference that Drake intended to use gas to start a fire at his failing business. A reasonable jury could reason that Drake's asking Baker to cook the books, then say the gas statement, then his Mercedes is seen speeding away without any headlights on, a jury could conclude Drake was the driver and arsonist.

Voice Recognition – Proper Foundation

The prosecution must lay the foundation that Owen is the next door business owner and he is familiar with Drake's voice. The length of time he has known Drake is a professional capacity should be explored along with his vantage point. Owen knows Drake well enough to know the Mercedes belongs to Drake.

If the prosecution can establish that Owen is familiar with Drake's voice, due to business connections or otherwise, the foundation has been laid.

Evidence/Question 3/Answer Outline/Fall 2017/J.Davenport

1. *The Prosecutor calls Walter as a witness. The prosecutor seeks to introduce the statements Victor made to Walter.*

Relevance: The prosecutor is seeking to elicit the identity of Victor's assailant. Victor's statements to Walter are hearsay. (Out of court statement offered for the truth of the matter asserted).

Hearsay: This is an out of court statement offered for the truth of the matter asserted.

Dying declarations

For a statement to be admissible as a dying declaration under the federal rules of evidence, the proponent of the evidence must show: 1. The case is a prosecution for a homicide or a civil case; 2. The declarant is the victim named in the pleading; 3. At the time of the statement, the declarant had a sense of impending death. The declarant must have abandoned all hope and concluded that certain death was imminent; 4. At the time of trial the declarant is unavailable. 5. The statement relates to the event inducing the declarant's dying condition. The statement may not describe previous quarrels or fights between the declarant and the defendant; and 6. The statement is factual in nature.

The element that poses a problem in this scenario is that the statement must be made when the declarant had a sense of impending death. Factors that support that contention: Victor recently regained consciousness after being shot; Victor is hospitalized and is in serious condition; Factors that do not support a belief of impending death: he is in stable, although serious condition. The statement, "I hope I make it" could be argued either way. It doesn't necessarily suggest that he believes his death is imminent, however, the statement does show some fear that he may not survive. In balance, this would likely not be sufficient for a dying declaration.

Excited Utterance: "I can't believe Doug shot me!"

Under the Federal Rules, for the proponent of the evidence to must show the following to satisfy the Excited Utterance Exception: 1. An event occurred; 2. The event was startling, or at least stressful; 3. The declarant has personal knowledge of the event; 4. The declarant made a statement about the event; and 5. The declarant made the statement while he or she was under a state of nervous excitement.

It is the last element that poses a potential problem. The event that was startling occurred a day before the statement was made. However, it could be argued that Victor only regained consciousness an hour before he made the statement to Walter. Also, the punctuation indicates that he was excited when he made the statement.

Present Bodily Condition: "I was in agony when I got shot"

Victor's statement that he was in agony is recalling a bodily condition rather than an objective event. It does not qualify under FRE 803(3) (present bodily condition) because it was not a "then existing" statement. The statement was made to a patient, not a physician so it would not be made in furtherance of medical diagnosis or treatment.

- 2. The Prosecutor calls Police Officer as a witness. The prosecutor seeks to introduce the Statements Victor made to the Police Officer during his interview at the hospital.*

Relevance: To introduce the identity of Victor's assailant through the photo ID

Prior Identification Not Admissible. A prior identification is exempted from the hearsay definition under the federal rules. The evidence to establish the statement of identification exclusion under the FRE: 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

A prior identification will be admissible non-hearsay only where the declarant is presently testifying at trial. Because Victor cannot testify and thus cannot be subject to cross examination about the statement, his identification of Doug is not admissible.

Confrontation Clause issue

The prosecutor seeks to introduce an out of court statement, offered for the truth of the matter asserted against the defendant. The confrontation clause is triggered because that statement is testimonial in nature because the primary purpose of the police officer in obtaining the information from Victor is to obtain information about a past event that is potentially relevant to a later criminal prosecution.

The test set forth in Crawford v. Washington is used to determine whether the constitutional requirement of confrontation has been met with regard to the admission of testimony of evidence. This test requires that the witness' statement have been subject to cross examination. In accordance with the intent of the Sixth Amendment Confrontation clause, prior "testimonial" evidence is inadmissible unless: 1. The declarant is unavailable; and 2.) the defendant had a prior opportunity to cross examine the declarant. Thus, while actual cross examination is not required, the opportunity to do so is. Here, given that Victor died before the defendant was arrested for the crime, the defendant did not have the opportunity to cross examine the police officer. Therefore, Victor's statement, even though he is unavailable, should be excluded.

The prosecution could argue that the statements were obtained to aid with an ongoing emergency because at the time the statement was made neither Doug nor Bill had been apprehended. However, this argument will likely fail given the amount of time that has elapsed since the shooting and the interview with Victor.

- 3. The Prosecution subpoenaed Doug's cell phone records prior to trial. The Prosecution establishes that on June 17, 2017 the cell phone Doug owned received a text message from the cell phone Bill owned. The Prosecutor seeks to introduce Doug's cell phone records containing the text message on June 17 from Bill to Doug as People's Exhibit 1. The records show that Doug never replied to the message from Bill. Doug disconnected his cell service an hour after receiving the message.*

The cell phone records can be introduced as a business record. The Business records exception requires: 1. The report was prepared by a person with a business relationship with the company; 2. The declarant (the ultimate source of the report) had a business duty to report the information. NOTE: A report is not prepared in the course of business unless all of the persons contributing to the report have a business duty to do so; 3. The declarant had personal knowledge of the facts or events reported; 4. The written report was prepared contemporaneously with the facts or events; 5. It was a routine practice of the business to prepare such reports; 6. The report was reduced to written form and 7. The report was made in the regular course of business.

However, the content of the text message will be hearsay unless there is an exception or exclusion.

Implied adoptive admission. An implied adopted admission is excluded from the hearsay definition under the federal rules of evidence.

The fact that a party failed to respond (by statement or act) in the face of a provocative accusation or event may under certain circumstances be classified as a party statement. The party's failure to respond will be considered a statement if: 1. The party against whom the evidence is offered heard, understood and was capable of responding to the statement; and 2. A reasonable person in the party's position would have responded (for instance, by denying the accusation). Whether a reasonable person in the party's position would have responded presents a mixed question of law and fact. For this reason, the judge resolves the issue of whether an innocent person would have immediately denied the accusation. (FRE 104(a)).

Under the implied adopted admission theory, Bill's statement is introduced for the non-hearsay purpose of effect on the listener. It is Bill's silence that would be the "admission".

Arguments for admissibility: Bill's statement is accusing Doug of shooting and killing Victor. This is the type of statement that one normally would deny if untrue. Doug doesn't respond to the text message, so there could be an argument that he never saw the text. However, given the gravity of the allegation, it is likely the statement would be admitted.

Statement of a co-conspirator

The prosecution could also attempt to use the statement for the truth of the matter asserted if they can show that it is a statement of a co-conspirator. A statement of a co-conspirator is excepted from the definition of hearsay under the Federal Rules. In order for the party seeking to admit a statement by a co-conspirator the party needs to show 1. There was a conspiracy; 2. The declarant was a co-conspirator; 3. The declarant made the statement in furtherance of the conspiracy; 4. The accused was a member of the conspiracy; The problem with the admission of the statement under this theory is that it appears that the statement was made after the conspiracy had ceased. Although Bill states his intention to flee, there is no indication that part of the conspiracy included fleeing after the crime was committed.

- 4. In the Defense case, Doug testifies that he was not involved in the burglary or murder. Doug further testifies that he barely knows Bill and believes Bill is trying to frame him. In rebuttal, the Prosecutor seeks to introduce evidence that Doug and Bill were previously arrested and charged as co-defendants for assaulting a rival drug dealer.*

Cannot be used as character evidence – to show that Doug has a propensity to commit these types of crimes. The prior bad act may be admissible for a non-character purpose: to show that Doug and Bill do know each other. It would also be admissible to impeach Doug's testimony. Doug could object to the evidence on the grounds that the probative value is substantially outweighed by the prejudicial effect. The court would likely exclude the portion of the testimony that would identify what the arrest was for. The defense could ask for a limiting instruction to instruct the jury to consider the evidence only for its proper purpose.

1)

1. Mark's Testimony

Relevance

Evidence can be testimonial, real, demonstrative or documentary. Relevance has to do with the tendency of evidence to prove or disprove a material issue. Relevance is concerned with the substance or content of the evidence rather than the form or manner in which it is presented. Relevant evidence must be both logically and legally relevant.

Logical Relevance

Evidence is logically relevant if it has any tendency in reason to make a material fact more or less probable than it would be without it. Here, Piper's statement is relevant because it speaks to the damages element of negligence. Moreover, Mark's statement regarding the lids of the coffee cups is logically relevant because it goes to the causation aspect of the negligence claim.

Legal Relevance

All relevant evidence is admissible unless it falls under a public policy exclusion or if the presiding judge finds that its probative value is substantially outweighed by its prejudicial effect (misleading the jury, confusing the jury, waste of time, etc.). Here, Piper's statement and Mark's statement are legally relevant.

Hearsay

Hearsay is an out of court statement offered for the truth of the matter asserted (TOMA). Hearsay is generally inadmissible unless it falls within a hearsay exception or exemption (outside of the scope of hearsay).

Excited Utterance

Under this hearsay exception, a statement made by a person while engaged in a startling event or witnessing a startling event is admissible. The statement must be made during or immediately after the occurrence. Here, Piper's statement "Help me, I've fallen!" could come in via this exception as she had just experienced a startling event.

Present Sense Impression

This exception entails that a declarant has witnessed or has been involved in an event and has made a statement regarding the said event. The person must have knowledge of the event and the statement made must have been done so during or shortly after the event occurred. Under the CEC, the statement must have been made by a declarant who was involved in the conduct (rather than just a mere observer).. Here, Piper's statement could fall under this exception as she had just experienced a fall and was narrating the event through her exclamation.

Present State of Mind- Physical Condition

This hearsay exception encompasses the expression of a person's present physical condition. Here, Piper is describing her present physical condition. She has physically fallen to the ground as the result of the spilled coffee. Her statement may be admissible under this exception.

Speaker's Knowledge of Facts

This hearsay exemption entails that a speaker had first-hand knowledge of the surrounding circumstances or issue at-hand. In such a case as this (a negligence case) a declarant's knowledge of facts is crucial. Here, Mark stated that the supermarket should invest in properly fitting lids for the hot coffee. His statement provides that he was aware of the fact that there was an issue with the lids not fitting properly and speaks to duty, breach, and causation elements. Mark will most likely argue that allowing this evidence to come in is prejudicial as it could lead the jury to believe that the supermarket is guilty, however he can request a limiting instruction.

Statement Against Interest

This hearsay exemption rests on the idea of a speaker making a statement against his or her pecuniary, proprietary, or penal interest. The policy behind this exemption is that a person would not intentionally harm themselves or put themselves in a negative position. Here, Mark's statement regarding the lids could be considered a statement against interest and could be admissible in the courtroom.

Admission by Party Opponent- Vicarious Admission

Under this hearsay exemption, a statement made by an employee working within the scope of their employment in regards to an event is admissible. Here, Mark, in his capacity as a manager, is working for the supermarket and therefore his statement regarding the need for new lids is admissible.

2. Insurance Agent's Testimony

Relevance

Evidence can be testimonial, real, demonstrative or documentary. Relevance has to do with the tendency of evidence to prove or disprove a material issue. Relevance is concerned with the substance or content of the evidence rather than the form or manner in which it is presented. Relevant evidence must be both logically and legally relevant.

Logical Relevance

Evidence is logically relevant if it has any tendency in reason to make a material fact more or less probable than it would be without it. Here, the insurance agent's testimony regarding the offer of \$100,000 to settle the case is relevant as it speaks to the damages aspect of negligence.

Legal Relevance

All relevant evidence is admissible unless it falls under a public policy exclusion or if the presiding judge finds that its probative value is substantially outweighed by its prejudicial effect (misleading the jury, confusing the jury, waste of time, etc.). Here, there is an issue in regards to mark's offer to settle as it conflicts with a public policy issue.

Public Policy Exclusions

Public policy exclusions include offers to compromise and remedial measures. The purpose behind these policies is to encourage settlement of cases (efficiency) and to promote society to take safety measures to ensure a safer environment for its citizens.

Here, the insurance agent's offer of \$100,000 to settle the lawsuit will be inadmissible as it qualifies as a settlement offer or offer to compromise.

3. Photograph of Piper's Hand

Relevance

Evidence can be testimonial, real, demonstrative or documentary. Relevance has to do with the tendency of evidence to prove or disprove a material issue. Relevance is concerned with the substance or content of the evidence rather than the form or manner in which it is presented. Relevant evidence must be both logically and legally relevant.

Logical Relevance

Evidence is logically relevant if it has any tendency in reason to make a material fact more or less probable than it would be without it. Here, the photograph of Piper's hand is relevant as it strongly supports the damages element of her negligence claim, thus it is logically relevant.

Legal Relevance

All relevant evidence is admissible unless it falls under a public policy exclusion or if the presiding judge finds that its probative value is substantially outweighed by its prejudicial effect (misleading the jury, confusing the jury, waste of time, etc.). Here, the photograph of Piper's hand is relevant, although defense counsel will most likely argue that its probative value is substantially outweighed by its prejudicial effect. Defense counsel will claim that the photograph and its gruesome nature will evoke an emotional response from

the jury and influence their decision. However, the photograph will most likely be admitted and defense counsel can request a limiting instruction.

4. Cooper's Testimony

Relevance

Evidence can be testimonial, real, demonstrative or documentary. Relevance has to do with the tendency of evidence to prove or disprove a material issue. Relevance is concerned with the substance or content of the evidence rather than the form or manner in which it is presented. Relevant evidence must be both logically and legally relevant.

Logical Relevance

Evidence is logically relevant if it has any tendency in reason to make a material fact more or less probable than it would be without it. Here, Cooper's testimony is relevant because it demonstrates that the supermarket was well-aware of the dangerous conditions that were caused by the coffee lids and supports the causation element of Piper's negligence claim.

Legal Relevance

All relevant evidence is admissible unless it falls under a public policy exclusion or if the presiding judge finds that its probative value is substantially outweighed by its prejudicial effect (misleading the jury, confusing the jury, waste of time, etc.). Here, Cooper's statement regarding the claims are legally relevant although his statement regarding the actions of the supermarket after the lawsuit poses an obstacle (will discuss further below).

Hearsay

Hearsay is an out of court statement offered for the truth of the matter asserted (TOMA). Hearsay is generally inadmissible unless it falls within a hearsay exception or exemption (outside of the scope of hearsay).

Business Records Exception

Records that are made during the regular course of business, by a person with personal knowledge and a duty to record are admissible in court. Here, the claims submitted by the supermarket to the insurance company detail multiple instances of coffee spills and were created by Cooper, the custodian of records for the supermarket. Cooper would be able to attest to the authenticity of the claims, which is necessary when trying to introduce a physical document into evidence.

Public Policy Exclusions

Public policy exclusions include offers to compromise and remedial measures. The purpose behind these policies is to encourage settlement of cases (efficiency) and to promote society to take safety measures to ensure a safer environment for its citizens. Here, we are concerned with the public policy exclusion of remedial measures. Cooper states that after the lawsuit, the supermarket took steps to provide proper lids for the coffee cups and also lowered the temperature of the coffee. These particular actions are considered remedial measures and will be deemed inadmissible. Again, the purpose of this public policy is to establish and maintain a safe environment for others.

END OF EXAM

Great Job!!!

2)

tion 2

Drake charged with arson, burned down failing business to get insurance. use FRE.

Should the court have admitted?

1. Sonny's testimony: yes

Sonny testified that ten minutes before the fire started, his dad Ned told him "Look at that Mercedes speeding with no lights on!" Sonny did not see the vehicle. Ned was not available to testify at the jury trial because he suffered a massive stroke.

Is this testimony **relevant (material and probative)?** **Yes.** It goes to the identify of the arsonist, who was speeding away from the scene (was it Drake's car?). It goes to the state of mind of whoever was driving the car (circumstantial - inference = speeding to get away from crime scene. lights off to evade sight = consciousness of guilt).

Is it hearsay? Yes of course it is. Hearsay is an out of court, assertive statement (Ned told him "Look...") offered for the truth of the matter asserted (that a Mercedes was speeding with no lights on).

Is there a HS exception we can use to get this in?

Present sense impression - this is when the declarant is describing an event at or very near the time it takes place. The CEC requires that the declarant be involved in the action, but

we are using FRE here, which does not require that Ned was describing the events as he perceived them, so this qualifies. Its unfortunate Ned is unavailable but fortunately for the pros, availability doesn't matter for the Present Sense Impression exception. So we can get this in.

Defense may object that Sonny did not see the vehicle himself (no personal knowledge) but it doesn't really matter since Sonny is testifying about what Ned said he saw, not what Sonny saw.

Excited Utterance - this exception applies when someone is speaking about a traumatic event while still in a state of shock from the event. We don't know how shook up Ned got seeing that speeding car but there sure are alot of exclamation marks in the quote. Maybe he though the car might hit his son! OH! That would get anyone worked up. So its possible we could use this exception, but more likely we could use the Present sense impression one.

Defense may object saying there is confrontation clause issue, because the declarant is not available (due to stroke) but for that to be true, it has to be in a criminal case (this is, i think), the statement against the accused must be testimonial (made in course of police investigation for purpose of later trial), declarant unavailable, and defense hasnt had a chance to cross examine statement prior to trial. Well in this case, the statement isn't testimonial. It wasn't made to an officer in an investigation. It was made to a son in a parking lot and made out of surprise. So there is not a confrontation clause issue here.

Great!

2.Detective Collins' testimony. yes

Testified that a red Mercedes was registered to Drake (he verified with DMV custodian of records).

This is relevant because the car being at the scene, speeding with no lights on, was likely to have been driven by the arsonist, and finding the IDENTITY of the owner would help us find the identity of the arsonist.

Is it hearsay? Out of court statement? Yes, DMV custodian of records said so and provided certified copy of registration. Assertive? Yes, DMV custodian asserts that a red Mercedes is registered to Drake. Offered for the TOMA? Yes, that Drake owns the car.

Is there an exception? Yes, public records exception - this is where an agency (DMV) keeps records of its own activities or other info it is required by law to keep. The requirements are similar to Biz records exception: the record must be one that is regularly kept, in the regular course of business, made at or around the time of the event, by someone with personal knowledge of the event or with a legal duty to record info from s/o with personal knowledge. The DMV keeps registration records in exactly this manner, so we can get this testimony in under the public records exception.

Collins also testified he had seen this Mercedes parked in Drake's driveway. Well this is just a statement from Personal knowledge. not hearsay or anything else objectionable. Defense may object saying that this is irrelevant because the car could have been anybody's, but when combined with the other facts, it becomes pretty relevant (its registered to Drake AND was seen in his driveway... its probably his car).

Great Job!

3. Baker's testimony. yes

Baker, book-keeper for Drake's business testified that 5 months before the fire, Drake told Baker to record some fraudulent accounts receivable hoping to increase Drake's opportunity for a bank loan. is that relevant to this arson? Not really. What does that type of fraud have to do with arson? But it is fraud and so is arson, so maybe this is propensity evidence. **Is it presented to show propensity for dishonesty/ fraud? In**

that case, it can't come in (unless D opens the door first, but we haven't seen that in the facts). Is there another way we could use this besides for character / propensity? Motive, intent, absence of mistake, identity, common plan or scheme, opportunity, preparation? Well perhaps **MOTIVE, INTENT or COMMON PLAN / SCHEME**. Pros could offer this testimony to show there was a similar scheme of fraud here, perhaps with similar motive and intent as well.

Great!

Defense may object claiming Hearsay. But these are statements that Drake made. So these are Statements / Declarations by party Opponent, and those are considered NOT HEARSAY under the FRE, so we don't even have to find an exception.

Great!

If we did need an exception for some reason, we could use Statements Against Interest (if declarant were unavailable) - Baker complied with the fraud - so this would be a statement against interest.

But we don't know he is unavailable and we probably don't even need an exception. Most likely, Baker's testimony can be admitted to show a common plan or scheme, motive or intent to defraud.

403/352 balancing though. The danger of prejudice, confusing jury, confusing issues, etc could be seen to substantially outweigh probative value of this testimony. Jury may see this as propensity / character evidence no matter how much we tell them it isn't.

4. Owen's testimony. yes

Owen testified that the day before the fire, Owen was walking past Drake's Mercedes and heard a voice state "Gasoline is the best for starting a fire." Owen recognized the voice as Drake's. So basically Owen heard Drake say "gas is best for starting a fire." Is it hearsay? Well sure, it was an out of court statement, asserting the best thing to start a fire is gas, but

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it isnt being offered to prove that the best thing for starting a fire is gas. **it is being offered as circumstantial evidence of Drake's state of mind** / future plans / intent. so it isnt even Hearsay.

And even if the Defense argued that it was hearsay, it would still be an admission/statement by a party opponent so it is not hearsay as a matter of policy.

END OF EXAM

3)

question 3

FRE

1. Pros calls Walter. Pros seeks to introduce statements victor made to Walter.

After being shot and unconscious, Victor woke up in the hospital the next day, and about an hour after waking, tells his hospital roommate Walter "I cant believe Doug shot me! I was in agony when I got shot. I hope I make it"

It is hearsay because Victor's statement was made out of court, it was assertive of a few facts, most importantly "Doug shot me," and it is presented to prove the truth of the matter (that Doug shot Victor).

Is there an exception? Could be a **dying declaration hearsay exception**. **Victor's statement "I hope I make it" indicates that he knows he may die (For a dying declaration exception, declarant is required to believe he is about to die).** **Declarant is also required to make his statement about the cause or condition of his death. In this case "I cant believe Doug shot me! I was in agony when I got shot. I hope I make it" would qualify. Pros will argue that Victor is expressing a statement about the cause of his death (Doug shot me) in anticipation of his impending death ("I hope I make it.")**

Defense may argue that Victor was just speculating about maybe dying. We all do that sometimes. But the fact that Victor actually did die later that day, makes it more likely this was a Dying Declaration. Also, the **declarant must be unavailable, and since Victor is dead, he is unavailable.**

good

This is not a statement made to obtain medical treatment, so that exception does not apply. Victor was just groaning to his room mate.

It is not a present sense impression ("I was in agony") because this refers to a past impression. *good*

It is likely not an excited utterance because Victor was in stable condition, not still shook up emotionally from the experience, although the Pros could argue that he was (there is not time limit on excited utterance, just have to still be all shook up.) *good*

It is likely that this statement will be admitted as a dying declaration.

2. Pros seeks to intro statements Victor made to PO during hospital interview.

Is it hearsay? V tells PO Doug and Bill were stealing his money, drugs and guns when V interrupted the burglary. Yes, this is an OOC statement offered for the TOMA (that Doug shot Victor when Victor walked in on the robbery).

Is there an exception? Yes, **Statement against interest exception to HS**. It would not be in Victor's interest to admit he had drugs and guns. Declarant is required to know the statement is against his interest when he made it. Victor would have known. Declarant's unavailability is also required. V is unavailable bc he is dead. so we can get this in.

Victor told PO it was Doug who shot him. Is this a Declaration by Party Opponent? I don't know if victim is considered an "opponent." Probably 'the people' are Doug's opponent so not gonna work.

But this was Victor's **present sense impression at the time he saw Doug shoot him**. Victor was describing what he saw.

But the defense will argue that he didn't make the statement at or near the time of the event, only later, to the PO, so present sense impression wouldn't work as an exception here.

PO showed V a photo lineup and V circled Doug's photo to identify the shooter. So this could be a Prior ID which is NOT HEARSAY as a matter of policy under the FRE. However, in order to get this Prior ID into evidence, the **declarant has to testify! V is dead so we can't get it in as prior ID.**

Past recollection recorded? Nope. Declarant has to testify that it was accurate when it was recorded, and he can't, because he is dead.

Great Job!

Maybe some confrontation clause issue because Victor is accusing Doug of shooting him, Victor is unavailable, his statement was testimonial (made in course of police investigation for purpose of prosecuting), and the defense hasn't had opportunity to cross examine the statement before trial.

So even though we found an exception for the hearsay, this statement still may be excluded for conf clause.

Now Doug would lose this if he was the reason Victor was unavailable, and in fact he is the reason, BUT he has to have shot Bill for the purpose of keeping him from testifying! It is unlikely the Pros will be able to convince a jury that Doug shot Victor for that reason. And even if Pros could, they would have to admit that Doug shot Victor. So this probably not coming in due to confrontation clause.

3. Doug's cell phone record. Doug's phone got text from Bill's phone. Pros seeks to intro text as exhibit 1.

Well the communication between the two would be relevant to show they were in a conspiracy together.

The record shows Bill texting Doug saying "I cant believe you shot Victor!" This is relevant to whether Doug adopted this statement or not. **If Doug did adopt it, then this statement is admissible as a Statement by party Opponent.**

Records show Doug never replied. If this is seen as a statement to which a reasonable person would reply (to deny it), then **Doug will be seen to have adopted it by failing to respond.**

And even if he isnt seen to have adopted it that way, **he can still be seen to have adopted the statement of his conspirator, Bill.**

also Doug disconnected his service an hour after receiving the message so this is relevant (shows consciousness of guilt).

these records are likely admissible as statements by party opponent

4. Doug testifies he was not involved in the burg or murder and that he barely knows Bill and believes Bill is trying to frame him.

In rebuttal, Pros seeks to intro evidence that Doug and Bill were previously arrested and charged as co-defendants for assaulting a rival drug dealer.

This cannot be used as Character / Propensity evidence BUT it can be used to show that Doug and Bill DO know each-other well.

The court may want to use a limiting instruction so the jury knows these past wrong acts are not being introduced to show propensity for attacking rivals, but to show that **DOUG AND BILL DO KNOW EACHOTHER.**

END OF EXAM