

**MONTEREY COLLEGE OF LAW**

**EVIDENCE**

**Midterm Examination**

**FALL 2015**

**Professor Davenport**

**INSTRUCTIONS:**

There are three (3) questions in this examination.

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

QUESTION #1

Penny slipped and fell on ice in the driveway of Duncan Arms, an apartment building, in the City of Duncan in California. Her injuries were a fractured right wrist that required surgery. Penny sued both the Duncan Arms and the City of Duncan, alleging a negligence cause of action.

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

Answer according to California Law.

1. During Penny's case-in-chief, her counsel called Willa, as the first witness. Willa was outside of the Duncan Arms on the day of the fall. Willa testified, "I saw a woman fall at the Duncan Arms. The woman was holding her right wrist, and said: 'I am in terrible pain!'"
2. Then, Penny's counsel called Max, the manager of the Duncan Arms apartments, who ran outside and said to Penny: "I am so sorry. Don't worry, we have liability insurance."
3. Next, Sheldon, the maintenance supervisor for Duncan Arms testified: "The city usually does the ice removal, but after the woman's fall, the owner hired a private ice removal company."
4. Next, Penny's counsel offered the deposition transcript of the testimony of Dr. Lee, a qualified orthopedic surgeon who had diagnosed and performed surgery on Penny's fractured wrist. Dr. Lee died before the trial. The deposition was read into evidence by the court reporter.

QUESTION #2

A 911 call alerted the police that an armed bank robbery was underway, and police officers were dispatched to a bank. The police search the premises and found Dylan hiding in the restroom at the bank. Bess, a bank teller, identified Dylan as the robber. A lawful arrest and search was conducted by Officer Gordon and a gun and \$1,000 cash were located in Dylan's pants pockets and seized as evidence.

Dylan's defense argument is that he was forced to do the bank robbery.

Assume each of the numbered events occurred in a jury trial in a Federal court. Discuss all the evidentiary issues and arguments that would likely arise and include objections, if any, and the likely ruling by the trial court.

Answer according to the Federal Rules of Evidence.

1. The prosecution called Bess, a bank teller. Bess pointed to Dylan and said, "The man who robbed me is right over there. I identified him at the preliminary hearing. During the robbery, he said: 'I am sorry to do this, but I just lost my job.' "
2. Next, the prosecution called the police dispatcher supervisor who had the 911 record call log and a transcript of the call. The dispatcher who actually received the call was on vacation in Italy. The supervisor testified that the 911 call transcript read: "Help! The bank has just been robbed of \$1,000 cash! "
3. Next, the prosecution called Officer Gordon, the arresting officer as a witness. Gordon recounted the arrest and search of Dylan, but could not recall the amount of cash that he seized as evidence. The prosecution approached the witness with Gordon's police report that stated the amount of cash seized. Upon review, Gordon said: "The amount of cash was \$1,000."
4. Defense counsel called Madison, age 8, as the first witness. Madison was present at the bank when it was robbed. She testified: "I saw the man with a gun and he said: I am sorry but I am forced to do this."

QUESTION #3

Betty and Vic have been dating for two months. Late one night, Vic's neighbors called the police because they heard a heated argument between a male and a female occurring at Vic's house. When the police arrived, they found Vic lying on the ground in the kitchen, deceased, with a stab wound to the neck.

An investigation ensued. Betty was arrested and charged with second degree murder. The prosecution's theory is that Betty was angry at Vic for cheating on her and in the middle of an argument she stabbed him in the neck, killing him. Betty's defense is that Vic was savagely attacking her so she grabbed a knife from the kitchen counter and stabbed him once. During the investigation the police found a handwritten note lying next to Vic. The note stated: "I can't believe Betty stabbed me."

## Questions:

1. The prosecutor seeks to introduce the note found next to Vic's body. Discuss all the evidentiary issues, including objections, if any, and the trial court's likely ruling on the admissibility of the evidence.
2. The Prosecutor seeks to introduce the testimony of Pam. If permitted, Pam will testify that a year prior to Vic's death, Betty got into a fist-fight with Pam at a party because Pam was flirting with Betty's then boyfriend Bob. Discuss whether this evidence is admissible, what objections can be made, and how will the court likely rule.
3. Assume for purposes of this question only that the sole defense witness is Betty. She testifies that Vic attacked her and she acted in self defense. Betty does not testify that Vic was a violent person. In rebuttal, the prosecutor offers evidence that Vic had a peaceful character. Betty objects. Is this evidence admissible in a Federal Trial? In California State Court? Explain the reasons why or why not.
4. The defense offers testimony from Betty's friend Rhonda. If permitted, Rhonda will testify that she heard Vic's friend Roy tell Betty, "Vic has knifed two people in the last year". Discuss all the evidentiary issues, including objections, if any, and the trial court's likely ruling on the admissibility of the evidence.

## Evidence –Fall2015 - Answer Outline – Seaside & SLO

### QUESTION 1:

#### 1. WILLA

- **LEADING OBJECTION:** counsel is testifying as to a woman slipping and falling in the driveway at Duncan Arms. Generally, counsel may not lead on direct testimony. Here, the plaintiff may argue this is foundational. However, a trial judge may sustain the objection by defense. (Students may argue the outcome either).
- 
- **RELEVANCE:** Of Penny's statement that she is in terrible pain and holding her right wrist. Relevant to prove the nature of her injuries.
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- **WILLA'S REPLY-** as a percipient witness, Willa can testify that she witnessed the slip and fall and the location. Penny's statement, "Oh, I am in terrible pain"- is **HEARSAY**, an out of court statement offered to prove the truth of the matter asserted. Under CEC, **SPONTANEOUS STATEMENT, PRESENT STATE OF MIND, PRESENT PHYSICAL OR MENTAL CONDITION AND PRESENT SENSE IMPRESSION ACCEPTABLE** exceptions.

#### MANAGER'S STATEMENT TO PENNY- MULTIPLE HEARSAY LAYERS

- **RELEVANCE:** "I am so sorry" -tendency to show fault or culpability of Duncan Arms; on other statement, "Don't worry, we have liability insurance."
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- **SPECIAL RELEVANCEPROBLEM/PUBLIC POLICY-** because public policy is that statement cannot be used to establish negligence or fault. However, may be relevant to establish ownership or control if in issue. Here, because Owen will deny ownership or control, it may be an exception to the public policy exclusion. Not admissible at first, when manager says "we have liability insurance."
- 
- **HEARSAY-** defined supra.
- 
- **EXCEPTION-** Under CEC, **PARTY ADMISSION** because due to respondeat superior civil cases, (negligence) statements of employees may be attributed to the employer.

## 2. SHELDON

- **RELEVANCE:** tendency to blameshift to the city and later with regard to subsequent remedial measures may show fault or negligence in not removing ice from the driveway.
- **PERSONAL OBSERVATION OF WITNESS:** Shelon noted city workers did not clear the area; he knew this because he was working at the time.
- **SUBSEQUENT REMEDIAL MEASURES-** public policy exclusion against after accident repair, etc. to fault. The fact that Owen hired a private ice removal company cannot be used for fault yet.

## 3. DEPOSTION TRANSCRIPT OF DR. LEE

**RELEVANCE:** establish injuries and medical records of fractured wrist.

- **HEARSAY- SUPRA. EXCEPTION- FORMER TESTIMONY.** Dr. Lee is unavailable because he died. At depositions, there is an opportunity to cross-examine by the defense. Medical diagnosis of a fractured right wrist needs a qualified expert. Here, Dr. Lee was an orthopedic surgeon and did previously testify as to the fractured wrist. There may be a redaction on the “due to a fall on ice.”

## 4. OWEN

**RELEVANCE:** non –ownership of the driveway area and blame shift to city. Owen is denying that the driveway area is his responsibility

**SUBSEQUENT REMEDIAL MEASURES:** Public policy against establishing fault if an owner repairs an area. However, once Owen denies ownership or control over the driveway a contract with a private company for ice removal may be used as an exception- to establish Owen does have control over the driveway

**LIMITED PURPOSE/LIMITING INSTRUCTION:** Trial court should instruct jury to consider the contract as showing ownership and control of the driveway by Owen, but not fault.

## QUESTION #2

### 1. BESS

#### FUNDAMENTALS:

**-DISCUSSION OF RELEVANCE** – evidence is logically relevant if it tends to make the existence of any material fact more or less probable than it would be without the evidence. Then, balancing test, FRE 403-the court may exclude relevant evidence if its probative value is outweighed by the danger of unfair prejudice, confusing the issues, misleading or confusing the jury.

**-POINTING AT DYLAN, THE DEFENDAN BY BESS-** is the pointing to Dylan an assertion? Did Bess mean to communicate or assert information? The pointing to Dylan may be intended to be an assertion that coupled with her statement may be tied into the prior identification below.

**-HEARSAY-**is an out of court statement by the declarant offered to prove the truth of the matter asserted. A statement is assertive verbal, written or non-verbal conduct intended as a statement.

**- PRIOR IDENTIFICATION-** Prior out of court identification is not considered hearsay, provided the opposing counsel has an opportunity to cross-examine the witness who made the identification. Here, Bess identified Dylan as the robber from a prior hearing. Admissible non-hearsay under FREs. (OK if students compare to CA., but only to briefly say it is an exception to hearsay).

#### **- DYLAN TO BESS-**

“Give me all your cash or else. I am sorry to do this, but I lost my job.” Multiple hearsay issues- each statement needs to be considered separately.

- The first statement, “Give me all your cash or else,” is a statement by an opposing party (the defendant) under the FRE is considered admissible non-hearsay under the FREs. (OK if students compare CEC party admissions exceptions, but briefly) .
- Dylan’s state of mind- “I am sorry to do this, but I lost my job”- Dylan’s state of mind as to remorse and/or mitigation regarding the bank robbery.
- Excited utterance- “Give me all your cash or else!” – statement made under stress of event. ( In CA. called spontaneous statement under CEC).
- Bess placed in fear by Dylan- relevant to establish the force of fear element of robbery. “I have a gun!”

## 2. POLICE DISPATCH SUPERVISOR

### -RELEVANCE DISCUSSION-

- **BUSINESS RECORDS:** is the 911 call log and transcript admissible by a supervisor instead of the actual dispatcher who received the call? Students should recognize that the original 911 operator is not needed. Here the operator is unavailable because she died. Records of events made in the regular course of business, consisting of matters within personal knowledge with a duty. However, the **custodian of the records**, presumably a supervisor, is needed to establish a business record.

-**PUBLIC RECORD DISCUSSION**-is the 911 call a public record with the call log and transcript a public record? Does the supervisor have a public duty to record this 911 information?

### -CRAWFORD CASE/SIXTH AMENDMENT RIGHT TO CONFRONT

- Was the call testimonial in nature? An ongoing emergency?

-**THE CALLER SAID, "THE BANK HAS JUST BEEN ROBBED OF \$1,000 IN CASH IN SEQUENTIAL BILLS!"**

-Hearsay considerations: students should recognize that the statement may qualify as an **excited utterance, present sense impression or present state of mind of the caller.**

## 3. OFFICER GORDON

### -RELEVANCE DISCUSSION

-**PAST RECOLLECTION RECORDED-** writing made or adopted by the witness who cannot remember the facts, while made fresh in his mind and is trustworthy. Here, the officer remembered the robbery report, the arrest and search of Dylan, **but not the amount of cash he seized from the defendant.** Gordon's memory was refreshed by looking at his own police report. Students should comment that the police report itself should not be admitted into evidence.

## 4. MEGAN

- **RELEVANCY DISCUSSION-** The defense wants Megan's testimony of Dylan being forced to do the robbery many negate the robbery with regard to intent or at least serves as mitigation.

-**COMPETENCY OF WITNESS, AGE 8-** her age should be discussed, but does not disqualify her from testifying. An offer should be made that the minor witness knows the difference between a truth and a lie and the consequences of lying. Megan is an eyewitness and can testify as to what she observed, the man robbing the bank. She is also a lay witness.

- **JUDICIAL NOTICE-** is this mandatory or permissive judicial notice of a calendar day? Defined as a trial judge recognizing certain facts or other information to establish a fact. Here, the court is using a shortcut to establish the robbery was on January 23 and that was a Friday.

- **HEARSAY BY ROBBER-** the statement Megan heard, "I am being forced to do this."

**EXCEPTIONS: EXCITED UTTERANCE, PRESENCE SENSE IMPRESSION, STATE OR MIND**



### QUESTION 3

Relevance: Betty has testified that she acted in self defense. This defense makes Vic's character for peacefulness relevant if it is otherwise admissible.

Character Evidence: This question raises the issue of whether proposed character evidence is admissible by the Prosecutor in the absence of evidence of character introduced by the defendant. The defendant's act of taking the stand to testify does not place the defendant's character at issue. Under both the federal and California rules, the defendant must open the door to evidence of character in a criminal case. Under the federal rules, if the defendant first introduces evidence of his good character then the prosecutor can introduce evidence of the defendant's bad character for that trait or the victim's good character for that trait. Here, Betty has not introduced any character evidence.

Federal Rules: There is one exception to the general rule under Federal Rule 404(a)(2)(c). In a homicide prosecution, evidence of the victim's character for peacefulness can be introduced by the prosecution regardless of whether the defendant introduces character evidence of the victim's violent disposition if the defendant claims self defense. The policy rationale behind this rule is that the victim is unavailable to speak for himself, so the prosecution should have an opportunity to speak for the victim. In a Federal Court, this evidence would be admissible.

California Rules: California does not have any corresponding rule to the federal rule. In California, the Prosecution can only introduce evidence of the Victim's peaceful character if the defendant first introduced evidence of the victim's bad character. Here, no evidence has been introduced on the issue of character so the evidence would be inadmissible.

1. Betty seeks to introduce evidence that she was in fear of Vic. The defense seeks to introduce the statement of her friend Rhonda. If permitted, Rhonda will testify that she heard Vic's friend Roy tell Betty, "Vic has knifed two people in the last year". Is this statement admissible? Please discuss why or why not.

Relevance:

This statement is relevant and material as Betty is alleging self defense and Betty's fear of Vic is thus a matter at issue in the trial. The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of undue prejudice. Undue prejudice means evidence that is not merely damaging to one party's case; it refers to a tendency to evoke an emotional bias against one party without having a substantial effect on a disputed issue. Since the issue is self defense in this case, the court will likely find that the probative value of the evidence substantially outweighs any prejudicial effect.

Hearsay:

A statement is hearsay if it is an out of court statement offered for the truth of the matter asserted. The statement by Roy to Betty was made out of court. However, the statement is not being offered for the truth of the matter asserted. The question indicates that Betty seeks to introduce evidence that she was in fear of Vic. If the statement is offered for that purpose, rather than to show that Vic actually knifed two people, it is being admitted for the effect it had on the hearer – Betty. Thus the statement is admissible as non-hearsay.

Note: Some Students May address Character Evidence:

A defendant can introduce character evidence of the defendant's good character for a specific trait at issue or the victim's negative character for a relevant trait. That character must take the form of reputation or opinion testimony. Specific acts of misconduct are specifically excluded. In this instance, the defendant is not offering the evidence on the issue of the alleged victim's character. Instead, she is offering it on the issue of her fear of the defendant. It is possible that the jury could consider for potentially impermissible purposes: that the Victim did knife two people in the past year. The remedy would be a limiting instruction.

Limiting Instruction: Because the statement of Roy is being offered not for its truth, but rather for the effect on Betty, the Prosecutor should ask for a limiting instruction indicating the limited purpose for which the evidence is relevant.

2. The prosecutor wants to introduce the note written by Vic. Is this evidence admissible? Please discuss:
  1. any foundation/authentication issues
  2. hearsay issues

## **Evidence Answer Outline**

### **FALL 2015 - QUESTION 3**

#### Foundation/Authentication

In order to introduce the note the Prosecution will need to authenticate it. Since Vic is deceased, the Prosecutor will need to find a way other than Vic's testimony to establish that the note was authored by Vic. There are several possible ways to identify handwriting. The prosecutor could call an expert who would compare the note with known specimens of Vic's handwriting that have been authenticated. The prosecutor could introduce a non-expert witness who was familiar with Vic's handwriting prior to the litigation to express an opinion on the handwriting. This person could have obtained familiarity with Vic's writing by seeing him write, by exchanging correspondence with Vic or by other means. Finally, if the prosecutor could authenticate a known sample of Vic's writing, the prosecutor could submit the known sample and the note to the jury to compare.

Hearsay Issues: Hearsay is an out of court statement offered for the truth of the matter asserted. The statement in the note is hearsay as it is an out of court statements offered for the truth of the matter asserted.

#### Dying Declaration:

To be admissible as an exception to the hearsay rule as a dying declaration the following elements must be met: The declarant must be unavailable as a witness. Here the declarant is deceased.

Dying declarations are only admissible in a homicide case or in a civil case. This is a homicide prosecution.

The statement is about the cause or circumstances of impending death. Here the statement made by Vic deals with the cause of his death – the fact that Betty stabbed him.

The declarant believes his death is imminent at the time the statement was made. In the present case, there is nothing in the statement itself which indicates that the declarant believed that his death was imminent. The policy rationale behind the rule is that people are unlikely to lie at the moment of their death. Without that assurance of trustworthiness, the statement is not admissible. This is a foundational element which the judge must decide (FRE 104(a)). The judge could make this finding based on the circumstantial evidence of V's deteriorating condition, and the fact Vic wrote the note within minutes of his death as the police arrived within 10 minutes after the neighbors called because they heard the arguing. This is a close call. The statement would probably be admissible under the dying declaration exception theory.

### Excited Utterance

The statement relates to a startling event. This element is met because being stabbed is a startling event.

The statement is made while under the stress or excitement of the event. In this case, the evidence shows that there was a span of approximately 10 minutes from when the neighbors heard the arguing until the police arrived and found Vic deceased. The statement itself suggests excitement – “I can’t believe that Betty stabbed me!”

The statement concerns the facts of the startling event – the fact that Betty stabbed Vic.

Thus, the statement should be admissible as an excited utterance

3. The Prosecutor wants to introduce evidence that a year prior to Vic’s death, Betty got into a fist-fight with Pam at a party because Pam was flirting with Betty’s then boyfriend Bob. Is this admissible? Please discuss why or why not.

Relevance: In a case where the defense is self defense, this evidence would be relevant on the theory of Betty’s propensity for violence. The Federal Rules specifically disallow (except in the context of allegations of child molestation or rape) evidence of a person’s character to prove their conformity therewith. Furthermore, the rules on character evidence disallow a prosecutor to introduce specific instances of conduct.

Relevance/Prior Bad Acts. Although evidence that could lead to a conclusion about someone’s character is kept out if offered to show action in conformity with that character on a specific occasion, it can be admitted if it is introduced for other purposes. The prosecutor is allowed to introduce evidence of other crimes or wrongs if it is relevant on a theory other than propensity, such as motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. For this evidence to be admissible, the prosecutor in a criminal case must provide reasonable notice in advance of trial.

In the present case the issues of opportunity, preparation, plan, knowledge, identity or absence of mistake or accident are not at issue. If this evidence is admissible at all, it would have to be relevant to prove motive or intent.

Motive. The commission of a prior crime may be evidence of a motive to commit the crime for which the defendant is accused.

Intent. In many crimes intent is the gravamen of the crime. Evidence that the defendant committed prior, similar wrongful acts is admissible to establish guilty knowledge and to negate good faith.

The proposed evidence involved an altercation between Betty and Pam was over Betty’s boyfriend. In the present case the alleged motive for the murder was Betty’s jealousy. As such, the evidence has some tendency to show that Betty acts in an aggressive way when she is jealous. This evidence would be relevant on Betty’s intent or motive(acting in anger/jealousy rather than self defense) Thus, the evidence would be relevant under these theories.

403 Analysis: Although the evidence is relevant, the probative value of the evidence must be weighed against the prejudicial effect. The evidence would clearly be damaging to Betty’s defense. It could lead a jury to convict based on the impermissible propensity inference: If Betty has been violent in a situation like this before, she probably did it again. There are additional factors which would diminish the probativeness of the evidence. The event with Betty and Pam occurred a year prior to the present incident. The fight did not involve Vic. The fight was a fist-fight, not a fight where weapons were used. There are other factors, such as whether alcohol was involved, that are unknown that could suggest differences in the situations.

Student could argue it either way as long as the argument is well reasoned.

# Blue Book

NAME

SUBJECT Evidence

INSTRUCTOR Davenport

EXAM SEAT NO

SECTION

21

DATE

Dec 7, 2015

GRADE

10<sup>7/8</sup> x 8<sup>1/4</sup>

25 - 24 PAGE

## Evidence Q1

### Penny v Dunbar Arms + City of Dunbar

P is suing D + D for negligence, a civil cause of action, in CA court, so CEC applies. Evidence is any testimony, documentation, physical objects, ect., that is being offered to prove or disprove a fact. All relevant evidence is admissible if competent, unless an exclusionary rule applies. Evidence is relevant if it has any tendency in reason to make a material fact more or less probable. Under CEC, the fact must be one in dispute.

Relevant evidence may be excluded for policy reasons, or if the judge determines the probative value is outweighed by the prejudicial effect. The judge considers factors like prejudicing the jury, misleading the jury, confusing the issues, or unduly cumulative + wasting time.

#### 1. Willa

Willa will testify to seeing P fall, and what P said when holding her wrist. This is relevant as it tends to prove the causation + damages elements of negligence. P fell on the side walk, and this caused her wrist "tender pain" so this makes those factors of negligence more probable.

D + D will argue W's testimony is prejudicial, as the jury will hear W's testimony + believe W + D + D

one at fault. But W's testimony doesn't give info as to the fall being D + D's fault, but the jury will still assume that b/c W says "~~that~~<sup>at</sup> Duncan Arms," the jury will assume liability.

However, the ct. will likely conclude the probative value is not outweighed, and if needed the judge could provide a limiting instruction to the jury.

Therefore, the evidence is admissible under relevance, so it will be excluded if an exclusion rule applies.

### Hearsay

Hearsay is an out of court statement that is being offered for the truth of the matter asserted (TOMA). The declarant's statement must be <sup>a</sup> verbal or nonverbal assertion. Hearsay is inadmissible unless a valid exclusion or exception applies.

W's testimony has two parts, and must be examined separately.

First, W testifies to what she saw: that a woman fell at Duncan Arms. The phrasing of her answer is not hearsay, as she is not testifying to something she said out of court, but to her direct + personal knowledge of what she saw.

So this portion of W's testimony is admissible b/c it doesn't fall under hearsay.

The next portion of his testimony refers to what he heard P say, that P is "in terrible pain." This is referring to what P said out of court, and if being offered to prove TOMA, that she is in pain, it is inadmissible hearsay.

### Excited Utterance / Spontaneous Statement

Under this exception, the declarant experienced a startling event, and made a statement while under the stress of that event. The theory of reliability is excitement suspends the ability to fabricate.

Here, P would argue that she had just fallen and severely injured herself, so she just went through a startling event. Her declaration was said immediately after falling, so it's likely she was still under the stress of the event.

This will likely be admissible under this exception.

### Present Sense Impression

Under this exception, the declarant is narrating an event or condition as it is happening, or immediately thereafter. Under the CEC, the declarant must be narrating their own conduct, not a 3<sup>rd</sup> party. The theory is that the person does not have time to lie.

Here, P fell, and immediately after stated she

is in ~~terrible~~ pain. This is contemporaneous, as she was stating the pain as she was presently feeling it. Also, she is narrating her own conduct, b/c she is the one that is in pain.

This would be admissible.

### State of Mind: Present Physical Condition

Under this exception, the declarant is stating their present or past physical condition, this cannot be applied to future conduct. The theory of reliability is the declarant doesn't have time to fabricate.

Here, P said "I am in terrible pain." This is a present physical condition, as it is described in condition as she feels at that moment.

This would be admissible under this exception.

### 2. Max - Duncan Manager

M will testify to what he said to Penny after she fell. This is relevant as it tends to show the duty, breach, & causative elements. B/c M said so, it tends to show D was responsible & they are sorry for not living up to the duty (breach). Also, it shows M likely saw P fall, which goes to causation. So M's



testimony makes P's neg. elements more probable

D would argue this statement is prejudicial, b/c the jury may be misled into believing that "I'm sorry" is an admission of guilt, when M could have only meant he was sorry P got hurt. So the jury will assume D or P are negligent.

The judge may rule the prejudicial effect does outweigh the probative value under a policy exclusion.

### Policy Exclusions

In certain circumstances, the judge can exclude relevant evidence b/c there is a high public policy reason for wanting it out.

For liability insurance, the ct wants to encourage people to have insurance, and this being used against them may not only dissuade ppl from having it, but also the jury may not focus on the merits of the case.

When ~~an~~ statements of fact accompany statements of liability insurance, it may come in. Under the FIFE, the statement of fact comes in but liab. ins. stays out. Under CEC, the statements cannot be severed and they are admissible.

B/c M has a statement of fact, the judge may rule the entire statement is admissible.

## Hearsay

Above.

M is testifying to what he said to P out of Ct, so if offered to prove he said something that they have liability insurance, it is inadmissible.

P will likely want it to come in for the TOMA, to show M was admittedly fault.

## Admissions / Statement by a party-opponent

Under this exclusion, the statement is being offered substantively for its truth, but is excluded from the definition b/c the Ct wants to hold people to what they say when an out of Ct. statement ~~is~~ is being offered against a party to the litigation, by the opposing party, it is admissible if it meets the elements.

Here, M is D's manager. So under FRE, it would be a vicarious admission b/c M is an employee to D, a party, and the statement was made during the existence of the relationship + it was of + concerning the relationship.

However, under CEC, the admission must be by an authorized spokesperson, as vicarious does not exist. The facts don't indicate M was authorized to speak, so it would be inadmissible.

### Excited Utterance

P may argue M was under the stress of seeing P fall, so it is M EU.

It may be admissible under this.

### 3. Sheldon

S's testimony about the city's ice removal may be relevant as it tends to show the ice was worse than normal, and needed a private company. This goes to causation, as it shows the ice needed to be removed but wasn't, and P fell. Also, it shows ownership, (duty) since the city fixed it.

P+D would argue it is prejudicial as it will make the jury believe they were neg. since they fixed it. The judge may find this outweighs the probative value.

### Policy Exclusion

When a defendant makes a subsequent remedial measure to fix a dangerous cond., the ct. doesn't want to hold this against them b/c it may dissuade ppl from fixing dang. conditions.

However, it is admissible to show ownership,

control, or feasibility, if disputed by D.

Here, the facts do not indicate that D + D disputed ownership over the driveway. So S's testimony may be inadmissible.

S's testimony is only admissible if D disputes ownership over the driveway.

#### 4. Dr. Lee - Depo Transcript

DL's testimony about his diagnosis is relevant b/c it goes to causation and damages. DL performing surgery shows the severity of P's injuries, which is material & likely disputed.

This is likely not prejudicial, as it will not confuse, mislead, or prejudice the jury, or waste time.

Therefore, DL's testimony will be relevant.

#### Hearsay

Above.

DL's depo testimony, though done under oath, was said outside the presence of the jury, so it may implicate hearsay.

## Former Testimony

Under this exception, the declarant is currently unavailable and said something ~~off~~ under oath, <sup>where</sup> with the present opposing party had the same opportunity to re-examine + develop the testimony.

However, under CA depositions transcripts are not allowed under this exception. Part P will argue that b/c the depo was for the current litigation, not a former one, it is admissible.

B/c at the time of the depo, D had a chance to re-examine.

Under this exception in CA, it would not be admissible.

## Confidential Clause

D would argue b/c the ~~depo~~ Dr is unavailable, he cannot re-examine him + this violates CA.

How, b/c it was a depo for the ~~current~~ current trial + D was able to re-examine during that, then this satisfies the CA + it would be admissible.

2)

===== Start of Answer #2 (1982 words) =====

this case take place in federal courts and the federal rules of evidence will apply

Rog 1

Relevance

evidence is admissible if it is relevant. Evidence is relevant if it has a tendency to make any material fact of consequence more or less probable than with out the evidence.

here this evidence is relevant to show Dylan was the person who robbed the bank and that he has intent to rob the bank b/c he has lost his job.

403- even if evidence is relevant the court can still exclude this evidence if its propensity value is substantially outweighed by undue prejudice, untimely delay or confusing the jury.

here the defense will claim that this evidence is highly prejudicial b/c it basically makes dylan culpable of the crime. the pros will argue that although this evidence is highly prejudicial it is not outweighed by its propensity value. the propensity value with this evidence is great b/c it identifies the defendant as the person who robbed the bank and gave him motive/ intent to rob the bank. the courts will likely conclude this evidence does not conflict with rule 403

Hearsay is an out of court statement offered into evidence for truth of the matter asserted. Hearsay statements are considered to be unreliable and will not be admissible unless an exception can apply. there is no chance to cross- examine the witness and test their credibility.

Prior ID is an hearsay exclusion and is usually offered to rebut a claim of fabrication. Prior id does not need to be made under oath.

here Bess identified the defendant at a preliminary hearing and the Prior ID is offered into evidence it would be considered an hearsay exclusion and would be admitted into evidence. if the pros entered the prior ID without Bess on the stand it would have violated the defendants 6th amendment right (conformation clause ) and would not be admissible.

the second statement "i am sorry to do this, but i lost my job" would be considered hearsay. it was said at the bank robbery (out of court) and is used to prove that Dylan robbed the bank b/c he just losted his job.

State of mind exception- this statement can fall under the state of mind exception b/c it tends to prove Dylan's intent. for the statement to be admissible the state of mind of the declarant must be at issue. here Dylan is claiming that he was forced to do the bank robbery and his intent is at issue. this statement will come in as a State of mind hearsay exception.

Statement against interest is an exception to the hearsay rule if the declarants is unavailable, the statement is against hsi penicary, penal or property interest, the declarant had personal knowledge of the facts and knew it was against his interest and had no reason to lie.

the pros will claim that declarant is unavailable b/c he is privilege from doing so (self-incrimination clause ). if the defendant does not claim the 5th he will not be unavailable and this statement will not be admissible. the defendant statement was against his interest b/c he can go to jail for robbing a bank. he knows it is against his interest b/c everyone knows that when you rob a bank you will get in trouble for it and the facts do not indicate he has a reason to lie. if the courts find Dylan unavailable to testify through

privilege this statement will be admissible.

Admission of party opponent- any statement made by a party and offered against that party is admissible. these statements are considered exclusions to the hearsay rule.

here when Dylan says "i am sorry to do this, but i lost my job" this would be considered an admission of party opponent. the declarant dylan is the defendant and the prosecution is entering this evidence against him. this statement will come in as an exclusion to the hearsay rule under the theory of admission of party opponent.

pp- is admissible b/c a RPP would not say this statement unless it is true.

Rog2-

Relevance- see above for rule

this evidence tends to show that the bank had been robbed and it was robbed for 1,000 cash.

403- see above for rule

this evidence is not highly prejudicial b/c it does not state who committed the crime and how it occurred.

Hearsay- see above for rule

here this statement was out of court b/c it was said over a 911 call. it is offered to prove that the bank had been robbed of 1,000 cash. the courts will likely considered this statement hearsay and a exception must apply for it to be admissible.



Excited Utterance is an exception to the hearsay rule if there is a particular exciting or startling event, the event cause the declarant to make a statement under the stress of the excitement and the statement was concerning the exciting event.

here the exciting event would be the bank robbery.the statement was still made under the excitement of the event b/c the declarant said help with an exclamation point!!!! and the statement was concerning the event b/c it stated that the bank has just been robbed of 1,000 cash. the courts will likely conclude this statement will come in as an exception to the hearsay rule.

Public policy reasoning is that the declarant is under the stress of the excitement and does not have time to lie.

Presence sense impression

if the statement does not come in as excited utterance then the statement can come in as presence cense impression b/c it was made at the time or immediately after the event.

here the declarant state the Bank has **Just** been robbed. the word just indicates that the statement was given immiedaitly after the event. furthermore witness' to a bank robbery do not wait a lengthy amount of time to inform the authorities of a bank robbery.

Public Policy reasoning- there is no time to lie b/c the statement was made at the time or immediately after the event.

Business records is an exception to the hearsay rule if the record was made under the regular scope of business (not for litigation PURPOSES), the recorder had a duty to make the record, it was made at the time or immediately after the event, it is trustworthy, authenticated and that someone who made the report had personal

knowledge of the record.

here the business record is in the form of a 911 record call log and a transcript. it was made under the regular scope of the business b/c it can be assumed that all 911 calls are recorded. both the supervisor and the dispatcher have a duty to record the 911 call. although the supervisor does not have personal knowledge of the 911 call this fact would be immaterial b/c the dispatcher had personal knowledge. it is assumed that it is automatically recorded so it was at the time of the event. 911 calls are also to be assumed trustworthy and authenticated. all the elements are met for business records and this evidence will be admissible.

PP- if it is good enough for the business it is good enough for the courts. business' want to keep accurate records so they are presumed reliable

if the evidence does not come in through business records in can come in a public records, assuming that 911 calls are available to public. see above for analysis.

Rog 3

Relevance- see above for rule

this evidence is relevant to show that 1,000 was stolen from the bank

403- does not prejudice the defendant b/c it is merely stating that 1,000 was stolen

Past Recollection Revived-

if the witness can not recall a certain fact he may refresh his memory through a document he made concerning the event. here the officer is given a police report that stated the amount of cash seized. once the witness has time to refresh his memory

through the document he may answer the question, but he may not read the report. if the witness can still not remember after refreshing his memory the party offering the evidence may read the document to the jury but may not admit it into evidence. if the witness claims that he can't remember the document must be authenticated by someone other than himself, must be trustworthy, must be made by witness, must have personal knowledge of the facts and must be made immediately after the event. once all these elements are met the past recollection Revive turns into a present recollection recorded and would be considered a hearsay exception.

Rog 4.

Relevance- see above

this is relevant to show that Dylan did not have the intent to rob the bank and that it was forced to do it. it is also relevant to show that a man had a gun when the bank was robbed.

403- see above

the pros will claim that this evidence will cause the jury to be confused b/c earlier testimony stated that dylan said i am sorry to do this i lost my job. the pros will also argue that this evidence will cause a huge delay in the case b/c the jury will not know who to believe. however the defense will state this this statement is highly probative b/c it tends to prove that Dylan did not have the intent to rob the bank and that he was forced to do it.

Hearsay- see above for rule

it was made during the robbery so it is an out court statement and it is offered to prove that Dylan said i am sorry but i am forced to do this.

the first statement is not hearsay "i saw a man with a gun "

Statement against interest- must be against pecuniary interest, property interest, declarant must be unavailable, must know it is against his interest and no reason to lie and must have personal knowledge.

here the defense will want to bring this statement in as a hearsay exception. however the pros will argue that i am forced to do this is not against his pecuniary interest. furthermore they will argue that Dylan has a reason to lie b/c he does not want to be culpable to the crime and wants an affirmative defense of duress. they will also claim that he is unavailable. the courts will likely conclude that this statement will not be admissible as a hearsay exception.

Admission of party opponent- any statement made by a party and offered against that party is admissible as a hearsay exclusion (offered for truth of matter asserted).

here the statement made by dylan was I am sorry but i am forced to do this. although this statement was made by dylan (the defendant in the case, a party member ) it was not offered against him. the defense wants to introduce this to show that dylan lacked the intent to commit the crime and he was forced to do it. this statement will not come in as an exclusion to the hearsay rule

State of mind exception- this statement can come in as an exception to the hearsay rule b/c Dylan is stating his future intent of robbing the bank. here Dylan state of mind is at issue so this statement can be admissible to show his intent.

Witness have to be competent- the pros will argue that Madison is not competent b/c she is only 8 years old. furthermore the event she is making statements about concerns a bank robbery. Bank robberies are extremely exciting and startling and most of the time the witness are concerned with their well beings rather than what the bank robber is saying/doing. the pros will argue that there must be a more competent witness than an eight year old girl. the courts will likely conclude that Madison is not competent.

ID: [redacted] (Evidence-F15)

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==== End of Answer #2 =====

# Blue Book

NAME ~~XXXXXXXXXX~~

SUBJECT Evidence

INSTRUCTOR

EXAM SEAT NO

SECTION

03

DATE

Dec 7, 2015

GRADE

10<sup>7/8</sup> x 8<sup>1/4</sup>

25 - 24 PAGE

## Evidence Q3

### People v. Betty

B. is being criminally prosecuted for murder. Evidence is any documentation, testimony, or physical object that seeks to prove or disprove a fact. All relevant evidence is admissible if competent. Evidence is relevant if it has any tendency in reason to make a material fact more probable. In CA, the fact must be one in dispute.

Relevant evidence may be inadmissible for policy reasons, or if the ct finds the probative value is outweighed by the prejudicial effect. The ct. will consider factors such as misleading the jury, confusing the issues, being unduly cumulative, or wasting time.

### 1. Vic's Note

Vic's note is relevant b/c it has a tendency to show B's guilt, since it says B stabbed him, which is a material + disputed issue.

B will argue this is prejudicial as it will make the jury convict her. The ct. may find it outweighs, but evidence is not inadmissible just b/c it hurts the other party. The note will likely be admitted.

Good Rule  
Stmnt on  
Hearsay

## Hearsay

Hearsay is an out of court statement being offered for the truth of the matter asserted (TOMA). The dec. statement must be a verbal or nonverbal assertion. Hearsay is inadmissible unless a valid exclusion or exception applies.

Here, V's note was written out of court, ~~not~~ and it will likely be introduced for TOMA, that B stabbed V. So it is inadmissible unless a valid exclusion or exception applies.

Good Stmnt  
re: dying  
dec

## Dying Declarations

P will argue the note is a dying dec. This is where the decedent is unavailable, and their statement was said while they were under the subjective belief they were going to die, and their statement pertains to the manner & circumstances of their death. In CA, they must die.

Here, V died and is therefore unavailable. The note was written while he was likely believing he was dying, ~~and~~ b/c he had already been stabbed, and is of + concerning for his death.

B will argue it is not an assertive statement, but just his opinion, since he says "I can't believe." P will argue V's statement was certain, just that he was in shock. The ct. will likely allow the note to be admitted.



## Nonhearsay - State of Mind

If not for TOMA, P will argue that it is being admitted to circumstantially to show V's belief that B stabbed him. ~~That~~ His state of mind is at issue since B is saying V was the first aggressor.

This may be admitted but jury dec is stronger.

## 2. Pam

P's testimony is relevant as it tends to show B is violent, which goes towards her guilt and ~~with~~ makes her self-defense claim ~~is~~ less probable. This is a material and disputed fact + issue.

B will argue P's testimony is prejudicial b/c the jury will think she is guilty b/c of her prior bad acts. The ct will likely rule the prejudicial effect outweighs the prejudicial value.

## Character Evidence.

CE is inadmissible to prove propensity. In criminal trials, the D must open the door to a relevant character trait during their case in chief, and then the P can re-examine or rebut w/ their own witnesses. In civil, only reputation + opinion is allowed. b/c specific acts are too time consuming.

Here, P appears to be during P's case in chief, which is inadmissible. D.B. could object that he hasn't opened the door. Also, P was testifying to specific acts, which are inadmissible in this setting.

So B will object, and the court will exclude and strike P's testimony.

### 3. Betty - U 1<sup>st</sup> aggressor

This is relevant as it tends to ~~pro~~ show B acted in self-defense, which is a material + disputed fact.

No prejudicial effect to B's direct exam. But B will argue P's x-exam is prejudicial + irrelevant. The ct will conclude the evidence is relevant, but the x-exam ~~line~~ may be excluded.

### Character Evidence

Above.

Under FRE, once the D opens the door to the victim's character, P can respond with a reb. or x-exam to both D + V. However, in CA, the D must specifically testify to U's character for violence in order for P to be able to rebut or testify to U's character for peacefulness.

Here, under the FRE, P's rebuttal is proper if B's testimony opened the door to either B or U's violent character. B's testimony doesn't seem to address character, as it only goes to U being the first aggressor + B acting in self-defense. However, when the D claims self-defense in a homicide case, specific acts may be relevant. So even if B didn't open the door specifically, P is allowed to bring in evidence of U's peacefulness b/c D claims U is the first aggressor. So under FRE, this will likely be admissible.

Under CA, the rules are different. In order for P to bring in U's character for peacefulness, the D must specifically offer evidence of U's character for violence. If D doesn't do this, then U's character for peacefulness is inadmissible.

Here, B did not testify to U's violence, so P's character evidence of U is inadmissible.

#### 4. Character

B's testimony of what they told B is relevant b/c it goes to B's state of mind that he is fearful of V b/c V is violent. Also, it goes to U's violence, which makes B's claim for self defence more probable.

P will argue it is prejudicial, as U's prior acts are irrelevant to this case + may mislead the jury into believing U was the first aggressor.

The Ct. may exclude for being prejudicial, but it is highly probative to B's state of mind.

#### Character Evidence

Above. CE may be admissible for non-character purposes like motive, intent, mistake, ID, or common scheme or plan.

Here, as CE, this will be inadmissible b/c specific acts are not allowed. However, B will argue this isn't going towards U's character trait for violence but that it is going towards B's motive + intent, that ~~because~~ B was fearful of V and what he was capable of.

So this is inadmissible as U's character for violence, but likely admissible as non-character purpose.

## Hearsay

Above.

R is testifying to what she heard R tell B out of ch, so if offered to prove TOMA, that U testified 2 ppl last year, it is hearsay.

## Nonhearsay - state of mind

But B will argue R's testimony is not being offered for its truth, but to circumstantially show B's state of mind during the incident. B/c B is claiming self-defense, B's state of mind is at issue. Roy's ~~test~~ statement to B would make B fearful of V, which would affect his state of mind during their encounter.

## Nonhearsay - effect on listener

Also, B would argue that R's testimony is not for TOMA, b/c they don't need to prove V actually testified 2 ppl, but that the effect on B after hearing what Roy said, B became fearful of V and what V is capable of.

## Double Hearsay

B/c R is testifying to what she heard Roy tell B, there are 2 layers of hearsay and each must meet a valid exception or exclusion

## Present Sense Impression

PSI is where the declarant is narrating what they or a 3<sup>rd</sup> party are doing, as it is happening or immediately thereafter. Under CA, the dec. must be saying their own conduct. Under FIZE, R's testimony would be admissible b/c she was testifying to what she observed Roy tell B as it was happening. Under CA, ~~she~~ it is not admissible b/c she is not talking about her own conduct. B will argue "It was R's conduct that she was narrating what she saw + observed"