

# MONTEREY COLLEGE OF LAW

## **EVIDENCE**

Mid Term Examination

FALL 2019

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

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

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

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

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

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

Answer according to California Law.

1. During Payne's case-in-chief, he testified that he placed aqua shoes on for stability. Also, that he received a **properly authenticated** letter from Manager Max of Dreamer Resort offering him \$75,000 to resolve the lawsuit. He declined the offer.
2. Next, Larry Lifeguard testified that months before Payne's accident, he observed six people slip and fall on a food items on the diving board. He filled out accident forms and gave them to Manager Max, of the Dreamer Resort.
3. Over objection, Payne introduces into evidence a **properly authenticated** Dreamer Resort premises liability coverage policy. The policy includes coverage of the pool area, the diving board area, the Food Court and the surrounding area.
4. Then, Payne introduces a **properly authenticated** paid invoice from Manager Max from Dreamer Resort. The paid invoice was for the diving board removal in the pool area. The invoice was for services rendered one month after Payne's fall.

QUESTION #2

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

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

1. In her case in chief, the Prosecutor seeks to introduce evidence that in February 2018 Mike was arrested for stealing a Robin Hood costume and a Mask from a costume store.
2. Next, the Prosecutor calls Betty. Betty was outside the bank on September 1, 2018 when she saw a man in a Robin Hood costume and mask run out of the bank with a bag of money. She saw the man's face when he took off his mask while running away. A week later, a police officer came to her house and showed her a photo lineup. She identified the robber but testifies at trial that she cannot remember the man she identified in the lineup. The prosecutor then calls the police officer and represents that the officer will testify that when he showed Betty the photo lineup, she pointed to Mike's photo and said, "That's the bank robber." The defense objects to the police officer's proposed testimony.
3. Next, the Prosecutor calls Investigator Ramirez. Ramirez spoke to Ed, the Chief Financial Officer for Robbin' Hood Foundation. Ed told Ramirez that on July 2, 2018 and September 2, 2018 (one day after each of the bank robberies occurred), Mike brought Ed a duffle bag full of money and instructed Ed to deposit the funds into various different foundation accounts. Ed asked Mike where the money came from. Mike said, "I robbed a bank". Ed thought Mike was joking and deposited the money as Mike requested. Ed was subpoenaed by the prosecution to testify at Mike's trial. However, at the time of trial, despite the diligent efforts of police, Mike cannot be located. The

Q2 continued...

prosecutor establishes that a \$50,000 payment was made to Ed from the Robbin' Hood foundation a week prior to Ed's scheduled testimony in this trial. The Prosecutor seeks to introduce:

- a. A **properly authenticated** text message from Mike's phone to Ed's phone that says: "I hope you take a well-deserved, very long vacation." and
  - b. Ed's statements to Investigator Ramirez.
4. Next, the Prosecutor calls Mary, Mike's former secretary. Mary saw Mike bring a duffle bag full of money into Ed's office on July 2, 2018. Mary jokingly said to Mike, "where did you get all that money? Did you rob a bank?" Mike responded with a smile and a nod.

QUESTION #3

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

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

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

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

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

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

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

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

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

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

#### **Logical Relevancy/CEC 250 Tendency Test**

As per CEC 350, only relevant evidence is admissible

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

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

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

#### **Legal Relevancy/Balancing Test CEC 352**

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

#### **Special Relevancy**

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

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

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

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

## **PAYNE'S COMPETENCY AS A WITNESS**

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

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

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

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

## **2. LARRY LIFEGUARD 'S TESTIMONY**

**Logical Relevancy-** defined above.

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

**Legal Relevancy-** CEC 352 defined above.

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

See Special Relevancy below.

**Similar Happenings: Six Claims and Prior Claim by Payne**

**Six Prior Claims: Notice of Dangerous Diving Board**

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

### **3. THE DREAMER RESORT PREMISES LIABILITY INSURANCE POLICY**

As per CEC 350, only relevant evidence is admissible.

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

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

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

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

#### **Special Relevance-Relevant Policy Exclusions**

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

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

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

The liability coverage policy is admissible to show that in fact, Dreamer Resort did "own an/or control" the premises where Payne slipped and fell off the diving board. Most likely, the diving board and pool area where Payne fell will fall under "premises."



**LIMITING INSTRUCTION/ LIMITED ADMISSIBILITY-** a limiting instruction is one where the court may restrict the proper scope of the evidence. In the admission of the liability policy, the jury may be instructed to consider the policy for the purpose that there is insurance on Dreamer Resort premises, but the policy does not establish negligence.

Thus, the policy is admissible to prove that the resort had "ownership or control" over the pool area, but not that the resort was negligent.

#### **4. SUBSEQUENT REMEDIAL MEASURES: INVOICE**

**Logical Relevancy-** defined above.

The paid invoice has a tendency to establish Dreamer Resort knew of the diving board problem and did nothing to repair or fix the problem until after Payne's fall. Also, the subsequent remedial measure effort to minimize the dangerous conditions indicates that the Dreamer Resort, not the Food Court, controlled the premises. Also, the fact that the resort paid for the diving board removal and posted signs has a tendency to establish that the business had a duty to maintain the pool area and diving board and breached its duty.

See Special Relevancy below.

**Legal Relevancy-** CEC 352 defined above

The trial court has discretion to weigh the probative value of the invoice against the unfair prejudicial harm it may cause the Inn.

See Special Relevancy below.

**Special Relevancy- Subsequent Remedial Measures**

In general, evidence of safety measures or repairs after an accident are inadmissible to prove negligence. This is due to public policy concerns as landlords, owners or managers should fix a problem. Taking action to fix prevent future harm is good public policy. Remedial measure taken before an accident do not implicate policy concerns.

Here, the paid invoice is after Payne's fall in the pool area of the Dreamer Resort. The invoice is for the removal of the diving board. The fact the resort removed the diving board and posted no food signs may show that there was an dangerous problem in the pool area because a service was hired to remove the diving board. However, the invoice will not be allowed in as evidence of fault as that is against public policy.

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

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

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

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

**Prior Bad Act Evidence that is Independently Relevant:**

Evidence of other crimes or misconduct is admissible if these acts are relevant to prove some issue other than the defendant's character or disposition to commit the crimes charged. Such crimes or acts may be admissible for other purposes (such as to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, ect.) whenever those issues are relevant in either a civil or criminal case. (FRE 404(b))

Evidence that Mike was arrested for stealing a Robbin Hood costume and mask would be relevant to show a plan/preparation to commit the bank robberies. It could also be relevant in establishing Mike as the bank robber if it could be established that the costume and mask Mike stole is the same costume and mask used in the bank robberies.

**403 Analysis:**

Mike will argue that the probative value of the evidence is substantially outweighed by the risk of unfair prejudice of allowing the prior arrest for theft. Although there is a risk that the jury could use the arrest for the theft of the costumes for a propensity theory, the probative value of the evidence is strong and a court would allow it to come in.

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

when he showed Betty the photo lineup, she pointed to Mike's photo and said, "That's the bank robber." The defense objects to the police officer's proposed testimony.

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

### **Prior Identification**

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

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

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

### **Text Message:**

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

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

**Police Officer's Testimony:**

The police officer seeks to testify to the out of court statements made by Ed. The statements are being offered for their truth – that Mike brought a duffle bag full of money and instructed Ed to deposit them into different accounts.

There is a hearsay-within hearsay issue as well. Ed, in his statement to police relates a statement Mike made to Ed.

**Forfeiture by wrongdoing**

The statements of a person who is unavailable as a witness is admissible when offered against a party who engaged in or acquiesced in wrongdoing that intentionally procured the declarant's unavailability. (FRE 804(B)(6)) A party forfeits his right to object on hearsay grounds to the admission of an unavailable witness' statements when the party's deliberate wrongdoing procured the unavailability of the witness.

Mike's statement to Ed would qualify as an exception to the hearsay definition as a statement of a party opponent.

**Not Former Testimony:**

There is no indication that Ed ever previously testified at a hearing under oath against Mike or that Mike ever had a chance to cross examine, so the statement would not fall under this exception.

**Confrontation Clause:**

A defendant who procures the absence of a witness forfeits the defendant's confrontation clause rights as to that witness, so there would not be a confrontation clause issue.

4. Next, the Prosecutor calls Mary, Mike's former secretary. Mary saw Mike bring a duffle bag full of money into Ed's office on July 2, 2018. Mary jokingly said to Mike, "where did you get all that money? Did you rob a bank?" Mike responded with a smile and a nod.

**Relevance:** The relevance of the duffle bag full of money is that it has some tendency to support the allegation that Mike robbed the bank. He had a duffle bag full of money the day after the robbery.

The statement Mary made to Mike and his response is potentially relevant to show that Mike in fact robbed the bank.

Mary can testify to what she observed as she has personal knowledge that Mike came into Ed's office with a bag of Money.

**Hearsay:**

**Implied adoptive admission**

1. The declarant made the statement in the party's presence
2. The party heard and understood the statement (Note: The declarant's statement is thus offered for a non-hearsay purpose – to show its effect on the state of mind of the party )
3. The party had an opportunity to deny the statement
4. The party either remained silent or made an evasive or equivocal reply.
5. Under similar circumstances, a reasonable innocent person would have immediately denied the accusation.

**NOTE:** the final element 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. (See FRE 104(a)).

Mary made a statement to Mike asking him, "where did you get all that money? Did you rob a bank?" Mike responded to that statement with a smile and a nod, so it appears that he heard the statement and had an opportunity to deny it. The smile and nod are an equivocal reply. The issue here is whether a reasonable innocent person would have immediately denied the allegation. Mary was joking when she asked Mike if he robbed a bank. Thus, Mike could have not taken her statement seriously and thus, not have felt it was necessary to deny the allegation.

The students can argue it either way as long as they identify the issues.

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

1) Item 1

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

2) Item 2

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

- ii. Admission:
  - 1. Limiting instruction as to how it can be used
- iii. Conclusion: likely be admitted to prove

3) Item 3

- a. Relevance
  - i. Conclusion: it is relevant
- b. Character evidence:
  - i. Rule against propensity
  - ii. MIMIC/MIAMI COP exceptions
    - 1. Most likely theories are common scheme, intent, motive
  - iii. Statutory Exceptions:
    - 1. Federal: FRE 414
      - a. Notice requirement met
      - b. FRE 414 "Child molestation" only includes victims under 14, which does not apply to one of the victims in the current case. May only be admissible as to the 13-year-old victims.
    - 2. CA 1108
      - a. Notice requirement met
      - b. Broader, applies to sex offenses including child molest
      - c. No time limit on age of evidence
- c. 403/352:
  - i. Exclusion:
    - 1. Impermissible inferences of propensity
    - 2. Remote in time
    - 3. No conviction
    - 4. Confusion of the issues
    - 5. Mental development of witness adds emotional element that does not add to probative value
  - ii. Admission:
    - 1. Limiting instruction as to how it can be used
    - 2. Statutory exemption(s) contemplates admission for policy reasons.
    - 3. Any MIMIC/MIAMI COP exceptions beyond statutory exceptions
  - iii. Conclusion: will like be admitted in CA
  - iv. Conclusion: will likely be admitted under FRE
- d. Competence of witness
  - i. Ability to perceive and recollect
  - ii. Was able to draw and tell his mother about sex suggests ability to testify; not age-determinative
  - iii. Conclusion: likely competent with proper voir dire

1)

1. Payne testified he placed aqua shoes on for stability

Here, Payne is offering direct testimonial evidence since he is testifying based on his actual knowledge and is giving the statement under oath.

### Relevance

Relevant evidence is defined as evidence that has any tendency to make a material fact (fact in consequence) more or less likely. Evidence is material if it relates to any of the substantive legal issues in the case or has a relationship to the weight or credibility of the evidence.

Relevant evidence is generally admissible as long as another provision doesn't exclude it and the judge believes it is sufficient to support a jury finding.

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of one or more of the following: Unfair prejudice, Mistaking the issues, Misleading the jury, Undue delay, Wasting time OR needlessly presenting supplemental evidence.

Here, Payne's testimony is likely offered to prove that his fall was more likely to have occurred due to the ketchup on the diving board than the reason of lack of stability. As a result, it is likely to be deemed relevant. It is likely to be found that its probative value is not substantially outweighed by any of the specified dangers explained above.



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Properly authenticated letter from Manager

Relevance (rule discussed above)

Here, the letter from the manager is likely to be offered to prove that the resort was liable for the fall since they offered \$75,000 to resolve the lawsuit. It is not likely the probative value will be substantially outweighed by one or more of the following: Unfair prejudice, Mistaking the issues, Misleading the jury, Undue delay, Wasting time OR needlessly presenting supplemental evidence.

Offer to compromise

Due to policy reasons, offers to compromise are inadmissible to prove the validity of the claim or the validity of the amount in controversy. As a result, it will not be admissible to prove the resort's negligence. However, if it is being offered to prove something other than the validity of the claim or the validity of the amount it may be admissible, but there are no facts to support that. As a result, it is likely to be deemed inadmissible.

2. Larry testifies he observed six people slip and fall on food items on the diving board

Competency of a witness - under the CEC, any person is competent to be a witness unless otherwise stated in the CEC (such as profoundly mentally handicapped or preverbal children). The CEC requires the witnesses to have first hand knowledge of the facts they are going to testify and take an oath to tell the truth. Here, there are no facts to support Larry was an incompetent witness.

Relevance (Rule discussed above)

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Here, the testimony is relevant to prove a material fact since it would make the claim of negligence more likely if it is admitted. It is not likely the probative value will be substantially outweighed by one or more of the following: Unfair prejudice, Mistaking the issues, Misleading the jury, Undue delay, Wasting time OR needlessly presenting supplemental evidence.

### Similar Past Occurrences

Similar past occurrences are generally considered irrelevant unless under certain situations such as: Causation, Prior false claims or similar bodily injury, similar accidents or injuries caused by the same event, to rebut a claim of impossibility, sales of similar property, habit or industrial or business routine

Here, previous similar injuries caused by the same event is being offered. It will be admissible to show that there was knowledge of the risk and they had an opportunity to cure the problem. Since Larry filled out accident forms and gave them to Manager Max it can be offered to prove that the resort had knowledge.

### 3. Liability coverage policy

#### Relevance (Rule discussed above)

Here, the liability coverage policy relates to the area where the incident occurred. The facts do not state why the liability policy is being offered, but it may be relevant depending on what it is offered to prove. It is not likely the probative value will be substantially outweighed by one or more of the following: Unfair prejudice, Mistaking the issues, Misleading the jury, Undue delay, Wasting time OR needlessly presenting supplemental evidence.

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### Liability Insurance

The existence of liability insurance is inadmissible to prove liability, negligence, or the ability to pay. However, it is admissible to prove ownership, control, or for impeachment purposes. Here, the facts state the resort denies liability stating that the Food court had a lease on the pool area and is solely responsible. As a result, if it is being offered to prove ownership, control or to impeach a witness it will be admissible.

### Motion to strike

The plaintiff may request a motion to strike if it is determined it was entered into the record inappropriately (if it is inadmissible due to being offered to prove liability).

### Limited Admissibility

If it is determined that the policy is being entered into evidence for an admissible reason (such as ownership, control, or impeachment of a witness) then the plaintiff may request a limited admissibility instruction to inform the jury that it is admissible for only the specific purpose and not to prove liability or the ability to pay.

#### 4. Paid invoice for diving board removal

##### Relevance (discussed above)

The paid invoice for the diving board removal is likely deemed relevant because it has a tendency to prove a fact of consequence, if it is not excluded by another provision.

However, if it is being offered to prove ownership or control of the area and that is the same reason the liability coverage policy is being offered it may be deemed that it is needlessly presenting cumulative evidence.

### Subsequent Remedial Measures

Subsequent remedial measures are not admissible to prove liability, negligence, fault or wrongful conduct. However, they are admissible to prove ownership, control, feasibility of the remedial measure or destruction of evidence. As a result, if the invoice for the diving board removal was being offered to prove liability or fault it will be deemed inadmissible.

**END OF EXAM**

2)

## ESSAY #2

### Stealing a Robin Hood costume and mask from costume store

#### Relevance

Evidence is relevant if it tends to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence.

Here, it is alleged that the defendant, Mike, committed two bank robberies while wearing a Robin Hood disguise. The prosecution seeks to introduce evidence that Mike had previously been arrested for stealing a Robin Hood costume. This certainly is material to the case because the attempted theft of the costume was the exact same one used in the bank robberies. It is also the name of Mike's foundation and established a common theme and is highly probative to show him as the culprit. Mike may argue that if he was arrested, he did not keep the costume and is thus inapplicable here.

The court will likely find that the evidence is relevant.

#### Prior Bad Acts

Evidence of prior bad acts is generally inadmissible in a case. They are highly prejudicial and may taint the jury, especially if offered solely to establish a criminal disposition. They may be admissible if offered for another material issue other than propensity such as: motive, intent, absence of mistake or accident, identity, common plan or scheme, opportunity and knowledge.

Here, evidence of Mike's theft and arrest of a Robin Hood costume is inadmissible if offered just to show propensity. The prosecutor may seek to introduce the evidence to show Mike's intent to use the costume to commit robberies. He had attempted to steal the costume a few months before the robberies occurred. Although his plan was thwarted at that time, the prior act may show that he tried again until he was able to do so. The attempt to obtain the costume may also be offered to show identity; Mike wanted the costume so much that he tried to steal it.

The court may admit the evidence of the prior bad act only if it doesn't show propensity.

#### Prior Bad Act - Legal Relevance Analysis

Relevant evidence may be excluded if its probative value is substantially outweighed by the dangers of harm of unfair prejudice, undue delay, undue waste of time, etc.

Here, the probative value of the evidence of Mike's prior bad act may be substantially outweighed by the dangers of harm of unfair prejudice before the jury. Admission of the evidence may influence the jury's sentiment and allow them to believe that once a criminal, always a criminal. However, if the evidence is offered for another reason such as intent or identify, then its probative value is also very high.

The court will not likely find that the probative value is *substantially* outweighed by the dangers of harm of unfair prejudice thus admitting the evidence.

#### Prior Bad Act - Limiting Instructions

A limiting instruction is necessary when evidence being offered to the jury may be interpreted in different manners. A limiting instruction will instruct the jury in the proper way to assess, analyze, and comprehend the evidence.

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Here, the admission of the evidence of the prior bad act may influence the jury improperly. Thus, a limiting instruction by the judge instructing the jury to consider the evidence only as it relates to another material issue is appropriate. This will limit the jury's ability to be influenced and allow them to run wild with their imagination about the prior bad act.

### Betty's Identification of the Bank Robber

#### Relevance

Here, a statement identifying the perpetrator of the bank robbery is highly probative and goes to a material issue of the case: who committed the robbery. If prosecution can establish that Betty identified the defendant, then it is highly material. Similarly, if Betty debunks the identity of the defendant, then he is free. This is also highly material.

The court will likely find that the statement of identification is relevant.

#### Hearsay

Hearsay is an out of court statement offered to prove the truth of the matter asserted.

Here, the statement of identification occurred outside the present trial and is presented to show the identity of the defendant, exactly the reason it is offered for.

The court will likely find that the statement is inadmissible as hearsay unless an exception applies.

Hearsay Exception - Prior Identification by Betty

A statement of identification of a person the declarant perceived earlier is generally inadmissible. However, under this exception a statement may come in if the declarant is present in court to testify to the statement and is subject to cross-examination. Also the declarant must testify that the individual they identified was the person they perceived earlier.

Here, Betty was outside the bank and saw the face of the man in the Robin Hood mask as he was exiting the bank. A week later she identified him in a photo lineup. However, at trial she was present and subject to cross-examination by the defendant but she testified that she could no longer remember the man she previously identified.

The court will not likely admit Betty's statement of identification because she did not meet the elements of the exception.

Hearsay Exception - Prior Identification by Police Officer

A statement of identification of a person the declarant perceived earlier is generally inadmissible. However, under this exception a statement may come in if the declarant is present in court to testify to the statement and is subject to cross-examination. Also the declarant must testify that the individual they identified was the person they perceived earlier.

Here, the Police Officer was present when Betty made the identification of the man in the Robin Hood Costume. However, the police officer did not personally make the observation and thus cannot testify that the individual they identified was the person they perceived earlier.

The court will not likely admit the police officer's statement of identification because he did not meet the elements of the exception.



A text message from Mike to Ed stating: "I hope you take a well-deserved, very long vacation."

Relevance

Here, this information may bring light to a material issue of whether the defendant caused the unavailability of a witness. It is highly probative and has some tendency to show that defendant made a payoff to a witness in a criminal proceeding.

The court will likely find this text relevant.

Hearsay

Here, the statement is a text message that occurred outside the present proceeding and is offered as circumstantial evidence that Mike induced or caused the witness to not be present in court to testify. The truth asserted in the text is that Mike hopes Ed has a good vacation.

The court will likely find that the text is not offered for the truth of the matter asserted and is admissible as non-hearsay.

Ed's Statement to Investigator Ramirez

Relevance

Here, Investigator Ramirez is testifying that Ed told him that Mike gave him duffels of money one day after each bank robbery occurred and instructed him to deposit it into the Robin Hood accounts. Ed also stated that Mike told him, "I robbed a bank." Both

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of these statements go to a material issue of whether Mike is the bank robber and whether he was funneling money through his foundation. This would cement the prosecution's case and is thus highly probative as it tends to show guilt on behalf of the defendant.

The court will likely find that the statements are all relevant.

### Hearsay

Here, Investigator Ramirez is testifying that Ed told him Mike gave him duffels of money one day after each bank robbery occurred and instructed him to deposit it into the Robin Hood accounts. Ramirez conversation with Ed occurred outside of the present proceeding and is thus an out of court statement. It is also being offered to show guilt on behalf of the defendant, and thus goes to the truth of the matter asserted. Additionally, the double-hearsay statement offered by Ramirez recounting what Ed told him that Mike said: "I robbed a bank" also occurred outside the present trial and is an out of court statement. It is offered to prove the truth of the matter asserted: that Mike robbed a bank.

The court will likely find that the statement is hearsay and is inadmissible unless there is an applicable exception.

### Hearsay Exception - Forfeiture by Wrongdoing

A statement offered against a party that wrongfully caused the unavailability of the declarant may be admissible as an exception. This exception requires that the declarant be unavailable, the party against whom the statement is offered caused the unavailability of the declarant, and the party did so intentionally when they caused the declarant's unavailability.

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Here, Ed's statements are being introduced by Investigator Ramirez and not Ed himself. Despite the diligent efforts of the police, Ed could not be located to testify himself. The prosecution will aim to show that the defendant paid off Ed and caused him to be unavailable by sending him on a far away vacation - far away from the court's subpoena power. This is an illegal act and, if proven, it would allow the court to admit Ed's statements against the defendant regardless of his absence.

If proven that Mike caused Ed's unavailability, then the court will likely admit Ed's statements.

#### Hearsay Exception - Double Hearsay - "I robbed a bank" - Statement by Party Opponent

Hearsay statements that include a second degree or additionally embedded hearsay may still be admissible but will require an additional exception. A statement by a party opponent is an exception that will allow statements by a party to a litigated case. There are personal admissions, statements by a third party which the party opponent adopts expressly, impliedly or even by silence and vicarious admissions based on theories of agency or co-conspiracy.

Here, most of Ed's statements may come in under the forfeiture exception. However, Ed's statement also includes a quote by Mike the defendant. This quote, "I robbed a bank" can come in as a personal adoption. Mike is a party to the litigated case, and the quote is being offered by the opposing party: the prosecutor.

The court will likely find that the double hearsay statement will come in.

#### Testimony by Mary about Mike bringing in a duffle bag full of money

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### Relevance

Here, evidence by another witness that Mike had a bag full of money after the day of the bank robbery is highly probative and goes to a material issue: that he was the culprit behind the bank robbery occurring on July 1st.

The court will likely find Mary's testimony relevant.

### Hearsay

Here, Mary is testifying that she made a statement that occurred outside of the present proceeding: on July 2, 2018. And that Mike responded to her statement by smiling and nodding. Since this occurred outside of court it meets the first element of hearsay. Mary's joking statement was that Mike robbed a bank, to which he responded in agreement. If offered to show that Mike robbed a bank then it is being offered for the truth of the matter asserted.

The court will likely find Mary's testimony as hearsay that is inadmissible unless there is an applicable exception.

### Hearsay Exception - Statement by Party Opponent

Here, Mary testified that after she saw Mike with a duffel bag full of money, she jokingly told him that he must have robbed a bank. Mike responded with a smile and a nod. The prosecution will argue that when someone accuses another of robbing a bank, they do not smile and nod, and thus it was an adoptive admission by Mike. The prosecution will argue that Mike, or any reasonable person, would have denied the statement or reacted differently. Thus his behavior constituted an adoption of the third party's statement implicating himself as a bank robber. Mike will argue that his smile and nod was not an admission because no reasonable person would have taken

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that seriously and gotten angry. Mike will also likely argue that Mary testified herself that she said the statement jokingly and thus he had no concern that she actually believed he robbed a bank.

The court will likely find that Mary's testimony does not come within the exception and thus is inadmissible hearsay.

**END OF EXAM**

3)

## 1) 2015 CONVICTION FOR SPOUSAL BATTERY

### RELEVANCE

Relevance evidence is evidence that tends to show any fact of consequence in the determination of the action is more or less probable that it would be without the evidence. The court will also do a CEC 352 analysis to ensure the probative value is not significantly outweighed by the prejudicial effect of the evidence.

#### Logical Relevance

Logical relevance is evidence that tends to show any fact of consequence in the determination of the action is more or less probable than it would be without the evidence (material + probative).

Here, the prosecution will argue that the evidence falls under the character evidence, prior bad acts exception. The prosecution will argue that the evidence is relevant to show lack of accident (see full argument below).

The court will likely conclude that the evidence is logically relevant.

### Legal Relevance

Legal relevance is evidence under FRE403/CEC 352 that weighs the probative versus the prejudicial value of the evidence. If the prejudicial value of the evidence substantially outweighs the probative value, that evidence may not be admissible.

Here, the defense will argue that the prior conviction of spousal abuse is highly prejudicial and significantly outweighs the probative value. The prosecution will rebut that the evidence of the prior conviction is not likely to induce any more of an emotional response than the current charge of spousal abuse and therefore should be admissible. The prosecution will contend that the probative value outweighs the prejudicial value.

The court will likely conclude that the evidence is legally relevant.

### CHARACTER EVIDENCE

Character evidence is evidence used to show that a person has a propensity to act in accordance or conformity with their good or bad character. Character evidence in a criminal trial can only be introduced by the defendant. Once the defendant opens the door to his good character, the prosecution is then allowed to offer evidence of defendant's bad character.

### PRIOR BAD ACTS EXCEPTION

A prior bad act is not admissible to show propensity that an individual likely acted in conformity with character, however prior bad acts may be admissible to show intent, motive, opportunity, identification, lack of accident, etc.

Here, the prosecution will argue that they are looking to admit evidence of the prior 2015 spousal battery charge to show intent, motive, and lack of accident for Danielle to batter her husband. Although there are no facts in the fact pattern to show the circumstances behind the prior spousal battery, it can be used specifically to show that the current altercation was not any type of accident. Typically in spousal abuse cases, one party or the other will claim that the injuries were sustained accidentally. In this case, the prosecution will seek to admit the prior conviction to show that there was a prior instance of spousal abuse and the current instance was not an accident as the defense may claim.

The court will likely conclude that the prior bad act is admissible.

### LIMITING INSTRUCTION

A limiting instruction can be given when a specific piece of evidence is allowed for one reason but not another.

Here, the defense will request a limiting instruction that the evidence of the prior spousal abuse can only be used in regards to the current spousal abuse charge. The defense will argue that the prior conviction for spousal abuse is not relevant to the other charges and should not be considered.

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The court will likely grant the use of a limiting instruction.

### PLEAS - NO CONTEST, NOT GUILTY, OR GUILTY

A plea or withdrawn plea cannot be used against a defendant charged with a crime.

Here, Defendant plead no contest to the charge of spousal abuse. This will likely not be admissible or a limiting instruction will be used.

The court will likely conclude that the plea of no contest cannot be introduced.

## **2) 2012 CONVICTION FOR FRAUD & FORGING A PRESCRIPTION**

### CHARACTER EVIDENCE

Character evidence is evidence used to show that a person has a propensity to act in accordance or conformity with their good or bad character. Character evidence in a criminal trial can only be introduced by the defendant. Once the defendant

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opens the door to his good character, the prosecution is then allowed to offer evidence of defendant's bad character.

### PRIOR BAD ACTS EXCEPTION

A prior bad act is not admissible to show propensity that an individual likely acted in conformity with character, however prior bad acts may be admissible to show intent, motive, opportunity, identification, etc.

Here, the prosecution will seek to enter evidence of the prior fraud and forgery conviction to show that defendant had intent and opportunity to commit a similar act. The act of fraud and forging prescriptions are likely gateways to impersonating a physician and the prosecution will argue that because defendant had forged prescriptions before and knew how to do it, she intended to impersonate a physician and she had opportunity because she was already familiar with the inner workings of the physicians work. Because she had wrote opiate prescriptions to those who had paid her, she was already close to impersonating a physician which would lead to similar past occurrences.

The court will likely conclude that the evidence is admissible under prior bad acts exception.

### PRIOR SIMILAR OCCURRENCES

The prior similar occurrences exception allows evidence of prior similar occurrences to be admitted if they are similar in place, time, or persons.

Here, the prior similar occurrence shows that defendant had already been acting similar to a physician when she would prescribe opiates to those who paid her. Opiates are heavily regulated and can only be administered by licensed clinicians. Because she was administering prescriptions for opiates, the prosecution will argue that defendant (similar person) was acting in a similar way to the current charge of practicing medicine without a license.

The court will likely conclude that the evidence is admissible due to the prior similar occurrences exception.

#### PLEAS - NO CONTEST, NOT GUILTY, OR GUILTY

A plea or withdrawn plea cannot be used against a defendant charged with a crime.

Here, the defendant plead not guilty. This will likely not be admissible or a limiting instruction will be used.

The court will likely conclude that the plea of no contest cannot be introduced.

### 3) PRIOR SEXUAL ENCOUNTER WITH HIGH SCHOOL, DEVELOPMENTALLY DELAYED, STUDENT

#### COMPETENCE OF WITNESS

In order to be competent to testify, a witness must have personal knowledge of the events that occurred and understand the oath to tell the truth and agree to tell the truth. In California, the witness must also be able to be understood, either personally or with the use of an interpreter.

Here, the evidence shows that based on Will's limited capacity and understanding, he had personal knowledge of the sexual acts (assault, abuse, and rape). Despite his limited capacity, there is no rule that he cannot testify, despite his mental development age. Will drew explicit photos that someone of his developmental age would not have knowledge of unless they personally experienced it. There is not evidence of whether or not Will understands the nature of the oath and his need to tell the truth, however for the sake of this essay that will be assumed true without other facts.

The court will likely conclude that Will is a competent witness.

#### CHARACTER EVIDENCE

Character evidence is evidence used to show that a person has a propensity to act in accordance or conformity with their good or bad character. Character evidence in a criminal trial can only be introduced by the defendant. Once the defendant

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opens the door to his good character, the prosecution is then allowed to offer evidence of defendant's bad character.

### PRIOR ALLEGATIONS OF SEXUAL ASSAULT, ABUSE, OR RAPE

Prior allegations, charges, or convictions of sexual assault, abuse, or rape are admissible for propensity purposes to show that the defendant had a character for engaging in sexual misconduct and likely acted in that way again. Typically character evidence can only be introduced by the defendant, however in cases of prior allegations, charges, or convictions of sexual assault, abuse, or rape, the prosecution has an exception and may be the first to introduce this specific type of character evidence.

Here, defendant was accused of sexual misconduct in the instance of Will, an underage and developmentally disabled student. Prior acts of sexual misconduct do not have to be proven, merely alleged or charged. The prosecution will assert that the prior allegation of sexual misconduct shows a propensity for Defendant to act in accordance with her character as a sexual predator. The current charges are in close relation to the prior allegations as the victims were approximately the same age and defendant took advantage of her position of trust to sexually abuse several minors.

The court will likely conclude the evidence is admissible per the prior allegations exception.

### RELEVANCE

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Relevance evidence is evidence that tends to show any fact of consequence in the determination of the action is more or less probable that it would be without the evidence. The court will also do a CEC 352 analysis to ensure the probative value is not significantly outweighed by the prejudicial effect of the evidence.

### Logical Relevance

Logical relevance is evidence that tends to show any fact of consequence in the determination of the action is more or less probable than it would be without the evidence (material + probative).

Here, the prosecution will argue that fact that defendant has a propensity towards sexual misconduct tends to make the current charge more or less probable than it would be without the evidence. Typically, offenders that commit sexual based crimes tend to repeat those crimes and will take advantage of every opportunity to commit sexual misconduct. Therefore, it is much more probable that once a defendant has committed a sexual misconduct act, they will again commit a similar act.

The court will likely conclude that the evidence is logically relevant.

### Legal Relevance

Legal relevance is evidence under FRE403/CEC 352 that weighs the probative versus the prejudicial value of the evidence. If the prejudicial value

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of the evidence substantially outweighs the probative value, that evidence may not be admissible.

Here, the defense will argue that the admission of Will's statement would be highly prejudicial based on his age and mental disability. If Will were to testify, it would elicit such an emotional response within the jury that they would not be able to rationally evaluate the charges against the defendant. The defense will further argue that in this situation, the probative value is substantially outweighed by the prejudicial effect. The prosecution will argue that there is not a significant and substantial difference in the weight between the probative and prejudicial values and that the evidence should be admitted into evidence.

The court will likely conclude that the evidence is legally relevant.

**END OF EXAM**