

KERN COUNTY COLLEGE OF LAW

MIDTERM EXAM QUESTION

FALL 2022 EVIDENCE

PROFESSOR H. STARR

General Instructions:

Answer Two (2) Essay Questions.

Answer 25 MBE Questions

Total Time Allotted: Three (3) Hours

Recommended Allocation of Time: Equal Time per Question

EVIDENCE
MIDTERM EXAMINATION
FALL 2022

QUESTION 1

Plaintiff Dusty filed a medical malpractice lawsuit against Defendant Dr. Dooms for personal injuries. Dusty underwent cataract surgery on her left eye with Dr. Dooms, an ophthalmologist.

After the surgery, Dusty kept an eye shield on at night and followed Dr. Dooms's instructions. However, Dusty noticed that days later, her eye was inflamed, painful and her vision was blurry. At the follow-up appointment, she told the doctor of her symptoms. Dr. Dooms told Dusty, "I am sorry for your pain. I am offering you \$40,000 for a settlement." Dr. Dooms said the surgery was performed under the proper medical protocols.

Unsatisfied, Dusty sought a second opinion from Dr. Better, also ophthalmologist. He told Dusty the lens was positioned too low which resulted in her blurry vision and pain. Further, Dr. Better said the surgery performed by Dr. Dooms deviated from the medical standard of care.

At a deposition in this case, Dr. Better testified where both sides were present. However, before the jury trial, Dr. Better died.

At each of the numbered events below, discuss all the evidentiary issues that would arise. The discussion should include the likely trial court rulings. Assume timely proper objections were made. Answer according to the **California Evidence Code**. **DO NOT address hearsay.**

At the jury trial, the following occurred.

- 1 In her case-in chief, Dusty called Nurse Nan who testified that she saw Dr. Dooms consume two shots of gin from a bottle of gin immediately before the cataract surgery. Also, Nurse Nan testified that Dr. Dooms had an unsteady hand during the procedure.
- 2 Next, Dusty Dr. Dooms to testify. He admitted making the statements "I am so sorry for the pain. I am offering you \$40,000 for a settlement." However, he said the statements were not meant be compassionate and nothing else. "
- 3 Then, Dusty asked Dr. Dooms if he had professional liability insurance.
- 4 Finally, Dusty called Secretary Sally to testify. Sally would testify to the contents of notes she found in Dr. Better's office indicating he knew that he had failed to perform diagnostics on his tools prior to the surgery. Sally would testify Dr. Dooms saw her reading the notes, so he confiscated them and burned them.

EVIDENCE
MIDTERM EXAMINATION
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QUESTION 2

Dun-Middleton, a mid-size sales company, found itself in dire straits when its warehouse workers, those who loaded merchandise onto trucks and delivered it, won their monthly Powerball lottery pool. Each of them, now flush with cash, quit on the same day, leaving no skilled warehouse workers to complete the deliveries. The regional manager of the company, Michael, held an office-wide meeting to address the issue. The assistant regional manager, Dwight, suggested that the sales staff take a day away from making sales and concentrate on loading the trucks and making deliveries. Michael entrusted Dwight to manage the operation, and Michael returned to the office. Dwight accompanied the sales staff to the warehouse, where he separated the sales staff into two teams: a team to load the trucks and a team to make the deliveries. Dwight placed Jim charge of loading trucks. Jim had never worked in a warehouse in his life. Not knowing how to use a forklift or operate a pallet jack, Jim devised a scheme in which he pumped grease from a large barrel onto the floor, attached ropes to the pallets, and then directed his team to pull the pallets close to the delivery truck, where sales staff could then load items onto the truck one at a time. Dwight placed Todd in charge of deliveries. Todd had surreptitiously consumed several shots of Irish whiskey in his coffee without Dwight's knowledge. Meredith, an office worker, came to the warehouse to assist with the operation. When she entered the warehouse, she slipped on the grease on the floor and fell. In the fall, she cracked her pelvic bone. Jim helped Meredith to her feet and instructed her to go to his car so he could take her to the hospital. Unfortunately, Todd had just started driving the delivery truck, and due to his inebriation, crashed into Meredith, fracturing four of her ribs. Meredith sued Dun-Middleton for negligence, premises liability, and negligent entrustment.

The following proffers are made at trial:

- 1) Meredith called Oscar, an accountant at Dun-Middleton. Oscar would testify that, three years prior, Dwight assigned Ryan, a temp, to drive Todd to sales calls because Todd's license had been suspended due to driving under the influence convictions. This arrangement lasted months, and it caused Todd to develop the reputation in the office of being untrustworthy behind the wheel.
- 2) Meredith called Creed, a quality assurance representative at Dun-Middleton. Creed would testify that, in the last four years at the office, he has seen six different workers struck by vehicles in the office warehouse's parking lot, and that he reported each incident to management.
- 3) Meredith called Toby, a human resources worker, who has worked at Dun-Middleton for many years. Toby is called to testify as to the employment of each person involved. However, Toby was involved in a ziplining accident on a vacation to Puerto Rico, where he broke his neck. He is now unable to speak or type. His deposition was taken by asking

yes or no questions and allowing him to blink his eyes one time for yes, two times for no, or three times for "I do not know."

- 4) Dun-Middleton called Angela, another accountant at the office who dealt with payroll. Angela would testify that Meredith worked in a nearby desk clump. Angela would testify that Meredith was an alcoholic who was very careless.

Address the proffers according to the Federal Rules of Evidence and indicate how the court should rule. Do not address Hearsay. Do not address substantive tort issues regarding agency theory or vicarious liability; limit your response to application of the law of evidence.

Evidence-Fall 2022-Prof. Lizardo/O'Keefe/Starr

ANSWER OUTLINE

PLAINTIFF DUSTY – DR. DOOMS -Q1-

Please Note: Students may argue different outcomes if they address the major issues. Specific listing of the code section is not required. This was not intended to test experts.

1. NURSE NAN'S TESTIMONY

As per CEC 350, only relevant evidence is admissible.

Logical Relevancy- CEC 210 Tendency Test

Evidence is logically relevant if there is any tendency to prove or disprove any disputed fact that is of consequence.

Here, Nurse Nan has personal knowledge that Dr. Dooms is consuming two shots of gin before Dusty's cataract surgery. Since this is a medical malpractice negligence claim, this witness observation may tend to show a breach of care. Furthermore, Nan saw Dooms' hand shaking which may tend to show a breach of care especially since Dooms was the surgeon.

Defense may argue that Nan's observation of the gin shots had nothing to do with a breach of duty since it was before the surgery and not during the procedure. However, this is not a convincing argument because Dr. Dooms drank the gin right before the surgery, not hours before. This impairment may have affected Dr. Dooms' medical performance.

The trial court will likely rule that Nan's personal observations of the gin and Dooms' hand shakiness are logically relevant.

Legal Relevancy- CEC 352 Balancing Test

Under CEC 352, the trial court has discretion to exclude evidence if the probative value is substantially outweighed by the danger of unfair prejudice. The probative value of the nurse's testimony is very high since it is an eyewitness account of what happened right before Dusty's surgery. It does not seem that this percipient witness account will consume a lot of time, mislead, or confuse a jury.

Therefore, the trial court will rule the nurse's testimony as legally relevant.

Witness Competency /Percipient Witness

In California, the general rule is that all people are qualified to testify unless there is a reason for disqualification. The factors for witness competency include perception, memory, narration, or sincerity. There is a duty to tell the truth and personal knowledge is key.

Here, Nurse Nan has based her testimony on her personal knowledge as an eyewitness to Dr. Dooms' misconduct and breach of care. There is no given reason for her to be disqualified and she will be allowed to testify.

2. Dr. Dooms' two statements to Dusty

Logical Relevance- defined above

The sympathy statement, "I am sorry for your pain," tends to show that Dooms is feeling about the failed cataract surgery. The defense will argue that the statement was not intended as any form of an admission.

The trial court will rule the statement as logically relevant.

However, there are public exclusion policies. See below.

Legal Relevance- defined above

Probative Value v. Prejudice

a. Dr. Dooms Expression of Sympathy to Dusty

Dr. Dooms' statement to Dusty, "I am sorry for your pain," has tendency to show he believes he is at fault or breached a duty of care.

Here, CEC 11360 makes inadmissible any expression of sympathy regarding pain, death or suffering of any person involved in an accident. Studies has shown that people who receive an apology are less likely to sue. However, the present case is not a traffic accident but medical malpractice.

It may be argued that the statement is part of the offer to compromise and therefore excluded.

See below.

b. Settlement Offer of \$40,000

Logical Relevancy- defined above

The \$40, 000 offer by Dooms to Dusty tends to show that the doctor believed he was responsible for the improperly done cataract surgery. Part of a medical malpractice claim is to establish causation. Dusty may argue that by Dooms consuming gin prior to her surgery impaired his medical abilities to perform as a surgeon.

The offer is logically relevant, however, see below – Special Relevancy Rules.

Legal Relevancy- defined above

Trial court weighs and balances probative value against prejudicial effect. There is a high probative value of the Dooms offer. However, there is more of a compelling need for offer to be excluded since a jury may assume that Dooms is liable without other proof.

See below under Special Relevancy Rules.

Special Relevancy- Public Policy Exclusion

Generally, for public policy reasons, offers to settle are inadmissible to show liability. The offer by Dr. Dooms to Dusty of \$40,000 promotes the policy of encouraging settlements in civil cases. CEC 1152 prevents the use of settlement offers or negotiations to prove liability in a negligence lawsuit.

Here, the \$40,00 offer by Dr. Dooms to Dusty is likely an offer to compromise or settle the case. Dusty may argue that the offer was during a follow-up medical visit is more of an admission of fault. However, due to the strong public policy to encourage negotiations, this argument will fail.

The trial court is likely to rule the settlement offer, and expression of sympathy are not admissible as against public policy.

Option: Some students may consider the statement as a Party Admission. Element are offered against the party opponent and said by the party. This is fine, but the student should recognize the public policy to exclude.

3. Insurance Policy – Medical Malpractice

Logical Relevancy- *defined above.*

Dr. Dooms having professional liability coverage tends to show that he is expecting some medical malpractice lawsuits due to his negligence. On the other hand, the defense will argue that the doctor was required to have professional liability insurance, and this does not mean he was negligent.

The trial court will likely rule the insurance policy is logically relevant.

Legal Relevancy- *defined above*

Probative value v. prejudice

The jury may be highly prejudiced by the insurance since the jury may lay blame on the doctor for Dusty's medical problems without the need to establish all the negligence elements.

See Special Relevance below.

Special Relevancy/Public Policy Exclusion

Evidence that a person has liability insurance or professional insurance is inadmissible to prove negligence or fault.

Here, Dr. Dooms has professional liability insurance for his medical services. However, there may be an issue of coverage if Dr. Dooms may have been impaired during Dusty's surgery since he belted down two shots of gin. This issue is more between Dr. Dooms and his insurance carrier and not relevant in this case.

The trial court will likely rule Dr. Dooms's insurance policy is excluded on public policy grounds.

4. Former Testimony- Dr. Better's Deposition Transcript

Logical Relevancy- *defined above*

The deposition by Dr. Better tend to establish that Dooms was not careful in Dusty's cataract surgery and did not follow medical protocols.

Legal Relevancy- *defined above.*

Balance probative value v. prejudicial effect.

Hearsay- *defined above.*

Here, the Dr. Better deposition is being offered to prove the truth of the matter asserted, that Dr. Dooms was negligent by failing to use proper medical protocol or standards.

The trial court will rule the transcript is hearsay and inadmissible without an exception.

Hearsay Exception: Dr. Better's Former Testimony

Former testimony means testimony given under oath concerning the same action or if it is a different action, there must be a similar interest and motive. Also, there was an opportunity to cross-examine the witness and the declarant (Dr. Better) must be unavailable.

Here, the deposition was in the same negligence action and the parties are the same, Dusty is the plaintiff and Dr. Dooms is the defendant. Since both parties were present with their attorneys, there was an opportunity to cross-examine Dr. Better. Finally, the unavailability requirement is satisfied since Dr. Better has died.

The trial court ruling will allow in the deposition transcript of Dr. Better.

Option: Medical Diagnosis Hearsay

Fall 2022 Evidence Mid-Term Exam Question

Prof. O'Keefe

Answer – Q2

The defendant, Dan, is on trial for the first degree murder of Victor. The Prosecution's theory is that Dan shot Victor after Victor won in a poker game. Dan denies being at the poker game or shooting Victor.

In motions in limine prior to trial, the parties seek to obtain rulings regarding the admissibility of the following evidence. Discuss all the evidentiary issues and arguments that would likely arise, including objections, if any, and the likely trial court ruling on the admissibility of the evidence. Apply the **Federal Rules of Evidence**.

1. The Prosecution seeks to introduce properly subpoenaed and authenticated medical records from the victim's hospitalization prior to his death. The defense objects to the following notes in the medical records made by Dr. Oz, the victim's treating physician:

Patient brought into the emergency room by his friend, Bob, who said Victor is in a lot of pain because he was just shot by Dan after Victor won all Dan's money in a poker game. Victor states he is in a lot of pain. Victor said he can't believe Dan shot him over \$100.00.

How should the Court rule?

Analysis:

Relevance: Evidence is relevant if it has some tendency to prove or disprove a material issue in the case. Here the identity of the individual who shot the victim is the central issue in this case. Thus the victim's statement to the police officer indicating the shooter's identity is relevant.

Hearsay: Hearsay is an out of court statement being offered for the truth of the matter asserted. The prosecution is seeking to introduce at trial the victim's and Bob's out of court statement regarding the shooter's identity through the medical records. The statement is offered for its truth. Thus, to be admissible, a hearsay exception must apply.

Business Records: The Prosecution may seek to introduce the medical records through the business record exception. To do so, the Prosecution must establish

1. The declarant had a business duty to report the information
2. The declarant had personal knowledge of the facts or events reported

3. *The written report was prepared close in time to the events contained in the report while it was still fresh in the declarant's memory*
4. *It was a routine practice of the business to prepare such reports*
5. *The report was made in the regular course of business.*

Analysis: The defense will object on hearsay grounds. Bob and Victor did not have a business duty to the hospital. Thus, although the hospital records will be generally admissible, their statements will need to be redacted from the records unless an independent exception applies. This is a "hearsay within hearsay" situation.

Present Bodily Condition: *The prosecution can introduce Victor's statement that he was in a lot of pain through the present bodily condition exception.*

1. *The statement of bodily condition is made contemporaneously with the symptoms.*
2. *By the person experiencing the symptoms*
3. *The statement must refer to the person's present bodily condition*

Bob's statement that Victor is in a lot of pain will not be admissible as present bodily condition because the statement must be made by the person experiencing the symptoms.

Statement for Medical Diagnosis or Treatment:

1. *The declarant made the statement for the Purposes of medical diagnosis or treatment; This exception does not require that the statements be made by the person who needs medical help since statements of that kind might be made by others on behalf of a sick or injured person*
2. *The statement describes Medical history, Past or present symptoms, pain or sensations; The inception or general character of the cause; or external source of the issue as pertinent to diagnosis or treatment*

Bob and Victor's statement that Victor is in pain and was shot would be admissible under this exception. The identity of the shooter would not be admissible. The inception or general character of the condition is admissible but statements as to fault are not admissible.

2. *The Prosecution seeks to introduce testimony of a police officer who spoke with the victim at the emergency room. The victim had just undergone a procedure to drain fluids from his chest cavity and to re-inflate his lung. The victim told the officer several times that, "Dan shot me, I'm dying". During the hearing on the motion in limine, the defense offers testimony that the time that the victim's statement was made, the victim had been examined and treated by doctors who believed that the victim would recover and was in no imminent danger of dying. In fact, doctors and nurses had assured the victim that he was going to be alright. It was the doctor's opinion at the time that this statement was made that the victim's wound was not fatal and that he would recover. The defendant later developed a massive, uncontrolled infection and died eight days after the shooting. How should the court rule?*

Analysis:

Relevance: Evidence is relevant if it has some tendency to prove or disprove a material issue in the case. Here the identity of the individual who shot the victim is the central issue in this case. Thus the victim's statement to the police officer indicating the shooter's identity is relevant.

Hearsay: Hearsay is an out of court statement being offered for the truth of the matter asserted. The prosecution is seeking to introduce at trial the now-deceased victim's out of court statement regarding the shooter's identity through the police officer. The statement is offered for its truth. Thus, to be admissible, a hearsay exception must apply.

Dying Declaration: Rule 804(b)(2). Rule 804(b)(2) provides that "a statement made by a declarant while believing that his death is imminent, concerning the cause or circumstances of what he believed to be his impending death

Under the Federal rules, for this exception to apply, the following elements must be met:

1. The case is a prosecution for a homicide or a civil case;
2. The declarant is the victim named in the pleading;
 - a. 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
3. At the time of trial, the declarant is unavailable
4. The statement relates to the event inducing the declarant's dying condition
5. The statement is factual in nature.

Analysis of Dying Declaration Exception: The statements of the doctors that the decedent was in no danger of dying when the statements were made are relevant. However, the mental state that is decisive in determining whether an out of court statement qualifies as a dying

declaration, is that of the declarant and not his doctor. The relevant inquiry is whether at the time the deceased made those statements or declarations to the officers the deceased in his own mind was conscious of approaching death and believed at the time that he was dying. What renders a dying declaration worthy of belief is not that the conviction of impending death was scientifically arrived at, but that it was sincerely and steadfastly held. Thus, the statement would be admissible.

3. *The defense seeks to introduce the testimony of Dan's girlfriend, Tina. Tina will testify that two weeks after Dan was arrested in connection with Victor's death, she was drinking at the No Good Saloon when she heard Oscar boasting that he was the one who shot Victor. Tina did not come forward with this information until after Oscar died, about one year after the shooting but before Dan's trial. At the hearing on the motion in limine, Tina testified the reason she did not tell police about what Oscar said sooner was because she was afraid of Oscar. Tina testified she cannot remember who else was present in the bar at the time Oscar made this statement. No other witnesses are introduced who would testify that they heard Oscar make this statement. No other witnesses are introduced who would testify that Oscar was at the poker game where Victor was shot. How should the Court rule?*

Analysis:

Relevance: *Evidence is relevant if it has some tendency to prove or disprove a material issue in the case. Here the identity of the individual who shot the victim is the central issue in this case. Thus, Tina's testimony regarding the shooter's identity is relevant.*

Hearsay: *Hearsay is an out of court statement being offered for the truth of the matter asserted. The defense is seeking to introduce at trial Oscar's out of court statement to show it was Oscar, not Dan who was the shooter. The statement is offered for its truth. Thus, to be admissible, a hearsay exception must apply.*

Statements Against Interest:

1. *The declarant is unavailable at the time of the trial*
2. *The statement must have been against pecuniary, proprietary, or penal interest when made*
 - a. *The declarant subjectively believed that the statement was contrary to his or her interest.*

1)

Q1.

I: Dr. Dooms attorney could object to Nurse Nan's (N) testimony about observing Dr. Doom consume two shots of gin before the surgery, and having unsteady hands during the surgery on the basis of **relevance**.

R: Evidence is relevant if it (1) has any tendency to prove a fact, and (2) it is a fact of consequence.

A: Nan's testimony has a tendency to prove Dr. Doom was negligent because he consumed gin/ alcohol before performing the surgery. His consumption of alcohol is a fact of consequence because Nan will testify Dr. Doom's hands were shaking during the surgery as a result of his drinking.

NOT VERY CLEAR
HOW DOES IT PROVE NEGLIGENCE?

C: Overruled.

I: Dr.' Doom's attorney could object to Nan's testimony on the basis of **personal knowledge**.

R: In order for a witness to testify, the witness must have personal knowledge.

A: Nan may testify about Dr. Doom drinking and shaking because she has personal knowledge based on her first hand observations.

C: Overruled.

I: Dr. Doom's attorney should object to N's testimony on the basis of **CEC 352**.

R: Under CEC 352, relevant evidence may be excluded if it's probative value is substantially outweighed by unfair prejudice, or other factors.

A: N's testimony about Dr. Doom drinking and shaking is probative because it tends to prove Dr. Doom was impaired. Dr's Doom's attorney would argue N's testimony would mislead the jury, or confuse the issues because of the substantial risk that the jury could

BUT WOULD IT?

use that testimony against Dr. Doom, even if Dr. Doom may not have been impaired after only two drinks.

C: Overruled.

Overall C to Q1: N's testimony comes in.

Q2.

I: Dr. Doom's attorney could object to Dusty's testimony about Dr. Doom offering to pay \$40,000 in a settlement, on the basis of **relevance**.

R: Evidence is relevant if it (1) has any tendency to prove a fact, and (2) it is a fact of consequence.

A: Dr. Doom's offer to settle has some tendency to prove he felt, or thought he was responsible for Dusty's injury, and that responsibility/ negligence is a ~~material~~ fact of consequence in this negligence lawsuit, which makes it relevant.

C: Overruled.

I: Dr. Doom's attorney should object to Dusty's testimony about Dr. Doom's offer to settle on the basis that **statements made during settlement negotiations are inadmissible**.

R: Statements made during settlement negotiations, or contemplation of a settlement are inadmissible.

A: Dr. Doom's statement of "I am sorry for your pain. I am offering you \$40,000 for a settlement" was made during an offer to settle, and all statements made during a settlement negotiation, or contemplation of a settlement are inadmissible.

C: Sustained.

I: Dr. Doom's attorney should object to Dusty's testimony about an offer based on **CEC 352**.

R: Under CEC 352, relevant evidence may be excluded if it's probative value is substantially outweighed by unfair prejudice, or other factors.

SYNDICATED?
MEDICAL

Conclusion
A: Dr. Doom's offer to settle, in conjunction with his apology is substantially more prejudicial than probative because it makes it seem as though Dr. Doom admitted guilt or negligence, when in fact an offer to settle could be simply an offer of peace, or a way of mitigating damages and costs, and not an admission of negligence. Further, Dr. Doom's offer to settle could mislead the juror's into believing Dr. Doom was admitting fault when he apologized, and offered money.

C: Sustained.

Q2's overall conclusion: Dr. Doom's offer to settle will not come in.

Q3

I: Dr's Doom's attorney should object to Dusty's proffer of Dr. Doom having, or not having liability insurance, on the basis of **relevance**.

R: Evidence is relevant if it (1) has any tendency to prove a fact, and (2) it is a fact of consequence

CONCLUSION DOES IT?
A: Dr. Doom's attorney will argue that whether or not Dr. Doom has liability insurance does not have any tendency to prove he was negligent, and is not a fact of consequence because having, or not having, liability insurance has nothing to do with whether or not Dr. Doom was negligent on this particular surgery.

ARGUING COMPETING CONCLUSIONS IS NOT ANALYSIS
Dusty's attorney will argue that Dr's Doom's possession, or lack of liability insurance has any tendency to prove Dr. Doom anticipated being negligent, and an anticipation of being negligent is a material fact because Dr. Doom was accused of negligence in this case.

HAVING MIGHT TEND TO SHOW NEGLIGENCE

C: Overruled.

I: Dr's Doom's attorney should object to Dusty's proffer of Dr. Doom having, or not having liability insurance, on the basis that **liability insurance**, or lack thereof, cannot be used to prove negligence of culpability.

R: Evidence of liability insurance cannot be admitted to prove negligence or culpability, but can be used to show ownership or control.

A: Dr. Doom's having or not having liability insurance cannot be admitted to prove Dr. Doom was negligent, or culpable. It has no bearing on ownership or control in this case.

C: Sustained.

I: Dr. Doom's attorney should object to Dr. Doom's liability insurance status under **CEC 352**.

R: Under CEC 352, relevant evidence may be excluded if it's probative value is substantially outweighed by unfair prejudice, or other factors.

A: Dr. Doom's liability insurance status would, if admitted, be substantially more prejudicial than probative. The unfair prejudice would substantially outweigh any probative value, and potentially mislead the jurors, waste the court's time, and confuse the issues.

C: Sustained.

Q3's overall conclusion: Dr. Doom's liability insurance status will not be admitted.

Q4.

I: Dr. Doom's attorney could object to (1) Sally's testimony about the contents of notes she found in Dr. Better's office, and (2) could object to Dr. Doom reading the notes and burning them on the basis of **relevance**.

R: Evidence is relevant if it (1) has any tendency to prove a fact, and (2) it is a fact of consequence.

A: Sally's testimony about Dr. Better's notes would have a tendency to prove a fact that Dr. Better knew Dr. Doom failed to diagnose his tools, and that fact would be of consequence in this case because it goes to Dr. Doom's negligence.

Sally's testimony about Dr. Doom confiscating Dr. Better's notes and burning them would tend to prove Dr. Doom wanted to hide evidence that could be used against him, and his act of taking and burning the notes is a material fact to this case because it's indicative of Dr. Doom's deviation from standards of care. *Answer*

C: Overruled as to both.

I: Dr. Doom's attorney should object to Sally's testimony based on the ^{Crim}secondary evidence rule.

R: Evidence is admissible if it is the original writing, a duplicate, or a copy, and testimony of secondary evidence is admissible if the documents were (1) lost or destroyed, (2) unavailable by judicial process, (3) not produced by the party it would be used against if it was in that party's possession, and (4) if the writings do not closely relate to the issue.

A: Sally's testimony of the Dr. Better's notes would be admissible because the original writing, duplicates (if any), and copies (if any) were destroyed. Sally's testimony of those documents would be considered admissible secondary evidence because they were destroyed by the opposing party, and Dr. Better was unavailable due to his death.

C: Overruled.

I: Dr. Doom's attorney could object to Sally's proffer of Dr. Better's notes under **propensity character evidence**.

R: Character evidence is inadmissible to prove acts of conformity therewith.

A: Dr. Doom's acts of destroying Dr. Better's notes, and not calibrating his surgery tools are acts in conformity with the willful negligence he is accused of in this case because not calibrating tools is negligent, destroying notes is negligent, and doing a bad job while intoxicated was negligent.

C: Sustained.

I: Dusty's lawyer should argue Sally's proffer should be admitted under **exceptions to propensity**.

R: Exceptions to character evidence include other uses, including Motive, Identity, Absence of Mistake, Intent, Common scheme or plan, Opportunity, Preparation, Modus Operandi, and Knowledge.

A: Here, Sally's testimony would be used to show Dr. Doom had knowledge that he failed to diagnose his surgery tools because Dr. Better investigated, and found that out.

C: Sustained.

I: Dr. Doom's attorney should object to Sally's proffer under **CEC 352**.

R: Under CEC 352, relevant evidence may be excluded if its probative value is substantially outweighed by unfair prejudice, or other factors.

A: Sally's proffer would be substantially more prejudicial than probative because Dr. Doom's actions of confiscating and burning Dr. Better's notes took place after the surgery, and although Dr. Doom's actions are generally unsound, it does not have any relevance on whether or not he was negligent in the surgery. However, Sally's testimony about what Dr. Better's notes read, specifically the part about Dr. Better not diagnosing his tools is substantially more probative than unfairly prejudicial because Dr. Doom's negligence is central, and "at issue" in this case.

C: Overruled.

Overall conclusion to Q4. Sally's proffers will be admitted.

2)

1. Oscar's (O) testimony about Todd (T)

DM should object to O's testimony about T under relevance. *GOOD ISSUE*

All evidence must be relevant to be admissible. Evidence is "relevant" if it (a) has any tendency to make a fact more or less probable than it would be without the evidence, and (b) is a consequence of fact in determining the action. Under CA Prop 8, all relevant evidence is admissible subject to CEC 352. *FAILURE TO RESPOND TO CALL OF QUESTION, FRE ONLY.*

Here, O's testimony that Dwight (D) had assigned Ryan (R) to drive T to sales calls because T's license had been suspended due to driving under the influence has a tendency to make the fact that D knew about T's drinking problem more probable. *GOOD - HOW IS THIS A FACT OF CONSEQUENCE?*
Overruled.

Dun-Middleton (DM) should object to O's testimony about T under impermissible character evidence.

Character evidence is not admissible to prove an act in conformity therewith. *GOOD*

O's testimony that Dwight (D) had assigned Ryan (R) to drive T to sales calls because T's license had been suspended due to driving under the influence cannot be used for propensity. This form of reputation evidence is showing that T had prior problems with drinking the past can not be used to show that T now has a drinking problem that would make him liable for M's injuries. *WHAT? CANNOT BE USED FOR PROPENSITY?*

Sustained.

ANALYSIS IS NOT EXTRAPOLATION - DEMONSTRATE HOW RULE APPLIES, DON'T JUST SAY IT APPLIES

M should respond to DM's object about O's testimony under exceptions to character evidence. *OBJECTION? WHAT?*

Character evidence is not admissible to prove an act in conformity therewith; however, evidence of specific past acts, wrongdoings, misconduct can be used to show: intent, preparation, identity, knowledge, absence of mistake, motive, opportunity, or common scheme or plan.

Character evidence can be used to prove knowledge of a fact or event.

ESSENTIAL ELEMENT?

Here, O's testimony that Dwight (D) had assigned Ryan (R) to drive T to sales calls because T's license had been suspended due to driving under the influence can be used to show that D had knowledge of T's drinking problem prior to the incident because this had been going on for three years. These three years were more than sufficient time for D to know about T's reputation as a drunk.

CLEAR STUFF

BY PRIOR, NOT FOR 3 Y. BE MORE CAREFUL W/ FACTS

DM should object to O's testimony about T under 403/352.

FRE ONLY

Relevant evidence may be excluded if its probative value is substantially outweighed by the risks of undue prejudice and other factors.

Here, O's testimony that Dwight (D) had assigned Ryan (R) to drive T to sales calls because T's license had been suspended due to driving under the influence has high probative value. The testimony will not substantially outweigh the probative value with undue prejudice because it will not enflame the passions of the jury in a way that it will favor M due to this testimony.

CONCISOR

CONCISOR. LITTLE TO NO DEPTH

Overruled.

2. C's testimony

?

DM should object to C's testimony about management under relevance.

THERE SHOULD BE A REASON WHEN DESCRIBING PROPER - I.E. DIFFERENTIATING BETWEEN SPECIFIC ASPECTS HERE YOU ARE MERELY SUMMARIZING PURELY REMOVE AND ISSUE IS BETTER AND TIME SAVING

WHERE IS THE REST OF THE IRAC?

All evidence must be relevant to be admissible. Evidence is "relevant" if it (a) has any tendency to make a fact more or less probable than it would be without the evidence, and (b) is a consequence of fact in determining the action. Under CA Prop 6, all relevant evidence is admissible subject to CEC 352.

FRE ONLY - THIS HAS NO PLACE HERE

DM should object to C's testimony about management under impermissible character evidence.

Character evidence is not admissible to prove an act in conformity therewith.

Here, C's testimony regarding that in the last four years he at the office, he has seen six different worker struck by vehicles in the office shows propensity. This testimony cannot be used to show that because vehicles have been involved in accidents in the past, then they are more likely to be struck by accidents now.

IS THIS CHARACTER A PERSON HAS CHARACTER

WEAR ANALYSIS

Overruled.

WHY DOES THIS KEEP APPEARING?

M should respond to C's testimony about management under routine.

The routine practice of an organization is admissible to show that business acted in accordance with the routine on a particular occasion.

Here, C's testimony about reporting incidents to DM shows that the employees engage in a routine of reporting incidents when they occur. The fact that C witnessed these incidents six times and reported them all shows a routine that is regular, semi-automatic, and specific.

1 EMPLOYEE
6 TIMES
IN HOW MANY
YEARS?

WHOSE?
6 TIMES?

↳ SOUNDS LIKE RULE
LANGUAGE, WHERE IS
IT IN YOUR RULE
STATEMENT?

Sustained.

M should respond to the objection about to C's testimony about management under exception under character evidence.

Character evidence is not admissible to prove an act in conformity therewith; however, evidence of specific past acts, wrongdoings, misconduct can be used to show: intent, preparation, identity, knowledge, absence of mistake, motive, opportunity, or common scheme or plan.

Character evidence can be used to prove knowledge of a fact or event.

Here, C's testimony regarding that in the last four years he at the office, he has seen six different worker struck by vehicles in the office can be used to show that DM knew about these events taking place on their premises because one of their workers had reported this incident to management on various occasions.

OK, BUT WHY IS KNOWLEDGE IMPORTANT? IS IT PART OF THE CAUSE OF ACCIDENT? ANALYSIS COULD BE DEEPER.

Absence of mistake

Prior bad acts can be admissible to negate the possibility of mistake.

Here, the fact that C reported this incident to management six times negates the possibility of the T crashing into M as being a mistake. The prior bad acts that C is referring show that DM was aware of the possibility of these injuries occurring in their parking. Thus, it is not a mistake or one time coincidence.

HOW?
THIS IS
JUST
FLAT
WRONG.

THIS DOES NOT LOGICALLY FOLLOW.

Sustained.

SO... NONE OF THIS RESPONSE OVERCAME THE INITIAL OBJECTION.

DM should object to C's testimony about management under 403/352.

FREE ONLY

Relevant evidence may be excluded if its probative value is substantially outweighed by the risks of undue prejudice and other factors.

Here, C's testimony regarding that in the last four years he at the office, he has seen six different worker struck by vehicles in the office has high probative value. The testimony will not substantially outweigh the probative value with undue prejudice because it will not enflame the passions of the jury in a way that it will favor M due to this testimony.

Overruled.

CONCLUSIVE? WHY? DOES IT REALLY NOT ANSWER JUST CONCLUSIONS
SINGLEHANDEDLY PROVE AN ELEMENT OR SOMETHING?

3. T's testimony

DM should object to T's testimony under competence.

Generally, everyone is presumed competent. A witness can be deemed competent if they can narrate coherent events and give detailed facts.

Here, T is presumed to be competent. Although, he can not verbally speak, he is able to coherently narrate events and answer questions by blinking in substitution of verbally saying yes or no.

Overruled.

SEEMS CONTRADICTION
USE FACTS - A HE GAVE A DEPOSITION!
RELEVANCE??
403??

4. A's testimony

M should object to A's testimony under relevance.

All evidence must be relevant to be admissible. Evidence is "relevant" if it (a) has any tendency to make a fact more or less probable than it would be without the evidence, and (b) is a consequence of fact in determining the action. Under CA Prop 8, all relevant evidence is admissible subject to CEC 352. FRE ONLY

Here, A's testimony that M was a careless, alcoholc has a tendency to make the fact that she could have also been negligent when sustaining her injuries. The consequence of fact that she could have potentially been drunk at the time the incident occurred is a consequence determining the incident.

Overruled.

WHY? BECAUSE IT MIGHT SUGGEST CONTRIBUTORY NEGLIGENCE, DIMINISHING DAMAGES...

M should object to A's testimony under impermissible character evidence.

Character evidence is not admissible to prove an act in conformity therewith.

Here, evidence that M has a tendency to be drunk in the past cannot be used to show that M could have potentially been drunk in the moment of the incident. This evidence shows propensity in M's conduct.

Overruled.

IS IT BEING USED FOR THIS? THE FACT THAT IT IS 100% OF THE REL. PURPOSE YOU ANALYZED SUGGESTS SO.

DM could respond to objection about to A's testimony under exceptions to character evidence.

Character evidence is not admissible to prove an act in conformity therewith; however, evidence of specific past acts, wrongdoings, misconduct can be used to show: intent, preparation, identity, knowledge, absence of mistake, motive, opportunity, or common scheme or plan.

No exceptions are available for DM's objection.

ANY EVEN ARGUABLE?

Overruled.

DM should object to A's testimony under 352/403.

Relevant evidence may be excluded if its probative value is substantially outweighed by the risks of undue prejudice and other factors.

Here, A's testimony has high probative value to the facts of this case and the fact that M might be a careless, drunk does not substantially outweigh the probative value with undue prejudice. Although the jury might hear this testimony and create a distaste for M, it will not enflame the passions of the jury in a way that will sway them way or the other.

Overruled.

PROBABLY SUSTAINED YOUR BASED ON IRACS EARLIER

SINCE 100% OF THE PROBATIVE VALUE IS IMPERMISSIBLE INFERENCE, SEEMS LIKE PV IS 0 AND UP IS 100...

END OF EXAM

OVERALL, QUITE GOOD. KEEP WORKING ON RULES AND ANALYSIS, CUT USELESS VERBIAGE. DON'T LEAVE OUT LOGREL + 403. FOLLOW CALL OF QUESTION. USE YOUR FACTS FOR DEEPER ANALYSIS. OTHERWISE GOOD JOB. ON THE RIGHT TRACK.