

Kern County College of Law

**EVIDENCE**

Mid-Term Examination

FALL 2020

Professor H. Starr

INSTRUCTIONS:

There are three (3) questions in this examination.

You will be given four (4) hours to complete the examination.

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## QUESTION 1

Devin, a construction supervisor, just finished construction on Pete's new mansion. Pete had ordered a third-story pool on a balcony overlooking the city. Upon completion, Pete's check cleared, and Devin had a lot of money in the bank. He immediately went and bought a high-end sports car that he had been dreaming about for years. After driving it around town, he got a call from his younger brother, Edmond. Edmond said he wanted to borrow a car to impress a girl he wanted to marry. Devin, feeling magnanimous in light of the payday, agreed, and let Edmond borrow the sports car.

That night, Edmond drank a pint of Jack Daniels, smoked a marijuana cigarette, and drove the sports car over 100 miles per hour on the freeway, striking a car that was stranded on the shoulder of the road and killing its passengers. Edmond also died. The living relatives of the passengers of the stranded car, the Vincente family, published an article in the local newspaper in which the family stated that by lending Edmond the car, Devin had killed their family members. Moreover, the Vincente family accused Devin of being corrupt and slowing down construction projects unless he received personal kickbacks.

The Vincente family sued Devin for negligent entrustment. Devin sued the Vincente family for libel. The following proffers were made at trial.

The Vincente family called Will, a former longtime friend of Devin. Will would testify that Devin had fired Will because Will was going to blow the whistle on one of Devin's kickback schemes during the construction of a public park.

The Vincente family called Jodi, Edmond's ex-girlfriend, who would testify that, when Devin and Edmond were younger, Devin used to let Edmond drive his dune buggy, and the Edmond always drank alcohol and smoked marijuana before driving, and that Devin would even drink and smoke with Edmond before Edmond drove.

Devin produced a witness, Tom. Tom would testify that he was Edmond's "accountability-buddy," and that Edmond had been sober for three years leading up to the accident, and that Edmond took his sobriety chip everywhere all the time.

Devin produced a witness who worked a clerical job at the newspaper job where the libelous article was published. The worker, Susan, said that she was working for one of the editors who signed off on the Vincente piece. She would testify that she saw an email exchange between Vincent Vincente (the actual author of the piece) and the editor in which Vincente wrote, "I don't really care if the stuff in the article is 'true,' but people need to hear about this guy Devin and his loser brother." Susan took a picture of the salacious email with her phone because she thought it might be important one day. But her phone was stolen a week later by an unidentified mugger.

Do not address hearsay. Analyze all the possible arguments and objections to the Federal Rules of Evidence only. How would a court rule on the admissibility of each of these items of evidence?

## QUESTION 2

Dwight, the safety supervisor for a local paper company, DM Inc., gave a PowerPoint presentation to his coworkers on emergency procedures in case of a fire. Dwight was dismayed when nobody in the office paid attention to his presentation. To seek revenge on his coworkers, and to reinforce the valuable safety lessons, Dwight hatched a plan to simulate a fire emergency. The week after the PowerPoint, and using special access keys given to him in light of his status as safety supervisor, Dwight locked all the outer doors of the office, disconnected the phone lines, and then lit a fire in a wastepaper basket to create smoke. When Dwight's coworkers noticed the smoke, they leapt to their feet in a panic and began trying to get out of the office. Dwight, eager to see his coworkers learn their lesson, began guiding them through the procedures, such as checking the temperature of door handles and reminding them to call authorities. Despite Dwight's best efforts to maintain peace, all the office workers were swept up in a mass panic. Dwight, fearing the exercise had gotten out of control, used a bullhorn to get his coworkers' attention and announced that the fire had been nothing more than a simulation. Stanley, one of the veteran salesman, immediately fell to floor, suffering a major myocardial infarction (a heart attack).

Dwight was disciplined by the company, and demoted from the position of safety supervisor. Stanley sued Dwight and DM Inc. in federal court for intentional and negligent infliction of emotional distress as well as negligent entrustment under the theory that the company should not have provided Dwight the position of safety supervisor in the first place. The medical bills and other damages from Stanley's heart attack, including pain and suffering, were over 5 million dollars.

Stanley proffers the following evidence:

Oscar, an accountant at the paper company, would testify that on a prior occasion, Dwight called in a bomb threat – both to DM Inc. and to the police – because his coworkers did not pay attention to his bomb threat PowerPoint. Dwight was never disciplined by the company on that prior occasion, but he was terminated from his job as a Volunteer Sheriff's Deputy because calling in a false bomb threat is a misdemeanor in that jurisdiction.

Mose, Dwight's cousin, who has developmental disabilities, would testify that, three weeks after the fire simulation incident, when Dwight was acting manager for 3 days, Dwight wore a revolver in a holster around the office for several hours. When his coworkers complained, he said he would put the revolver away, but while twirling it on his finger, fired a shot into the floor, damaging a coworker's eardrum.

*Continued....*

Dwight proffers the following evidence:

Stanley's former mistress, Cynthia, will testify that Stanley weighs over 300lbs and has repeatedly chastised his fellow coworkers behind their backs for "eating too damn healthy." Stanley also disdains exercise.

Do not address hearsay. Analyze all the possible objections as though this case is being tried in Federal Court according to the Federal Rules of Evidence, but the controlling substantive law is California law. How would a court rule on the admissibility of these items of evidence?

### QUESTION 3

Magician Shazam was performing on the stage of the Hocus Pocus Magic Castle. During his performance, Vicki assisted. Shazam requested that Vicki hold a bouquet of roses and he would make the flowers disappear. Shazam said, "Abracadabra," but the bouquet and nearby stage curtains accidentally caught on fire instead of disappearing. As a result of the fire, Vicki's hands were severely burned.

As Vicki was being taken to the hospital, Shazam handed Vicki a note. The note read, "I am so sorry. I will pay for your medical expenses." Two days later, the manager from Hocus Pocus, visited Vicki in the hospital and asked her, "Will you take \$75,000 to settle this case?" Vicki declined.

For the next magic shows, Shazam gave the audience volunteers fire retardant gloves when performing the bouquet trick. Also, fire retardant curtains were installed. No further injuries occurred. Vicki sued the Hocus Pocus Magic Castle and Shazam for her personal injuries. The Castle denied liability arguing that Shazam was not performing on the Castle's premises. Assume the following occurred at the jury trial in a California state court. Discuss all evidentiary issues and arguments that would likely arise in each section below. Assume the proper objections were made. How should the court rule on each of the evidentiary objections or arguments?

**Do not address hearsay related issues.** Answer according to **California Law.**

1. During Vicki's case, she testified about holding the bouquet which caught on fire burning her hands. Then, she offered the note from Shazam into evidence.
2. Next, Vicki testified that the manager of Hocus Pocus offered her \$75,000 to settle the case. She declined.
3. Next, Vicki offered into evidence that after her accident, Shazam required volunteers wear fire retardant gloves and retardant curtains were installed by Hocus Pocus Magic Castle.
4. Finally, Vicki offers the Hocus Pocus insurance liability policy which states the stage is part of the premises.

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ANSWER

Will

Devin objects to relevance

Has a tendency to prove the truth of the claim – is directly on point with defense

Devin objects to character evidence

Standard propensity analysis – excluded

Exception – truth is a defense in libel cases. Accordingly, the fact that Devin had actually committed one of these schemes would be substantive character evidence to defense against the libel suit.

403 – Overruled because the character of Devin is an element of the defense.

Jodi

Devin objects to relevance

Has tendency to prove the claim – is directly on point with plaintiff's claim

Devin objects to character evidence

Standard propensity analysis – excluded

Exception – character is an element of a negligent entrustment claim, so it would be admissible

403 – Overruled because the character of Devin is an element of the claim

Tom

Vincente objects to relevance

Tends to prove that Devin was not negligent in entrusting the car – directly on point with defense

Vincente objects to character evidence

Standard propensity analysis – Excluded

Mercy Rule – not a criminal case, does not apply

Exception – character is an element of the claim, so undermining character evidence is permissible in this manner

403 – Overruled because the character of Edmond is an element of the claim

Susan

Vincente objects to relevance

Tends to show that Vincente's claim was made with malice – directly on point with the claims

Vincente objects to personal knowledge

“Foundational” information regarding the parties and who they were and what they were talking about. May require further foundation to establish personal knowledge in hearing

Vincente objects under Best Evidence Rule

Is it a writing –

The email – yes, the email is a writing

The photo – yes, the photo of the email is a writing

Is the writing available

No, and at no fault of the proffering party since there is no evidence the mugging was connected

Secondary evidence is permissible

403 – Little harm of undue prejudice that cannot be fleshed out through cross exam

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### QUESTION 2 ANSWER

Oscar and Dwight's Bomb Scare

Relevance –

Relevant: shows he knew what he was doing was wrong for inflicting emotional distress;

Relevant: also shows that the company should have been on notice of his behavior. The factual issue here is whether the company actually knew, since there was no discipline, but the call was made to them, weighing in favor of knowledge.

Character – likely to be sustained against Dwight as propensity evidence absent exceptions

Exceptions –

Elements of neg entrustment case against the company, so that is straightforward exception

Knowledge of how it was wrong

MO/Identity – probably not since identity and MO are not really at issue here

Intent – also not particularly clear since there was no similar result last time

403 – Response to exceptions

Not a criminal case; intentionality is important, so intent would be important, and knowledge informs intent (basic understanding of relatedness – distinctness of various exceptions; similarity may weigh in favor of exception but also in favor of confusion; criminality of act is more in favor of prejudice

conclusion: can go either way for Dwight, but since it would inform an actual element of negligent entrustment for the company, would probably come in as to the company

Mose and Dwight's Gunshot

Relevance –



Demonstrates that Dwight has a propensity for bad behavior, and shows the company should have known he did. However, the timing of the incident tends to weigh against being relevant for knowledge. Although it does tend to suggest the company is uncaring about Dwight's malfeasance because they allowed him to be acting manager

Conclusion: may have some tiny bit of relevancy, enough to make it over a very low bar

#### Character/Propensity

Shows that Dwight has a propensity for such dangerous antics. Informs the element as to negligent entrustment, but not very well, since it happened after the fact.

#### Exceptions:

Knowledge on the part of DM Inc./Element of cause of action (with the same weaknesses as mentioned above)

403

Highly prejudicial use as propensity evidence with minimal use, especially in light of bomb threat evidence for proving element.

Conclusion: likely to be excluded.

#### Competency

##### Rule applicable:

FRE says that when state law controls suit, state law controls competency, so CA law controls competency.

##### Competent?

Not enough information to draw a full conclusion, but his ability to give all this info tends to suggest he is competent due to the presumption of competency.

#### Stanley's History

##### Relevance

Relevance of disdain for health

Tends to undermine causation arguments

##### Character

Propensity evidence

Exceptions – tends to undermine causation argument

403

Because it is not bad acts, tends to be very little if any prejudice but goes to an element of defense, making it highly probative

## **QUESTION ANSWER OUTLINE SHAZAM**

*Please note: the focus of this essay is SPECIAL RELEVANCY ISSUES. Also, the instructions said, "Do not address hearsay."*

### **1. VICKI'S TESTIMONY**

**LOGICAL RELEVANCY/CEC 250 Tendency Test-** evidence is logically relevant if there is a tendency to prove or disprove any disputed fact of consequence.

Here, Vicki's observations of holding the bouquet during a magic trick directly causing her hand injuries is logically relevant to prove damages because the trick failed when a fire ensued. Her eyewitness testimony is relevant because it is based on personal knowledge of how her hands were burned.

Vicki will argue that since both the bouquet and stage curtains were on fire, both Shazam and the Hocus Pocus Magic Castle should share in liability.

**LEGAL RELEVANCY/CEC 352 Balancing Test-** the trial court has discretion to exclude evidence if the probative value is substantially outweighed by the danger of unfair prejudice. It does not seem likely that Vicki's testimony as an eyewitness to the accident would confuse or otherwise mislead or prejudice the jury.

Vicki will be able to present her own observations as a competent eyewitness. However, the note from Shazam is different. See below.

**COMPETENCY-** for a witness to be competent to testify, CEC 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. Witnesses must have the capacity to observe, recollect, communicate and be truthful.

Nothing in the facts suggest that Vicki is impaired or lacking competency. Her testimony on her observations will be admitted.

**SPECIAL RELEVANCY – Relevant Policy Exclusions (Shazam note to Vicki)**

The general rule is that offers to pay for medical expenses cannot be admissible to prove negligence or liability. Also, expressions of sympathy regarding pain may be excluded on public policy grounds.

Here, Shazam offered a note which read, "I am so sorry. I will pay for your medicals." This note has a tendency to show Shazam or the Magic Castle was potentially at fault. However, due to public policy, the note will not be admitted to establish liability. Likewise, Shazam's expression of sympathy, "I am so sorry," will be deemed inadmissible. (CEC 1160)

## **2. HOCUS POCUS OFFER- \$75,000 IN SETTLEMENT**

**LOGICAL RELEVANCY-** defined above

The Manager's \$75,000 offer to Vicki in settlement for her burned hand injuries has a tendency to prove that the Castle was responsible for her damages due to a mishap by the magician. Therefore, the Castle breached duty of due care by having inadequate safeguards in place for magic tricks. Therefore, the settlement offer is logically relevant. However, see below.

**LEGAL RELEVANCY-** defined above.

Here, although the offer is logically relevant, special relevancy considerations are discussed below.

### **SPECIAL RELEVANCY**

Generally, to promote settlements in civil cases, CEC prevents the use of settlement offers and statements to prove liability or the validity of a claim.

Here, Hocus Pocus manager came to the hospital and offered Vicki \$75,000 in settlement of her hand injuries. Vicki did decline the offer. Since the filing of the personal injury lawsuit is being disputed, this offer will not be admissible to prove liability or negligence.

## **3. SUBSEQUENT REMEDIAL MEASURES: Gloves and curtains**

**LOGICAL RELEVANCY-** defined above.

There are two subsequent remedial measures. First, fire retardant gloves that Shazam gives an assistant which has a tendency to establish that the magic trick was improperly performed since Vicki's hand were burned. Second, the Castle's installation of fire-retardant curtains after the accident may have a tendency to prove a breach of duty or causation.

**LEGAL RELEVANCY-** defined above.

Although the subsequent remedial measures (fire retardant gloves and curtains) are legally relevant, there are governing special relevancy conders. See below.

#### **SPECIAL RELEVANCY- SUBSEQUENT REMEDIAL MEASURES**

Generally, evidence of safety measure or repairs taken **after** an accident are inadmissible to prove negligence or liability. This is due to public policy and concerns by the law wanting landlords or owners to fix problems.

Here, there are two subsequent remedial measures: (1) the fire retardant gloves that Shazam gives the assistants; and (2) the fire retardant curtains installed by the Castle. In both cases, these fixes were done after Vicki's hand injuries.

#### **4. THE HOCUS POCUS PREMISES LIABILITY POLICY- EXCEPTION**

**LOGICAL RELEVANCY-** defined above

The premises liability insurance policy has a tendency to establish that the premises where the accident occurred was under the control or owned by the Hocus Pocus Magic Castle. As such, the policy is logically relevant. However, see below.

**LEGAL RELEVANCY-** defined above

See below.

#### **SPECIAL RELEVANCY**

Generally, insurance premises liability policies cannot be admissible to prove negligence. However, there is an exception for disputed "ownership and control."

Here, the Hocus Pocus Magic Castle is denying liability stating there was no coverage of the stage area. Plaintiff Vicki wants to establish that the Castle did maintain the stage premises were "controlled or owned." Thereby, since the curtains caught on fire and the magic trick failed, Vicki's hands were burned. The Castle breached the duty of due care.

#### **LIMITING INSTRUCTION**

The trial court will admit the premises liability policy with a limiting instruction. The restriction will be for the jury to consider that the Castle did own or control the stage area. However, the jury cannot use the policy to create liability or fault.

1)

1)

**Wills's Testimony that Devin fired Will because he was going to blow the whistle on Devon's kickback schemes.**

**Devon should object to Wills's Testimony that Devin fired Will because he was going to blow the whistle on Devon's kickback schemes as not relevant.**

Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence.

In this case, Will's testimony that he was going to blow the whistle on Devon for having kickback schemes during construction of a public park makes it more probable that he has a bad character for truthfulness and could be responsible for negligent entrustment.

Therefore the court, should overrule the objection.

**Witness Competency**

For a witness to be competent to testify they must have personal knowledge of the matter and sworn oath or affirmation to testify truthfully.

In this case, Will has knowledge that Devin has a kickback scheme to which he is going to testify and that nothing shows that he won't testify truthfully.

Therefore, Will is a competent witness.

**Devin should object to the evidence of Will's Testimony under Character Evidence**

In general character evidence is not admissible to show conduct in conformity with the character trait on a particular occasion. In criminal cases, only the defendant can open the door to character evidence.

In this case, Will testifying to a specific act that Will was having a kickback scheme tends to show conduct in conformity with that of negligent entrustment and therefore it is inadmissible.

Therefore, the court will sustain the objection

**The Vincente Family should counter that the testimony evidence is admissible under Exception Character "At Issue"**

When character is "at issue" and is an essential element of the case, character evidence is admissible. Such cases included wrongful death, negligence and defamation. Evidence of reputation, opinion and specific acts are generally allowed.

In this case, Devin's character is at issue since he is being sued for negligent entrustment. Further specific acts of evidence are allowed like the one Will is testifying to here.

Therefore, the court should overrule the objection.

**Devin should object to Will's testimony that Devin fired Will because he was going to blow the whistle on Devon's kickback schemes under 403.**

As per FRE 403, a balancing test is used to determine the legal relevance. Relevant evidence may be excluded if its probative value is substantially outweighed by a danger of unfair prejudice,

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confusing the issues, misleading the jury, undue delay, waste of time, or needlessly presenting cumulative evidence.

In this case, Devin is being sued for negligent entrustment and if he had been taking part in kickback schemes this speaks as to the truthfulness of his character and an element of the case. Therefore, the probative value outweighs the undue prejudice.

2)

**Jodi's Testimony that Devin allowed Edmond to drive his dune buggy when he drank and smoke marijuana.**

**Devon should object to Jodi's Testimony that Devin allowed Edmond to drive his dune buggy when he drank and smoke marijuana.**

Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence.

In this case, the evidence of Devin allowing Edmond to drive his dune buggy, which can be compared to his car, while drinking and knowing that Edmond had a drinking problem make sit more probable than it would be without the evidence.

**Devin should object to the evidence of Jodi's Testimony under Character Evidence**

In general character evidence is not admissible to show conduct in conformity with the character trait on a particular occasion. In criminal cases, only the defendant can open the door to character evidence.

In this case, the testimony evidence Jodi would testify shows that Devin's conduct when he let Edmond drive the dune buggy while drinking smoking marijuana while having a drinking problem is

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conduct in conformity with the current issue of Devin allowing Edmond to borrow his car and drinking a pint of Jack Daniels and smoking marijuana. This type of character evidence is admissible here.

Therefore the court should sustain the objection

**The Vicente Family should counter that the testimony evidence is admissible under Exception Character "At Issue"**

When character is "at issue" and is an essential element of the case, character evidence is admissible. Such cases included wrongful death, negligence and defamation. Evidence of reputation, opinion and specific acts are generally allowed.

In this case, since Devin's character is at issue because he negligently entrusted his car to Edmond, character evidence is admissible.

Therefore, the court should overrule the objection.

**The Vicente Family should counter with "Other Purpose" Character Evidence**

Although character evidence of other crimes or specific acts are generally not admissible to show conduct in conformity with the character trait, specific acts may be admissible for other purposes to show: intent, motive, preparation, identity, knowledge, absence or mistake or accident, opportunity or plan.

In this case, the other purpose for showing character evidence is that Devin had knowledge of Edmond's tendency to drink and drive and therefore negligently entrusted Edmond with his car.

Therefore, the court should overrule the objection.

**Devin should object to Will's testimony that Devin fired Will because he was going to blow the whistle on Devon's kickback schemes under 403.**

As per FRE 403, a balancing test is used to determine the legal relevance. Relevant evidence may be excluded if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, waste of time, or needlessly presenting cumulative evidence.

The probative value of showing that Devin had entrusted his dune buggy to the same person that crashed his car while drinking outweighs the danger of unfair prejudice.

Therefore, the court should overrule the objections and admit the evidence.

3)

**Tom's Testimony that Devin was Edmond's accountability buddy.**

**The Vicente family should object to Tom's Testimony that Devin was Edmond's accountability buddy.**

Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence.

In this case, Devin being Edmond's accountability buddy makes it less probable that he negligently entrusted his car to Edmond.

Therefore, the court should overrule this objection

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**The Vincnete Family should object to Devin's Good Character Evidence**

The Defendant may not offer good character evidence in civil case, unless an exception applies.

In this case, Devin is trying to have Tom testify that he was Edmond's accountability buddy as good character evidence, but this is not allowed.

Therefore, the court should sustain the objection and exclude the evidence.

4)

**Susan's Testimony to the libel statement.**

**The Vincente Family should object to Susan's Testimony about the libel statement.**

Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence.

In this case, the statment Susan saw in which the Vincente wrote saying that they don't care if the article is true, but they need to hear about this guy has a tendency to make the fact of consequence more probable that it is libel.

Therefore, the court should overrule the objection

**The Vicente Family should object to Character evidence**

In general, charcter evidene is

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**Devin should counter with Character Evidence - Character "at Issue"**

When character is at issue and is an essential element of the case, character evidence is admissible.

Here it is admissible since it is for a defamation case.

The court, should

**Devin should counter that Tom's statement is admissible under 403.**

As per FRE 403, a balancing test is used to determine the legal relevance. Relevant evidence may be excluded if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, waste of time, or needlessly presenting cumulative evidence.

In this case, the statement Susan saw in which the Vincente wrote saying that they don't care if the article is true, but they need to hear about this guy is

**END OF EXAM**

2)

1. Oscar's Testimony

**Dwight should object to Oscar's testimony as irrelevant.**

Evidence is relevant if it has a tendency to prove or disprove a material disputed fact. Material facts normally include the credibility of a witness, elements of the claim/defense, or damages.

Stanley should respond that Oscar's testimony has a tendency to prove that Dwight is capable of intentional and negligent infliction of emotional distress and that GM Inc. knew that Dwight had this tendency and still entrusted him as the safety supervisor.

The court should overrule the objection and admit Oscar's testimony as relevant.

**Dwight and GM should object to Oscar's testimony as impermissible character evidence.**

In a civil case, such as this, character evidence is generally inadmissible to prove conduct in conformity with the character trait on a particular occasion, unless character is an essential element of the claim or defense ("in issue.") Character evidence can be proved by testimony in the form of opinion about a person's character trait, or testimony about a person's reputation in the general community. Specific instances of conduct are only admissible in a few situations - including when a character trait is an essential element to the claim or defense. In a negligent entrustment case, the character evidence does not concern the person being sued, rather the character of the person who was entrusted.

Dwight should argue that his character is not "in issue" in his intentional and negligent infliction of emotional distress claim. GM should argue the same, however, Stanley should respond that Dwight's character is directly "in issue" in the negligent entrustment claim because Dwight was the one GM entrusted as the safety supervisor. The specific instance Oscar is offering directly correlates to GM's knowledge of Dwight's character, Dwight's character is the character "in issue" in the negligent entrustment claim.

The court should overrule the objection and admit Oscar's testimony as permissible character evidence in the negligent entrustment claim.

**Dwight and GM should object to Oscar's testimony as unfairly prejudicial under 403/352.**

Under FRE 403/CEC 352, otherwise admissible evidence may be made inadmissible if the probative value is substantially outweighed by the danger of undue prejudice. Other exceptions include confusing the issues, misleading the jury, undue delay or wasting time, or needlessly presenting cumulative evidence.

Dwight and GM should argue that Oscar's testimony is unfairly prejudicial because if the jury hears about a bomb threat, which is a misdemeanor, they may react and make a decision on an emotional basis or believe that Dwight has already committed a crime so he must have done this. Stanley should respond that the fact that GM knew of Dwight's prior conduct is highly probative to show they negligently entrusted him as safety supervisor.

The court will have to conduct the balancing test and will likely overrule the objection because of the highly probative testimony.

**If the court does the balancing tests and decides the probative value is not substantially outweighed by the risk of undue prejudice, Dwight and GM could ask the court for a limiting instruction, or offer to stipulate.**

A party may request that the court issue a limiting instruction that informs the jury on how the evidence may be used. Using this instruction, the court can limit the dangers of unfair prejudice and other 403/352 exceptions.

When lawyers stipulate or offer to stipulate, this means they agree or seek to agree with the opponent about the admissibility of the matter.

Dwight and GM could ask that the jury be instructed to use the evidence only to prove that GM knew about Dwight's prior act, not to prove that Dwight was responsible for the current claim because he had called in a bomb threat before. Dwight and GM could also ask Stanley to stipulate to the fact that Dwight had been terminated from his job as volunteer sheriff's deputy because of his prior conduct but leave out the detailed description of the misdemeanor bomb threat.

Stanley likely won't agree to stipulate because of the highly probative nature of the evidence in the negligent entrustment claim.

## 2. Mose's Testimony

### **Dwight and GM should object to Mose's testimony as irrelevant.**

Evidence is relevant if it has a tendency to prove or disprove a material disputed fact. Material facts normally include the credibility of a witness, elements of the claim/defense, or damages.

Stanley should respond that Mose's testimony about Dwight's conduct has a tendency to prove that he is careless and has negligently injured someone in the office before when the gun went off and the a coworker's eardrum was damaged, and that GM knew about it because it was in the office. It also has a tendency to prove that GM knew about Dwight's negligent conduct because he was acting manager for 3 days, *after* the fire simulation incident.

The court should overrule the objection and admit the testimony as relevant.

### **Dwight and GM should object to Mose's testimony as impermissible character evidence.**

In a civil case, such as this, character evidence is generally inadmissible to prove conduct in conformity with the character trait on a particular occasion, unless character is an essential element of the claim or defense ("in issue.") Character evidence can be proved by testimony in the form of opinion about a person's character trait, or testimony about a person's reputation in the general community. Specific instances of conduct are only admissible in a few situations- including when a character trait in an essential element to the claim or defense. In a negligent entrustment case, the character evidence does not concern the person being sued, rather the character of the person who was entrusted.

Stanley should respond to the objection that Mose's testimony is permissible character evidence because GM entrusted Dwight as safety supervisor after knowing that he has injured an employee at work before, which is "in issue" in the current case.



The court should overrule the objection and admit Mose's testimony as permissible evidence in the negligent entrustment claim.

**Dwight and GM should object to Mose's testimony as unfairly prejudicial under 403/352.**

Under FRE 403/352, otherwise admissible evidence may be made inadmissible if the probative value is substantially outweighed by the danger of undue prejudice. Other exceptions include confusing the issues, misleading the jury, undue delay or wasting time, or needlessly presenting cumulative evidence. To limit the dangers of unfair prejudice or misleading the jury, the court can use a limiting instruction that informs the jury on how the evidence can be used.

Dwight and GM should argue that Mose's testimony is unfairly prejudicial because if the jury hears about the gun shot, they may react and make a decision on an emotional basis or believe that Dwight must have done this since he fired a gun at work and injured another coworker. Stanley should respond that because of this prior conduct, GM should have know about the danger of putting Dwight in a safety role and it was foreseeable that he could act this way again.

The court should have the parties draft a limiting instruction to keep from misleading the jury.

**Dwight and GM should object to Mose's testimony under FRE 601/CEC 701, lack of competency.**

Competency is a low bar. Witnesses are presumed to be competent to testify unless there is a disqualification due to perception, memory, or the witness does not understand the "truth" or cannot communicate. The rule of competency is substantive, therefor CEC 701 will govern.

The facts do not detail the severity of Mose's developmental disability. Stanley should respond to the objection that Mose is a competent witness even though he has developmental disabilities, he is not mentally incapacitated or a child. Dwight and GM could ask for the judge to voir dire Stanley to ensure he understands what "truth" means and can communicate.

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Following a voir dire, the judge should rule whether he believes Mose understands "truth" and can communicate.

**Dwight and GM should object to Mose's testimony as lacking personal knowledge.**

A witness is qualified to testify only regarding those matters about which a witness has personal knowledge, the extent to which the witness actually has perceived something first hand in the case, and reasonable opinions.

From the facts we know that Mose is Dwight's cousin, it does not say he is his coworker. Dwight and GM should argue that Mose lacks personal knowledge of the alleged incident in the office, unless it is proven that Mose is also an employee of GM and witnessed the gun shot.

The court will likely sustain the objection and rule Mose's testimony inadmissible unless he perceived the gun shot first hand.

### 3. Cynthia's Testimony

**Stanley should object to Cynthia's testimony as irrelevant.**

Evidence is relevant if it has a tendency to prove or disprove a material disputed fact. Material facts normally include the credibility of a witness, elements of the claim/defense, or damages.

Dwight and GM should respond to the objection that Cynthia's testimony about Stanley's health habits is relevant to prove their defense of contributory/comparative negligence, or prove how much damages Stanley should be entitled to.

The court should overrule the objection and admit Cynthia's testimony as relevant.

**Stanley should object to Cynthia's testimony as impermissible character evidence.**

In a civil case, such as this, character evidence is generally inadmissible to prove conduct in conformity with the character trait on a particular occasion, unless character is an essential element of the claim or defense ("in issue.") Character evidence can be proved by testimony in the form of opinion about a person's character trait, or testimony about a person's reputation in the general community. Specific instances of conduct are only admissible in a

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few situations- including when a character trait is an essential element to the claim or defense. Evidence of a person's habit may be admitted to prove that the person acted in accordance with that habit. A habit must be strong, specific, and consistent, to the point of being involuntary or automatic in its repetition.

Dwight and GM should respond to the objection that Stanley's character is directly "in issue" to their defense of contributory/comparative negligence and calculating Stanley's amount of damages. They could also argue that Stanley's *distain* for exercise is a habit and so is his repeatedly chastising of his coworkers for "eating too damn healthy." The phrase Cynthia used was specific and consistent, as is the way she described his attitude towards exercise. Dwight and GM should argue that Cynthia's testimony taken together could prove that they are not liable for the \$5 million in damages because Stanley already had a pre-existing condition that he directly contributed to by way of habit.

The court should overrule the objection and admit Cynthia's testimony.

**Stanley should object to Cynthia's testimony as unfairly prejudicial under 403/352.**

Under FRE 403/CEC 352, otherwise admissible evidence may be made inadmissible if the probative value is substantially outweighed by the danger of undue prejudice. Other exceptions include confusing the issues, misleading the jury, undue delay or wasting time, or needlessly presenting cumulative evidence.

Dwight and GM should respond that Cynthia's testimony is highly probative to their defense and the amount of damages which Stanley is claiming. Stanley should argue that his health habits have nothing to do with the claims against Dwight and GM and could mislead the jury or confuse the issues. Stanley's bad health habits could confuse the issues and mislead the jury because the original claim is for Dwight's conduct and the simulation he put his coworkers through, not the individual lifestyle choices of the GM employees.

The court should conduct a balancing test and will likely sustain the objection due to the risk of confusing the issue.

**END OF EXAM**

3)

1. Vicki's Hands/Shazam's Note

**Shazam should object to Vicki's testimony about her hands and the note Shazam gave her as irrelevant.**

Evidence is relevant if it has a tendency to prove or disprove a material disputed fact. Material facts normally include the credibility of a witness, elements of the claim/defense, or damages.

Vicki should respond that testifying about her hands has a tendency to prove that her hands were severely burned by the bouquet Shazam handed her. Vicki should also respond that the note from Shazam has a tendency to prove that he knew the bouquet had injured her hands and was responsible for her injuries.

The court should overrule the objection and admit the evidence as relevant.

**Shazam should object to Vicki's testimony about the note Shazam gave her as violating public policy.**

Otherwise relevant evidence can be excluded for public policy reasons. This is because we want to encourage certain types of behaviors for the greater of society. Evidence of providing, promising, or offering to pay medical, hospital, or other similar expenses resulting from an injury is inadmissible to prove liability for the injury. This public policy exception does not extend to other statements or conduct surrounding payment or the offer/attempt to pay them.

Shazam should argue that the note directly violates the public policy regarding offers to pay medical expenses. Vicki should respond that the note should be admitted for the statement "I am so sorry," but not for the offer itself to prove liability.

The court will likely overrule the objection and admit the first statement in the note.

**Shazam should object to Vicki's testimony about her hands and the note Shazam gave her as unfairly prejudicial.**

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Under CEC 352, otherwise admissible evidence may be made inadmissible if the probative value is substantially outweighed by the danger of undue prejudice. Other exceptions under 352 include confusing the issues, misleading the jury, undue delay or wasting time, or needlessly presenting cumulative evidence. Under CEC 355, To limit the dangers of unfair prejudice or misleading the jury, the court can use a limiting instruction that informs the jury on how the evidence can be used.

Shazam should argue that the conditions of Vicki's burned hands could cause the jury to decide emotionally and rule in her favor. He should also argue that the note, even with a limiting instruction, could cause the same reaction. Vicki should respond that her testimony about her hands is highly probative to show the bouquet she held burned her and the seriousness of the injury to assess damages. Vicki should respond to the note being highly probative to show Shazam knew he had injured her and was sorry about it.

The court will likely overrule the objection and admit Vicki's testimony with a limiting instruction on the note from Shazam.

## 2. Hocus Pocus' settlement offer

**Hocus Pocus should object to the settlement offer as irrelevant.**

Evidence is relevant if it has a tendency to prove or disprove a material disputed fact. Material facts normally include the credibility of a witness, elements of the claim/defense, or damages.

Vicki should respond that the settlement offer has a tendency to prove that Hocus Pocus knew they had breached a duty of care to a patron, which is a material disputed fact in the negligence claim.

The court should overrule the objection and admit the offer as relevant.

**Hocus Pocus should object to the settlement offer as violating public policy.**

Otherwise relevant evidence can be excluded for public policy reasons. This is because we want to encourage certain types of behaviors for the greater of society. Under CEC 1152 offers to settle, evidence of an offer, or related statements are not admissible to prove liability.

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Vicki likely doesn't have a valid basis for a response to this public policy exclusion. The \$75,000 settlement offer cannot be used to prove that Hocus Pocus was liable and it doesn't have any other basis for being admitted.

The court should sustain the objection and rule the evidence of the settlement offer inadmissible.

### 3. Fire retardant gloves & curtains

**Shazam and Hocus Pocus should object to the fire retardant gloves and curtains as irrelevant.**

Evidence is relevant if it has a tendency to prove or disprove a material disputed fact. Material facts normally include the credibility of a witness, elements of the claim/defense, or damages.

Vicki should respond that the fact that Shazam and Hocus Pocus required fire retardant gloves and curtains has a tendency to prove that they breached their duty of care to an audience member and do not want to be liable for future injuries.

The court should overrule the objection and admit the evidence as relevant.

**Shazam and Hocus Pocus should object to the fire retardant gloves and curtains as violating public policy, under subsequent remedial conduct.**

Otherwise relevant evidence can be excluded for public policy reasons. When a harm occurs, steps will often be taken to prevent the type of harm from happening again. Any post-accident repair, design change, or policy change that is made in an effort to prevent future similar accidents is not admissible to prove negligence or culpable conduct. The court may admit this evidence for another purpose, such as proving ownership or control - if disputed.

Shazam and Hocus Pocus should argue that the fact that they required volunteers to wear flame retardant gloves and they installed fire retardant curtains are considered subsequent remedial conduct following Vicki's accident. Vicki should respond to the objection that since Hocus Pocus is denying liability the fact that they installed fire retardant curtains should be admissible to show ownership and control over Shazam's performance.

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The court will likely sustain in part and overrule in part, and allow the evidence of the curtains in to show ownership on behalf Hocus Pocus.

**Shazam and HP should object to the fire retardant gloves and curtains as unfairly prejudicial.**

Under CEC 352, otherwise admissible evidence may be made inadmissible if the probative value is substantially outweighed by the danger of undue prejudice. Other exceptions under 352 include confusing the issues, misleading the jury, undue delay or wasting time, or needlessly presenting cumulative evidence. Under CEC 355, To limit the dangers of unfair prejudice or misleading the jury, the court can use a limiting instruction that informs the jury on how the evidence can be used.

Vicki should respond that the evidence will not be used to prove liability, it will only be used to show ownership and that is highly probative to her case against Hocus Pocus because they are denying liability. The unfair prejudice doesn't substantially outweigh the probative value of proving ownership in the negligence claim.

The court should overrule the objection and admit the evidence of the fire retardant gloves and curtains.

#### 4. Hocus Pocus' liability insurance

**Hocus Pocus should object to the liability insurance as irrelevant.**

Evidence is relevant if it has a tendency to prove or disprove a material disputed fact. Material facts normally include the credibility of a witness, elements of the claim/defense, or damages.

Vicki should respond that Hocus Pocus' proof of liability insurance has a tendency to prove that they are worried about potential accidents and that they have a duty of care to Shazam's audience.

The court should overrule the objection and admit the evidence of the insurance as relevant.

**Hocus Pocus should object to the liability insurance as violating public policy.**

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Otherwise relevant evidence can be excluded for public policy reasons. Under CEC 1155, evidence that a person has/does not have liability insurance is inadmissible to prove the person's fault or absence of fault. It may be admissible to prove ownership or control.

Vicki should respond as she did earlier, that the liability insurance should be admitted to prove ownership/control on behalf of Hocus Pocus because HP is denying liability to Shazam's performance, ownership is in dispute.

The court will likely admit the evidence of the liability insurance to show ownership, but not to prove negligence or fault.

**Hocus Pocus should object to the liability insurance under CEC 352 as needlessly cumulative.**

Under FRE CEC 352, otherwise admissible evidence may be made inadmissible if the probative value is substantially outweighed by the danger of undue prejudice. Other exceptions under 352 include confusing the issues, misleading the jury, undue delay or wasting time, or needlessly presenting cumulative evidence.

Hocus Pocus should argue that since the court already admitted the evidence of the flame retardant curtains that admitting the liability insurance to prove ownership would be needlessly presenting cumulative evidence and therefore prejudicial. Vicki should respond that under the CEC rules, liability insurance and subsequent remedial conduct are separate public policy issues and are highly probative in proving ownership on behalf of Hocus Pocus and are not outweighed by the risk of undue prejudice, or presenting cumulative evidence.

The court should overrule the objection and admit the evidence.

**END OF EXAM**