

MONTEREY COLLEGE OF LAW

EVIDENCE

Mid Term Examination

FALL 2018

Professor J. Davenport

INSTRUCTIONS:

There are three (3) questions in this examination.

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

QUESTION #1

Penny filed a negligence lawsuit against the Dew Drop Inn Apartments. She alleged that on December 1, 2017, she slipped and fell on ice in the driveway of the Inn. Further, Penny alleged that she fell at the point where the driveway crosses the sidewalk. Penny sustained a fracture of her right wrist and a concussion. The Dew Drop Inn denied liability and claimed the City was responsible for any maintenance of the surrounding areas, including the driveways and sidewalk.

The night before the accident, it had been raining and the temperature was very cold. Penny testified that she got up in the morning and observed that it was icy outside. She put on her boots and prepared to walk to the bus terminal. Penny crossed the first sidewalk beside the Dew Drop Inn Apartments and cleared the first driveway. She continued to walk around icy patches to the second driveway that slopes across the sidewalk.

Penny tried to be careful by putting her feet at the most level part of the slope which was at the high side of the slope. Penny did not see the film of ice and her left foot went all the way down the slope. In her fall, she put her right hand out in an effort to break her fall. After her fall, her face was near the ground and she was able to see the ice at that time. Penny did not observe or smell any chemicals or salt on the ice.

The manager drove up and saw Penny on the ground. At the manager's request, Penny pointed out her traveling path. She declined an ambulance.

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

Answer according to California Law.

1. Penny testified about her walking path, her fall and her observations about the weather conditions. Then, her attorney introduces an authenticated premises insurance liability policy, that includes negligence insurance at Dew Drop Inn Apartments.
2. Next, Penny's attorney introduces a properly authenticated letter from Dew Drop Inn offering Penny \$50,00 to resolve the case. Penny rejected the offer.
3. Next, Penny's attorney introduces a properly authenticated paid invoice from Dew Drop Inn Apartments. The paid invoice was for snow and ice removal services from the driveways and surrounding areas at Dew Drop Inn. The invoice was for services rendered on February 2018.
4. Over objection, the defense offers a prior 2015 insurance claim where Penny fell on a driveway by a school.

QUESTION #2

Dave is prosecuted for bank robbery in the case of People of the State of X vs. Dave. National Bank was robbed by a man in a ski mask. Two days after the robbery, police officers get their first break in the case. Mike and Mary tell police that they are homeless and sleep behind the bank. Mike saw the masked robber run out of the bank, take off his mask and jump into a car with a female. Mary was just waking up and did not see the robber or the car, but heard Mike yell, "I can see license plate number of the car. 5G6 182". Five minutes later, Mike told Mary, "A guy with a parrot tattooed on his cheek just ran out of the bank with sacks of money." The officer wrote Mike's statement in his police report. Further investigation shows the license plate is registered to Cathy and that Dave has a parrot tattoo on his cheek.

Cathy is arrested and strikes a deal with prosecutors, agreeing to testify against Dave for a reduced sentence. At Dave's preliminary hearing, Cathy testifies during the prosecution's direct examination that she and Dave planned and committed the robbery. Cathy asks to take a break before cross examination begins. Cathy enters the women's restroom and leaves a note which says, "I can't let Dave take the fall for me. I committed the robbery with Mr. Big. Dave wasn't involved. See ya Suckers! At the time of trial, it is rumored that Cathy and Mr. Big are in Mexico, however, they cannot be located.

Assume the following occurred in the jury trial of Dave. 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. The State of X has adopted the Federal Rules of Evidence

1. In her case in chief, the prosecutor calls Mary to testify to the statements made by Mike. If called as a witness, Mary remembers Mike's statement about the robber having a parrot on his cheek but she does not remember the license plate number provided by Mike. The prosecutor calls the police officer to testify to the license plate number.
2. The prosecution introduces the preliminary hearing transcript of Cathy's direct examination of Dave.
3. In the prosecution's case in chief, the prosecution introduces SnapChat messages she subpoenaed from SnapChat between Cathy and Dave. The messages were sent a week prior to the robbery. The messages state:
From Cathy to Dave: "I have everything set up for our first big heist"
From Dave to Cathy: (Smiley face emoji) ☺. "What are you talking about?"
4. In the defense case in chief, the defense introduces the note left by Cathy in the bathroom.

QUESTION #3

Pam works at an office Park with a number of other employees, including Mike and Dwight. Pam was walking through the parking lot of her office complex when Mike, who was driving Dwight's sport's car, hit her, fracturing her hip. Pam considered suing Mike for damages, but found out that Mike was completely broke. Pam knew that Mike's reputation in the office park was that of an extremely immature and reckless person. Pam sued Mike for negligence, Dwight for negligent entrustment, and M.S. Paper Co., the largest company renting space on the property, for premises liability, because there are no mirrors, stop signs, or yield signs at the turns in the parking lot.

Mike has filed a general denial to all allegations. Dwight's defense is that Mike is a trustworthy driver. M.S. Paper Co. denied liability in their pleading documents, specifying that their denial was premised on the fact that the collision occurred in the parking lot, which is accessed by all employees of the park, and is not included in the space the business rents. Despite all defendants moving to sever (hold separate trials as to each of them), there is a single trial as to all claims.

1) In her case in chief, Pam calls Meredith to testify. Meredith's proposed testimony is that she was working at M.S. Paper Co. two years prior, and was walking through the same parking lot when Mike ran over her with his car, hospitalizing her with a fractured pelvis. On cross-examination, Dwight's attorney seeks to ask Meredith about her drinking, specifically asking whether she was an alcoholic at the time of the collision, and whether she is sober enough now to even properly understand the questions she is being asked and answer truthfully.

2) Pam also calls Grotti, an insurance salesman who will testify that M.S. Paper Co. purchased liability insurance that specifically covered collisions in the parking lot. Moreover, after Mike's collision with Pam, M.S. Paper Co. paid for improvements to the parking lot, which included yield signs, stop signs, and mirrors at the corners in the parking lot.

3) In Dwight's case, he calls Joe, who's proposed testimony is as follows: Joe has known Mike for many years; Mike has a reputation for nonviolence, and would never run a person down with a car; Despite having no money due to taking care of his elderly mother who has cancer, Mike always admits when he is wrong, and therefore would not be fighting this case if he was in the wrong.

Assume that this trial involves state law claims, but for various reasons was removed to federal court applying the Federal rules of evidence.

Discuss the objections, and the responses to those objections, to each witness' proposed testimony. Please distinguish in your responses those objections that should be made. Do not address any issues of hearsay.

EVIDENCE FALL 2018- ANSWER OUTLINE - QUESTION #1- PENNY (S. Lizardo)

PLEASE NOTE: Students may argue different outcomes, so long as they hit the issues. This essay is more about the Special Relevancy Issues and Policy Exclusions as per CEC. The students should know CEC 352 and 250, but specifically listing the code section number is not required.

Also, Authentication is not meant as an issue because that is covered next semester. This is the reason the call of the questions say "properly authenticated letter, or policy or invoice."

1. THE PREMISES LIABILITY INSURANCE POLICY

As per CEC 350, only relevant evidence is admissible.

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

Here, the insurance policy has a tendency to establish that Dew Drop Inn does in fact own or control the premises. Part of a negligence claim includes duty, breach of a duty, causation and damages. Therefore, the policy may prove liability. Since the insurance policy has a tendency to establish a duty, it may be significant in the disputed claim.

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

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

Special Relevance-Relevant Policy Exclusions

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

Here, Dew Drop Inn, a party, is denying that the business has any dealings with the maintenance of the sidewalks or driveways. To prove otherwise, the policy will be admitted in since the premises maintenance is disputed. The Inn is "blame shifting" to the City. The premises liability policy is highly relevant because it tends to establish that Dew Drop Inn is in fact doing business and since the business is denying liability, the policy may help establish "ownership or control" of the area.

However, the Dew Drop Inn may argue that it is not the owner or manager of the driveways and sidewalks because it is the City's responsibility. This is a weak argument because a business does not tend to insure premises where it has no business interest therein.

The liability coverage policy is admissible to show that in fact, Dew Drop Inn did "own an/or control" the premises where Penny fell. Most likely, the driveway where Penny fell will fall under "premises."

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

Thus, the policy is admissible to prove that the Inn had "ownership or control" over the sidewalks and driveways, but not that the Inn was negligent.

PENNY'S COMPETENCY AS A WITNESS (WEATHER CONDITIONS, HER FALL)

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

Here, although Penny sustained a concussion (and right hand fracture), it does not appear this injury affected her memory. Her testimony is relevant because she is a **percipient witness** and is the plaintiff in this civil negligence cause of action. Her testimony is based on **personal knowledge of the fall**. The testimony that she knew it was rainy and very cold the night before establishes that she was aware of the weather conditions. **Lay opinion** must be based on rationally based perceptions. The fact that Penny put on boots because she was aware of the icy conditions will be admissible. Also, it is within common knowledge what salt smells like, so her testimony that she did not see or smell salt is likely admissible.

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

2. DEW DROP INN LETTER: OFFER OF \$50,000

Logical Relevancy- defined above

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

The offer by Dew Drop Inn of \$50,000 may be considered a settlement offer and has a tendency is to establish that the Inn was negligent in not removing the ice from the premises. The letter is highly relevant to establish fault or negligence of Dew Drop Inn.

See below under Special Relevancy.

Legal Relevancy- defined above

The trial court has the discretion to weigh the probative value of the letter offer against the unfair prejudice to Dew Drop Inn.

See below under Special Relevancy.

Special Relevancy- defined above

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

Here, the letter offer by Dew Drop Inn was for \$50,000 in settlement of Penny’s negligence claim. The fact Penny rejected the claim and the offer should be inadmissible as it is against public policy.

3. PAID INVOICE - SUBSEQUENT REMEDIAL MEASURES

Logical Relevancy- defined above.

The paid invoice has a tendency to establish that Dew Drop Inn knew of the ice problem and did nothing to repair or fix the problem until after Penny’s fall. Also, the subsequent remedial measure effort to minimize the icy conditions indicates that the Inn, not the City controlled the premises. Also, the fact that the Inn paid for the snow

and ice removal has a tendency to establish that the business had a duty to maintain the driveway and breached its duty.

See Special Relevancy below.

Legal Relevancy- CEC 352 defined above

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

See Special Relevancy below.

Special Relevancy- Subsequent Remedial Measures

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

Here, the paid invoice in February 2018 is about two months after Penny's fall in the driveway of the Dew Drop Inn. The invoice is for snow and ice removal. The fact that Dew Drop Inn may show that there was an ice problem in the driveway because a service was hired to remove the ice. However, the invoice will not be allowed in as evidence of fault as that is against public policy.

*In the alternative, if the invoice is used to establish the Dew Drop Inn, because the business paid for the snow and ice removal service, the court could allow the invoice in for the **limited purpose of establishing ownership or control.***

4. 2015 INSURANCE CLAIM BY PENNY

Logical Relevancy- defined above.

The proponent of the 2015 claim is the Dew Drop inn. The 2015 claim has a tendency to establish that Penny may be filing fraudulent claims or that she is comparatively negligent by not being diligent in her walking. If the Inn establishes that Penny had on the same pair of boots, the Inn may be able to make an offer of proof that it was the boots, not the weather condition that caused Penny to fall.

See Special Relevancy below.

Legal Relevancy- CEC 352 defined above.

The trial court has discretion to weigh the probative value of the 2015 prior insurance claim against unfair prejudice.

See Special Relevancy below.

Similar Happenings- Penny's 2015 claim

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

Here, there is a twist because is the defense offering in a 2015 insurance claim where Penny fell at a school. If the defense may argues her present injuries were complicated because of a prior injury, the court may allow the evidence in. The defense would need to argue that he 2015 claim would go to mitigating the damages awarded.

Mitigation- December 2017 Fall

The Inn may argue that since Penny declined an ambulance at the scene, she was not really hurt.

ANSWER OUTLINE-Fall 2018 Evidence02 Mid-Term Exam-Prof. Jennifer Davenport

Dave is prosecuted for bank robbery in the case of People of the State of X vs. Dave. National Bank was robbed by a man in a ski mask. Two days after the robbery, police officers get their first break in the case. Mike and Mary tell police that they are homeless and sleep behind the bank. Mike saw the masked robber run out of the bank, take off his mask and jump into a car with a female. Mary was just waking up and did not see the robber or the car, but heard Mike calmly state, "I can see the license plate number of the car. 5G6 182". Five minutes later, Mike told Mary, "A guy with a parrot tattooed on his cheek just ran out of the bank with sacks of money." The officer wrote Mike's statement in his police report. Further investigation shows the license plate is registered to Cathy and that Dave has a parrot tattoo on his cheek.

Cathy is arrested and strikes a deal with prosecutors, agreeing to testify against Dave for a reduced sentence. At Dave's preliminary hearing, Cathy testifies during the prosecution's direct examination that she and Dave planned and committed the robbery. Cathy asks to take a break before cross examination begins. Cathy enters the women's restroom and leaves a note which says, "I can't let Dave take the fall for me. I committed the robbery with Mr. Big. Dave wasn't involved. See ya Suckers! At the time of trial, it is rumored that Cathy and Mr. Big are in Mexico, however, they cannot be located.

*Assume the following occurred in the jury trial of Dave. 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. **The State of X has adopted the Federal Rules of Evidence.***

- 1. In her case in chief, the prosecutor calls Mary to testify to the statements made by Mike. If called as a witness, Mary will state that she remembers Mike's statement about the robber having a parrot on his cheek but she does not remember the license plate number provided by Mike. The prosecutor calls the police officer to testify to the license plate number.*

Hearsay: *Out of court assertive statement offered for the truth of the matter asserted.*

Present Sense Impression Exception:

- 1. An event occurred.*
- 2. The declarant had personal knowledge of the event*
- 3. The declarant made the statement during or very shortly after the event*
- 4. The statement relates to the event.*

Mike's statement to Mary: "I can see the license plate number off the car – "5G6 182":

Mike had personal knowledge because he observed the license plate of the vehicle the robber ran into. Mike made the statement contemporaneously with the observation. If Mary can relate the license plate number, it should be admissible as a present sense impression.

Past Recollection Refreshed: The prosecutor can refresh Mary's recollection with the police report written by the officer (or anything else).

Cannot Use Past Recollection Recorded: A record that is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; was made and adopted by the witness when the matter was fresh in the witness's memory, and accurately reflects the witnesses' knowledge.

1. The witness formerly had personal knowledge of the fact or event recorded
2. The witness subsequently prepared (or adopted) a record of the fact(s).
3. The witness prepared the record while the events were still fresh in his or her memory
4. The witness can vouch that when he or she prepared the record, the record was accurate.
5. At trial the witness cannot completely and accurately recall the facts even after reviewing the document.

Analysis of Past Recollection Recorded: Mary did not have personal knowledge of the event – she heard it through Mike. Thus, she cannot vouch that when the officer prepared the record, it was accurate.

Police Officer Cannot Relate statement – Confrontation Clause: The police officer cannot testify as to the license plate number if Mary's memory is not refreshed. Mike's statement to the officer is made two days after the bank robbery. The purpose of the statement is to aid in the apprehension of the suspect. There is no indication of an ongoing emergency. Thus, the officer's testimony would violate the Confrontation Clause.

Mike's statement to Mary: "A guy with a parrot tattooed on his neck just ran out of the bank with sacks of money." For a present sense impression, the timing element is crucial. Here, Mike relates the statement five minutes after the event occurred. Students could argue either way as long as it is well reasoned.

2. The prosecution introduces the preliminary hearing transcript of Cathy's direct examination of Dave.

Hearsay – Out of court assertive statement offered for the truth of the matter asserted.

Analysis of the Exception for Former Testimony:

1. Witness/Declarant is unavailable
2. Identity of the parties: In a criminal case, the party against whom the testimony is offered was a party in the former action

3. *Prior testimony was given at a trial, hearing or in a disposition and was under oath*
4. *There was a meaningful opportunity to cross examine at the prior trial or hearing on the issue for which the statement is being offered*
5. *The motive for cross examination at the earlier proceeding must be similar to the motive the party would have if the witness testified at the current trial*

A hearsay objection will be sustained in this case. Although Cathy is unavailable for trial, the parties are identical, and the testimony was given at a hearing under oath, Cathy left before she could be cross examined.

3. *In the prosecution's case in chief, the prosecution introduces SnapChat messages she subpoenaed from SnapChat between Cathy and Dave. The messages were sent a week prior to the robbery. The messages state:*
 - a. *From Cathy to Dave: "I have everything set up for our first big heist"*
 - b. *From Dave to Cathy: (Smiley face emoji) 😊. "What are you talking about?"*

Hearsay – *out of court assertive statement offered for the truth of the matter asserted*

Potential Multiple levels of Hearsay - *The Prosecution wants to introduce the content of the statements made by Cathy and Dave for the truth of the matter asserted – that Cathy and Dave were planning the bank robbery. The business record exception is the vehicle to allow the introduction of the SnapChat records. However, the portions of the record that are attributed to non-employees will need to be redacted unless there is a hearsay exception or exemption that applies.*

Analysis of the Federal business record exception:

1. *The declarant (the ultimate source of the report) 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.*
 - a. *This requires that the entry be related to the nature of the business.*

- b. *Reports specially prepared for litigation are not made in the regular course of business*

Exception from the Hearsay Definition: Statement by a co-conspirator.

1. *There was a conspiracy*
2. *The conspiracy was in progress when the declarant made the statement.*
3. *The declarant was a co-conspirator*
4. *The declarant made the statement in furtherance of the conspiracy.*
5. *The accused was a member of the conspiracy.*

The prosecution may use the content of the proffered statement to help establish the foundation showing the conspiracy. However, standing alone the statement itself is insufficient to lay the foundation. Dave would argue that there is insufficient evidence of a conspiracy. He would also argue that he was questioning Cathy's statement, not making a statement in furtherance of a conspiracy. The prosecution would argue that the totality of the evidence proves by a preponderance of the evidence that there was a conspiracy between Cathy and Dave and that Cathy's statement to Dave is clearly in furtherance of a conspiracy.

Implied adoptive admission

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

NOTE: *the final element presents a mixed question of law and fact. For this reason, the judge resolves the issue of whether an innocent person would have immediately denied the accusation. (See FRE 104(a)).*

The statement would not be an implied admission because Dave questions the statement made by Cathy.

4. *In the defense case in chief, the defense introduces the note left by Cathy in the bathroom.*

Hearsay – *out of court statement offered for the truth of the matter asserted.*

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.*
 - i. *The belief of the hypothetical, reasonable person could be used as circumstantial evidence of the subjective belief of the declarant.*
 - ii. *The judge needs to separately test each assertion to determine whether it was disserving. (The rule does not authorize the introduction of collateral, non self-inculpatroy statements)*
 - b. *In the case of a statement against penal interest there must be sufficient corroboration to clearly indicate trustworthiness*
3. *The declarant must have had personal knowledge of the facts*
4. *The declarant must have been aware that the statement is against her interests and she must have had no motive to misrepresent when she made the statement*

Cathy is unavailable at the time of trial. The statement is against her penal interest and was made at a time and manner which clearly indicates she was aware it was against her penal interest. There is corroboration to show that she was involved in the bank robbery. The problem for Dave is that the Court should admit only those portions of Cathy's statements which are disserving to her. This would not encompass statements that Dave was not involved because those are not against Cathy's penal interests.

Residual Exception – *A hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception if*

- (1) *the statement has equivalent circumstantial guarantees of trustworthiness;*
- (2) *it is offered as evidence of a material fact;*
- (3) *it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and*
- (4) *admitting it will best serve the purposes of these rules and the interests of justice.*

The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

ANSWER OUTLINE-Fall 2018 EvidenceQ3 Mid-Term Exam-Prof. H. Starr

Meredith

Evidence: Mike hit Meredith with his car:

- 1) *Objection: Prior collision is impermissible character evidence. (Mike should object)*
 - a. *Rule for objection: A prior act constitutes impermissible character evidence.*
 - i. *Responses:*
 1. *As to Dwight, the evidence is relevance because Mike's character is at issue in a negligent entrustment case.*
 2. *As to M.S. Paper Co., the prior collision put M.S. Paper Co. on notice of the dangerous conditions of the parking lot.*
 - ii. *Counter Response:*
 1. *As to Mike, the evidence is substantially more prejudicial than probative because the fact finder will likely use the evidence of the prior collision as propensity evidence (403)*
 - a. *Counter-Counter: Parties should draft a limiting instruction to keep the fact finder from using the testimony for propensity purposes, thereby lowering the risk of unfair prejudice.*
 - b. *Counter-Counter: Pam should argue that Mike would have been on notice about the faults with the parking lot as well, so his prior collision would be relevant to foreseeability.*
 - i. *Preferred conclusion: Given the multiple uses, the high degree of probative value, and a diminished risk of undue prejudice to Mike when the limiting instruction is given to the jury, the Court would most likely admit the evidence.*

Evidence: Meredith is an alcoholic:

- 2) *Objection: Alcoholism of a witness is irrelevant (Pam should object).*
 - a. *Rule for objection: Irrelevant facts are not admissible. Relevant evidence is evidence having any tendency to make a fact more or less probable, and that fact is of consequence.*
 - i. *Without using propensity evidence, whether Meredith is an alcoholic does not tend to make any fact of consequence more or less true. Using it as propensity evidence, it would tend to suggest that she was drinking alcohol on the occasion and therefore may have been comparatively at fault, or it may have interfered with her ability to accurately perceive events.*
 1. *Rule for sub-objection: Alcoholism is neither reputation nor opinion, and this evidence is being used as propensity evidence: i.e., since she drank alcohol, she was drinking alcohol on this occasion.*
 - a. *Responses:*
 - i. *Alcoholism, and not just occasional drinking, suggests invariability of conduct, so this may be habit evidence.*
 - ii. *If Meredith is currently drunk, so much so that she cannot understand or answer accurately, then she may fall short of competency standard.*
 1. *Rule to be applied: Because this case is a state law action, California rules of competency must be applied.*
 2. *Rule for competency: Everyone is presumed competent, but failure to be able to understand or communicate answers may raise issue.*
 - a. *Preferred competency conclusion: there should be no problem with her testifying, and any use of alcohol would go to weight not admissibility.*

- b. Counter: 403 objection – The relevance is largely dependent on propensity evidence, and any habit evidence is dubious, there is a high chance that the fact finder will misuse this evidence. Moreover, the large number of legal and factual issues it creates raises the problem of undue waste of time.
 - i. Preferred conclusion: this line of questioning should be excluded, or at least restricted.

Grotti

Evidence: M.S. Paper Co. purchased liability insurance that specifically covers the parking lot:

- 1) Objection legal relevance as categorical exclusion based on policy reasons (M.S. Paper Co. should object)
 - a. Rule for objection: The fact that a party did or did not have liability insurance is not admissible to prove whether a person acted negligently or wrongfully.
 - b. Response: Liability insurance may be offered for another purpose, such as proving ownership or control.
 - i. In the instant case, M.S. Paper Co.'s theory of the case appears to be that it did not control the parking lot and therefore should not be liable. This evidence is therefore admissible to prove control of the parking lot.
 - c. Counter: 403 – The likelihood that the fact finder will realize that some faceless insurance company can absorb the costs will almost certainly cause them to find in favor of Pam without regard for the facts. As such, there is a very high risk of undue prejudice. However, this is a very salient fact when confronting the defense theory.
 - d. Counter-counter: Parties should agree to a limiting instruction to minimize prejudice.
 - i. Preferred outcome: The court would let the evidence in with a limiting instruction.

Evidence: M.S. Paper Co. made improvements to the parking lot after the collision with Pam

- 1) Objection legal relevance as categorical exclusion based on policy reasons (M.S. Paper Co. should object)
 - a. Rule for objection: Evidence of subsequent remedial measures is not admissible to prove negligence or culpable conduct.
 - b. Response: evidence of subsequent remedial measures is admissible to prove – if disputed – control. In the instant case, M.S. Paper Co. is disputing its control over the parking lot. The evidence is therefore admissible.

Joe

Evidence: Mike has a reputation for nonviolence and would never run someone down

- 1) Objection to impermissible character evidence (Pam should object)
 - a. Rule for objection: General rule is that character evidence may not be used in order to prove an act in conformity therewith.
 - b. Response: A defendant in a criminal case can raise a defendant's pertinent trait.
 - i. If this were a criminal case, Defendant would be permitted to enter character evidence on a pertinent trait.
 - c. Counter: This is not a criminal case, and so this exception does not apply.
 - d. Counter: Nonviolence is not a pertinent trait because Mike is not accused of being violent, but negligent.

Evidence: Despite having no money due to taking care of his elderly mother who has cancer, Mike always admits when he is wrong

- 1) Objection 403
 - a. Rule for objection – evidence is inadmissible when the risk of undue prejudice substantially outweighs the probative value.

i. *In this instance, the fact that Mike has no money and the fact that he has an elderly mother who has cancer have virtually no probative value, but are likely to enflame the passions of the jury in favor of Mike.*

1. *Preferred outcome: this evidence would either be excluded or severely restricted.*

2) *Objection Character*

- a. *Rule for objection: General rule is that character evidence may not be used in order to prove an act in conformity therewith.*
- b. *Response: The use of the term "always" suggests habit evidence. Thus, there is a chance that the court may permit this as habit evidence. The crux of the analysis is invariability and specificity of actions to the point that it is almost automatic behavior.*
- c. *Counter (403): Because "fault" can be considered subjective, it is difficult to support the conclusion that admitting fault when proper is almost "automatic behavior, so a court may take issue with this behavior being considered "habit," and this might just be impermissible character evidence.*

1)

Question 1

P's Testimony

Relevance

Good! In order for evidence to be considered to be relevant it must have some tendency to make a material issue more or less likely. Relevance need be both logically relevant and legally relevant in order to come in. Logical relevance goes to materiality, that is, the evidence must have some tendency to make a fact at issue more or less likely to have occurred than without it. Legal relevance requires a consideration under CEC 352 wherein we must determine whether the evidences probative value is substantially outweighed by it's likelihood to prejudice the jury.

Logical Relevance

Good Here, P's testimony as to her observations are logically relevant to prove that the icy conditions existed on her path on the day in question, which goes to the causality of her injury. However, the location and the weather conditions are not in controversy, only the ownership of the sidewalk is considered to be in controversy. That said, P should have no problem giving an account of where she was when the accident occurred or what the weather conditions were.

Legal Relevance

Here, P's testimony as to her observations are probative and will not unduly prejudice the jury as weather conditions change through time and it should come as no surprise to the

jury. The path leads directly across an area in controversy and must be proven or disproven here because ownership over the premises is in controversy. That said, it should not unduly prejudice the jury to learn of the path traveled that day.

Liability Insurance

Relevance

supra

Logical

Good The insurance policy is logically relevant for the purposes of establishing ownership over the premises in a negligence claim.

Legal

Great! Here, there is a significant public policy concern for entering insurance policies into evidence for the purpose of proving liability in negligence or ability to pay on claims. The government wants to encourage parties to carry insurance and not discourage them from carrying it if it could be later used to prove fault or ability to pay. That said, because the party has placed their ownership of the premises at issue here, the policy may be legally relevant under a hearsay exception below.

Hearsay - Document

Hearsay may come from any out of court assertive conduct, statement or document that is used to prove the truth of the matter asserted. Here, the insurance policy is considered hearsay.

Business Records

There exists an exception to the hearsay rule that allows certain documentary evidence to come in if it is a record that would be made and kept in the normal course and scope of business, made by an employee or authorized agent of the business and can be authenticated by the custodian of records. Here, an insurance policy is likely made by and recorded by an authorized agent / employee of the organization in the normal course of business, concerning the business and was duly authenticated. Normally this type of business record would not be admissible as evidence. However, because of the ownership issue in controversy, it may come in.

Awesome job on this question!!!!

DDI Offer Letter

Relevance

supra

Logical

In order for the document to be considered logically relevant it must go to a material issue in the case and have a tendency to prove or disprove it. Here, the letter would be relevant because it goes to the issue of damages, and the value of the injuries sustained on the premises as well as ownership and control, as well as guilt.

Legal

As above with the insurance policy, there are significant issues with admitting into evidence prior negotiations between parties. The tendency of a prior negotiation to substantially alter the jury's opinion of fault creates a concern for the general public and the courts. The courts want to encourage people to seek remedy outside of the court system and it becomes very difficult to convince people to enter into negotiations if their negotiations will be hauled into court and laid out for all to see. For this reason, the offer letter would be inadmissible hearsay not within any exception.

it is not hearsay. it would be a statement of a party opponent. Here, the letter is excluded due to special relevancy issues - specifically offers to compromise a lawsuit are excluded as against public policy

Invoice Snow Removal

Relevance

Logical

This documentary evidence is logically relevant as it goes to the issue of ownership. The DDI organization is denying liability, and this evidence tends to show that the organization is indeed responsible for the maintenance and upkeep of the area at issue.

Legal

Again, for policy reasons, subsequent remedial measures are inadmissible to prove guilt in a negligence case. Their probative value is substantially outweighed by its ability to prejudice the jury. If the jury sees that a subsequent remedial measure has been made, instead of thinking logically, they begin to point fingers and wonder why the dangerous condition wasn't cured sooner rather than later. However, because the issue of ownership was placed directly in controversy by the defendant in their attempt to blame-shift responsibility to the city, the document may come in as a business records exception to the hearsay rule.

Hearsay

supra

Business Records

There exists an exception to the hearsay rule that allows certain documentary evidence to come in if it is a record that would be made and kept in the normal course and scope of business, made by an employee or authorized agent of the business and can be authenticated by the custodian of records. The invoice was paid in full by the organization. The removal of snow and ice is something most businesses use vendors (authorized agent) to conduct and would be likely to do so in the normal course and scope of business. Finally, because the document was properly authenticated, it should come in under the business records exception to the hearsay rule.

2015 Insurance Claim Prior Similar Occurrences

I ran out of time and wanted to return to this Rog. Relevance, this insurance claim is relevant as it goes toward the nature of the injury and the extent of the damages sustained. Here, the defendant would like to introduce this evidence of prior injury for the purposes of showing a prior fall may have contributed to the injuries sustained in the present. That said, typically these would not be allowed in to prove negligence via propensity for clumsiness. However, in an injury case, they do come in.

END OF EXAM

2)

Question 2:

1. Police Officer's Testimony:

Relevance:

There are four types of evidence: testimonial, real, documentary and demonstrative. In order to be admissible evidence must be both logically and legally relevant. To be logically relevant the evidence must have a tendency to prove or disprove a material issue. Under FRE 403, evidence must be excluded if its probative value is substantially outweighed by its prejudicial effect (undue delay, confuses the issue, confuses the jury, undue prejudice (emotional bias)). Legally relevant evidence must also be competent and not violate the exclusionary rule. *Great!*

Here, the facts indicate that the police testimony would be relevant to show that the license plate does correspond to Cathy's vehicle. Nothing in the facts indicates that the license plate would cause undue delay or confuse the issues. Thus the license plate would be both logically and legally relevant. *Good*

Hearsay:

Hearsay is an out of court assertive statement offered for the the truth of the matter asserted. Some statements are also inadmissible in court due to public policy reasons or hearsay exceptions.

1 Here, the facts indicate that the police testimony would not be hearsay because he is personally testifying in court. *It is hearsay if he is testifying to what Mike said to him; Mike's statements are out of court and offered for their truth.*

Present Recollection Refreshed:

Present recollection refresh is when the witness does not remember all the facts she once had personal knowledge about. So, to assist the witness the attorney provides the witness with a document to refresh her memory. After, she is provided with that document (which is not introduced into evidence) she is able to recall all the facts.

Here, the prosecution calls the police officer to testify to the license plate number. Unfortunately for the prosecution this will not work, only documents can be provided to the witness to refresh her memory. *Good!*

Business Record Exception:

Under the business record exception, police reports may not be introduced in criminal cases. For a business record to be introduced it must be made by a person who had personal knowledge of the event. Additionally the recording must be made contemporaneously with the event.

Here, nothing in the facts indicates that the prosecution is introducing the police report. If that was the case, the police report would be admissible since there is a bank robbery case (criminal). Here, the police is simply testifying to the license plate number. The issue here, is that the police has no personal knowledge of the license plate number the information comes from Mike. *Good*

Public Record Exception:

Under public records exception police reports in criminal cases are also inadmissible. For a public record to be introduced it must be made by a person with personal knowledge of the event. Further, it must be made by a public official.

Here, as stated previously the prosecution is not introducing the police report. The officer is just testifying to the license plate number. However, once again, the officer lacks personal knowledge about the events. In other words, he just knows the license plate number because Mike told him.

THE OFFICER WOULD HAVE TO TESTIFY ABOUT WHAT HE HEARD MIKE YELL FOR HIS TESTIMONY TO BE VALID

MIKES TESTIMONY WOULD BE VALID UNDER AN EXCITED UTTERANCE OR PRESENT SENCE IMPRESSION . *Missed Confrontation Clause issue*

Relevance: see defintion above.

Mike's testimony about the license plate number is relevant because he was the one who personally say the car and the license plate number. Thus, he is the only one who really knows if it's Cathy's car. The evidence is also legally relevant because of it's high probative value.

Excited Utterance:

Good

An excited utterance is a hearsay exception. For a statement to be an excited utterance the event must be startling or stressful and the declarant must have personal knowledge.

Here, Mike surely had personal knowledge since he saw the masked robber run out of the bank. Further, all bank robbery events are startling and stressful. Thus, Mike's statement could be admitted under an excited utterance statement.

Present Sense Impression:

For a present sense impression statement the declarant describes an event, the event does not have to be startling. In a present sense impression statement what is more important

is the timing between when the event took place and the statement was made (both must be very close in time). *Good*

Here, the facts indicate that Mike told Mary the license number soon after the guy got out of the bank and into the car. Thus, the statement would qualify as a present sense impression because it was almost contemporaneous to the event. *Good*

2. Preliminary Hearing Transcript of Cathy's Direct Examination of Dave:

Relevance: see definition above

Here, the transcript is totally relevant because she is testifying against Dave. This could prove that Dave and Cathy did in fact have a conspiracy. Dave's attorney could argue that the evidence should be inadmissible because it could cause undue prejudice on Dave. However, the court would find that Cathy's testimony is highly probative and therefore relevant.

Hearsay: see definition above

Here, Cathy basically said several assertive statements out of court and were offered to prove that Dave was part of the bank robbery. Thus, her statements would be considered hearsay.

Offers to Compromise:

Offers to compromise made to people of the government are admissible in criminal cases.

Here, Cathy struck a deal with the prosecutors, agreeing to testify against Dave for a reduced sentence. Her offer to compromise would be admissible in court.

Former Testimony:

In order for former testimony to be introduced the prosecution must have a meaningful opportunity to cross examine the witness.

Here, the facts indicate that Cathy asked to take a break before cross examination began. Thus, her testimony would be inadmissible in this trial because she was never cross examined in the first. Basically her credibility was never verified thus her testimony is inadmissible.

Confrontation Clause:

Under the 6th Amendment, a defendant in a criminal case should be given an opportunity to confront the person who is talking against him.

Here, Dave would argue that by introducing the preliminary hearing transcript his 6th Amend. right is being violated. Dave's argument is correct, the transcript should not be admissible unless Cathy is present and Dave is able to confront her.

3. SnapChat Messages between Cathy and Dave

Relevance: see definition above

Good
The snapChat messages are logically relevant to show that Cathy and Dave had some type of connection, they were probably co-conspirators. Nothing in the facts indicate that the messages would cause a waste of time or confuse the jury. Thus, the messages are also legally relevant.

Hearsay: see definition above

Good
The messages were assertive, and out of court (location unknown). Moreover, they were offered to prove the truth of the matter asserted, that there was some type of relationship between Cathy and Dave. Thus, the messages would be considered hearsay.

Admission by Party Opponent:

Good!
In criminal cases vicarious statements made by co-conspirators are admissible in court (NON-HEARSAY). A vicarious statement is a statement made by a person other than the party but attributed to the party because of the relationship between them. Co-Conspirator statements must be made while the conspiracy is in progress and in furtherance of the conspiracy. The party must also show some sort of agreement to his co-conspirators statement. Admissions by party opponent must be introduced by the party's opponent.

Here, Cathy told Dave, "I have everything set up for our first big heist." Dave replied with a smiley face and asking her "What are you talking about." Based on on these messages the conspiracy was in progress and she was letting Dave know that she had everything ready to go (in furtherance of the conspiracy). Dave's smiley face can demonstrate that he was in agreement with Cathy. Further, the facts state that it was the prosecution who introduced these messages against him (party opponent). Thus, the messages would be admissible.

4. Note left by Cathy in Bathroom

Relevance: see definition above

The bathroom note is relevant to show that Dave is not guilty. There is nothing that would confuse the issues or the jury thus the note is also legally relevant.

Hearsay: see definition above

The note was left in a bathroom (out-of-court) and it asserts that Dave is not responsible. Further, it is offered to prove the truth of the matter asserted (DAVE did not commit the robbery).

Excited Utterance - See definition above

Cathy was stressed because she was going to be subject to cross examination and she probably knew she was lying. Further she had personal knowledge about the event since she was one of the people who robbed the bank. Given that Cathy was stressed and that she had personal knowledge of the bank robbery. The statement would be admissible as an excited utterance.

END OF EXAM

3)

Question 3

M's testimony re Mike Ran Her Over Once Before

Relevance

In order for evidence to be considered to be relevant it must have some tendency to make a material issue more or less likely. Relevance need be both logically relevant and legally relevant in order to come in. Logical relevance goes to materiality, that is, the evidence must have some tendency to make a fact at issue more or less likely to have occurred than without it. Legal relevance requires a consideration under FRE 403 wherein we must determine whether the evidences probative value is substantially outweighed by it's likelihood to prejudice the jury.

Logical Relevance

Here, W's testimony is logically relevant because it goes to prove that it is possible that M had run her over before, that he had done it this time.

Legal Relevance

Here, the testimony's probative value to prove that M had run her down before must not be substantially outweighed by the prejudicial effect it will have on the jury. However, prior bad acts are often considered to be highly prejudicial to a jury because they will see that M has done this sort of thing before and will conclude absent additional corroboration, that he did it again. For this reason, I do not think it is proper to admit this

evidence. However, it may be offered for a different person within the same case, that is to prove negligent entrustment.

Character Evidence

Character evidence comes in the form of opinion, reputation in the community and similar incidents of conduct (prior acts). Here, there is evidence being offered that W has done this sort of thing before (running someone over with his car). That said, this is a complex case and each cause of action needs to be sorted out. Traditionally, this prior bad act should not come in (along with the remaining character evidence) as this is a civil case. However, if there is a prior bad act, it may be used to prove some elements of some other causes of action. See below.

Prior Bad Acts

In the FRE prior bad acts are allowed in a very narrow list of causes of action. Negligent entrustment is one of them. If the prior bad acts are offered to prove an element of negligent entrustment (that D acted negligently in allowing such an insane driver use his sports car) the evidence may come in. However, as the cases are not severed, see above, the evidence may be excluded because it will prejudice the jury against W for the charge against him.

Cross of M

On cross examination, it is irrelevant as to whether the witness is an alcoholic and drunk at the time, even to attack credibility. This is irrelevant and the prosecution should move to strike. He may only talk about issues relevant to what was on direct.

Grotti Testimony and Subsequent Remedial Measures

I am running out of time and will be compressing the format.

→ Great Job!

Relevant logically to prove that MSP carried liability insurance and had ownership over the parking lot area and is in fact in the right place right now being sued for dangerous conditions present in the parking lot. Also, the prejudicial value does not substantially outweigh the probative effect. However, typically speaking you will not be allowed to introduce evidence of insurance coverage to prove ability to pay or negligence for public policy reasons. The public should be encouraged to carry insurance, not attacked and targeted for having it. That said, because MSP denied responsibility for the area, placing it into controversy, they are subject to being confronted with the proof that they in fact did have ownership and control over the area, and that will come in the form of both the insurance policy and the improvements to the parking area as testified to by Grotti. Again, subsequent remedial measures are often not admissible for public policy reasons, but they are admissible to prove later that the one who did the repairs had ownership and control over the area.

Both of these statements on the stand will require corroborating evidence, most likely in the form of business records which will need to be authenticated for truthfulness and accuracy. However, there is a business records exception to the hearsay rule. Even though an out of court statement is being offered for the truth of the matter asserted, if the statement is a document recorded by an employee or authorized agent, in the normal scope and practice of their business, and it is relevant, it can come in if authenticated by the custodian of record to prove the truth of the matter asserted. Here that would be the insurance policy and the evidence of repairs paid for.

Joe's Testimony

D seeks to defend his case of negligent entrustment by entering the testimony of his friend Joe who will testify to W's good character via reputation and opinion testimony. Such character testimony would normally not be allowed, but D is charged with negligent entrustment in this civil case and all three can come in because they are at issue here in order to prove the elements of negligent entrustment. The statement that Mike has a reputation for nonviolence is okay if offered to prove against an assertion that M intentionally and maliciously ran over W and P. However, it may not be relevant as the violence of M is not really at issue, so much as his reckless and immature nature. The statement by Joe that he is broke and takes care of his elderly mother is also irrelevant as those are not facts disputed by the present case and a mere showing that he is a good guy doesn't prove or disprove any of the elements of negligent entrustment. The same should be true about the statement for truthfulness or rightness. These are not at issue in the present case.

END OF EXAM
