

Monterey College of Law

EVIDENCE

Mid Term Examination

FALL 2022

Prof. S. Lizardo

General Instructions:

Answer All Three Essay Questions.

Total Time Allotted: Three (3) Hours

Recommended Allocation of Time: Equal Time per Question

EVIDENCE
MIDTERM EXAMINATION
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QUESTION 1

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

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

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

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

At each of the numbered events below, discuss all the evidentiary issues that would arise. The discussion should include the likely trial court rulings. Assume timely proper objections were made. Answer according to the **California Evidence Code**.

At the jury trial, the following occurred.

- 1 In her case-in chief, Dusty called Nurse Nan who testified that she saw Dr. Dooms consume two shots of gin from a bottle of gin immediately before the cataract surgery. Also, Nurse Nan testified that Dr. Dooms had an unsteady hand during the procedure.
- 2 Next, Dusty Dr. Dooms to testify. He admitted making the statements "I am so sorry for the pain. I am offering you \$40,000 for a settlement." However, he said the statements were not meant be compassionate and nothing else. "
- 3 Then, Dusty asked Dr. Dooms if he had professional liability insurance.
- 4 Finally, Dusty introduced into evidence an authenticated official deposition transcript of Dr. Better.

Question 2

The defendant, Dan, is on trial for the first-degree murder of Victor. The Prosecution's theory is that Dan shot Victor after Victor won in a poker game. Dan denies being at the poker game or shooting Victor. In motions in limine prior to trial, the parties seek to obtain rulings on the admissibility of the following evidence. Discuss all the evidentiary issues and arguments that would likely arise, including objections, if any, and the likely trial court ruling on the admissibility of the evidence. Apply the **Federal Rules of Evidence**.

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

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

How should the Court rule?

2. The Prosecution seeks to introduce testimony of a police officer who spoke with the victim at the emergency room. The victim had just undergone a procedure to drain fluids from his chest cavity and to re-inflate his lung. The victim told the officer several times that, "Dan shot me, I'm dying". During the hearing on the motion in limine, the defense offers testimony that the time that the victim's statement was made, the victim had been examined and treated by doctors who believed that the victim would recover and was in no imminent danger of dying. In fact, doctors and nurses had assured the victim that he was going to be alright. It was the doctor's opinion at the time that this statement was made that the victim's wound was not fatal and that he would recover. The defendant later developed a massive, uncontrolled infection and died eight days after the shooting. How should the court rule?
3. The defense seeks to introduce the testimony of Dan's girlfriend, Tina. Tina will testify that two weeks after Dan was arrested in connection with Victor's death, she was drinking at the No Good Saloon when she heard Oscar boasting that he was the one who shot Victor. Tina did not come forward with this information until after Oscar died, about one year after the shooting but before Dan's trial. At the hearing on the motion in limine, Tina testified the reason she did not tell police about what Oscar said sooner was because she was afraid of Oscar. Tina testified she cannot remember who else was present in the bar at the time Oscar made this statement. No other witnesses are introduced who would testify that they heard Oscar make this statement. No other witnesses are introduced who would testify that Oscar was at the poker game where Victor was shot. How should the Court rule?

QUESTION 3

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

The following proffers are made at trial:

- 1) Meredith called Oscar, an accountant at Dun-Middleton. Oscar would testify that, three years prior, Dwight assigned Ryan, a temp, to drive Todd to sales calls because Todd's license had been suspended due to driving under the influence convictions. This arrangement lasted months, and it caused Todd to develop the reputation in the office of being untrustworthy behind the wheel.
- 2) Meredith called Creed, a quality assurance representative at Dun-Middleton. Creed would testify that, in the last four years at the office, he has seen six different workers struck by vehicles in the office warehouse's parking lot, and that he reported each incident to management.

- 3) Meredith called Toby, a human resources worker, who has worked at Dun-Middleton for many years. Toby is called to testify as to the employment of each person involved. However, Toby was involved in a ziplining accident on a vacation to Puerto Rico, where he broke his neck. He is now unable to speak or type. His deposition was taken by asking yes or no questions and allowing him to blink his eyes one time for yes, two times for no, or three times for "I do not know."

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

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

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

ANSWER OUTLINE

PLAINTIFF DUSTY – DR. DOOMS -Q1-

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

1. NURSE NAN'S TESTIMONY

As per CEC 350, only relevant evidence is admissible.

Logical Relevancy- CEC 210 Tendency Test

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

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

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

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

Legal Relevancy- CEC 352 Balancing Test

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

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

Witness Competency /Percipient Witness

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

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

2. Dr. Dooms' two statements to Dusty

Logical Relevance- defined above

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

The trial court will rule the statement as logically relevant.

However, there are public exclusion policies. See below.

Legal Relevance- defined above

Probative Value v. Prejudice

a. Dr. Dooms Expression of Sympathy to Dusty

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

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

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

See below.

b. Settlement Offer of \$40,000

Logical Relevancy- defined above

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

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

Legal Relevancy- defined above

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

See below under Special Relevancy Rules.

Special Relevancy- Public Policy Exclusion

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

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

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

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

3. Insurance Policy – Medical Malpractice

Logical Relevancy- *defined above.*

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

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

Legal Relevancy- *defined above*

Probative value v. prejudice

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

See Special Relevance below.

Special Relevancy/Public Policy Exclusion

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

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

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

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

Logical Relevancy- defined above

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

Legal Relevancy- defined above.

Balance probative value v. prejudicial effect.

Hearsay- defined above.

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

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

Hearsay Exception: Dr. Better's Former Testimony

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

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

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

Option: Medical Diagnosis Hearsay

Fall 2022 Evidence Mid-Term Exam Question

Prof. O'Keefe

Answer – Q2

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

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

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

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

How should the Court rule?

Analysis:

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

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

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

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

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

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

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

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

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

Statement for Medical Diagnosis or Treatment:

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

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

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

Analysis:

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

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

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

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

1. The case is a prosecution for a homicide or a civil case;
2. The declarant is the victim named in the pleading;
 - a. At the time of the statement, the declarant had a sense of impending death. The declarant must have abandoned all hope and concluded that certain death was imminent
3. At the time of trial, the declarant is unavailable
4. The statement relates to the event inducing the declarant's dying condition
5. The statement is factual in nature.

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

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

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

Analysis:

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

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

Statements Against Interest:

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

- 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*

The Statement against Interest Exception rule provides that "a statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability... that a reasonable man in his position would not have made the statement unless he believed it to be true" is admissible. However, "a statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement."

Admission of evidence under the provisions of Rule 804(b)(3) requires satisfying a two prong test. First, the statement must be against the declarant's penal interest. Second, the trial judge must find that corroborating circumstances ensure the trustworthiness of the statement.

To satisfy the first prong, the statement must actually subject the declarant to criminal liability and it must be such that the declarant would understand its damaging potential. To satisfy the second prong, there must be some other independent non-hearsay indication of trustworthiness.

Factors to be considered in evaluating trustworthiness include spontaneity, relationship between the declarant and the accused, existence of corroborative evidence, whether or not the statement had been subsequently repudiated and whether or not the statement was in fact against the penal interests of the declarant. In this case, there was no other corroborative evidence. Tina's testimony would be inadmissible.

Evidence Answer Outline – Q3-HStarr

Proffer 1: Oscar

1) Relevance

- a. Tends to show company was aware of Todd's poor character for driving, which is a fact of consequence in relation to the negligent entrustment claim.
 - i. Relevance objection should be overruled

2) Character

a. Propensity:

- i. Tends to show that Todd had a propensity for poor driving. Without more, this meets the requirements of the rule and would be excluded.
 1. Propensity objection should be – at this point – sustained

b. Essential Element:

- i. The negligent entrustment claim requires proof that Todd should not have been entrusted with the vehicle, and so his character, especially known to the company, is an essential element that must be proved.
 1. The earlier objection will be overruled as to this use

c. MIAMICOP (Exceptions):

- i. Knowledge – Tends to suggest that Dun-Middleton was aware of Todd's poor driving and should not have entrusted him with the vehicle.
 1. The earlier objection will be overruled as to this use

3) 403

- a. Students should recognize that the probative value of the evidence applies primarily to the negligent entrustment claim. To use it as part of the negligence claim outside of limited use of knowledge of the company would be propensity. However, as an essential element and falling under the exception, a limiting instruction should be sufficient to cure the prejudice enough for the objection to be overruled. Students should recognize the three-year gap will be argued as limiting the probative value of the evidence.

Proffer 2: Creed

1) Relevance

- a. Tends to show notice to the company of dangerous parking lot conditions (prior similar instances in tort cases)
- b. Tends to undermine Angela's testimony that Meredith was the negligent party
- c. Tends to show that, particularly in the negligent entrustment case, entrusting Todd to drive in a parking lot already dangerous was negligent

2) Character

a. Propensity:

- i. Character objection should be overruled, given that this is not truly character evidence
 1. Objection should be overruled

b. Essential Element:

- i. Students may want to briefly address this in the negligent entrustment portion

1. Initial objection should be overruled.
- c. MIAMICOP :
 - i. Students may address knowledge, but character analysis should not be overly in depth.
 1. Initial objection should be overruled.
- 3) 403
 - a. Students should recognize that, because character propensity is not really present here, the prejudicial effect is quite low, and the probative value is sufficient to outweigh it.
 - i. Objection should be overruled

Proffer 3: Toby

- 1) Relevance:
 - a. Evidence of employment would have a tendency to show that the company was or was not responsible for acts taken by the individuals affected
 - b. It is arguable that this evidence might have some bearing on damages
 - c. This evidence might also go to duty, given the claims and claimants
 - i. Objection should be overruled
- 2) Competency:
 - a. Students should recognize that there is a legal bias in favor of competency. However, given limited ability to speak and narrate events, the students should delve more deeply into the facts. Specifically, students should note that Toby was able to testify at a deposition.
 - i. Objection should be overruled
- 3) 403
 - a. The primary source of prejudice here should be waste of time, given the accommodations that must be made. However, it is clear that this is relatively basic testimony regarding employment status of employees, so it should not take an inordinate amount of time.
 - i. Objection should be overruled.

Proffer 4: Angela

- 1) Relevance:
 - a. May have tendency to show contributory negligence on the part of Meredith
 - b. Students should not argue that character evidence for propensity makes this evidence irrelevant
 - c. Student should note that this is poignant given that Meredith was injured twice in the same series of events.
 - i. Objection overruled
- 2) Character
 - a. Propensity:
 - i. Students should recognize that this is propensity evidence.
 1. Objection sustained
 - b. Essential Element:

i. There is no claim or counterclaim in which Meredith's character is an essential element.

1. Initial objection sustained.

c. MIAMICOP:

i. There is nothing in the fact pattern that triggers these factors. However, if a student can make a passable argument, points should be awarded.

3) 403

a. Students should recognize that this evidence would likely be excluded, and in the unlikely event it was not, it would likely be excluded under 403, due to the unclear if extant probative value. Students should be awarded points if they are able to articulate specific inferences the jury might make, such as that accusations of "alcoholism" might lead a jury to decline to award damages even when they think they are deserved.

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1)

1. Nurse Nan testimony

For evidence to be admissible it must be both logically and legally relevant.

Logical Relevant - Tendency Test

Logical relevance is determined by the tendency to prove, or disprove, a disputed fact of consequence.

Here, Nurse Nan is testifying at trial about a doctor for whom she works about a surgery she witnessed. Courts place a high value on percipient witness testimony and Nurse Nan's testimony has a high tendency to prove, or disprove, how Dr. Doom performed before, during, and after the surgery at issue.

Thus, Nurse Nan's testimony is logically relevant.

Legal Relevance - Balancing Test

Legal relevance is determined by balancing the probative value of evidence with the risk of unfair prejudice, confusing the jury, ~~and~~ undue delay.

Here, Nurse Nan's testimony is highly probative if she was one of the few, if any, other people beside Dr. Doom, who were awake and conscious in the room while Dr. Doom operated on Dusty. As Nurse Nan knows Dr. Doom well enough to know how steady his hands were in the surgery and what he drank before, her testimony is highly probative and offers little risk of unfair prejudice.

Thus, Nurse Nan's testimony is legally relevant.

Witness Competency

Witnesses are generally presumed competent. A witness must have personal knowledge of the issue and attest they will tell the truth. A witness must be able to attest, recollect, communicate, and appreciate the necessity of telling the truth and the consequences of a lie.

Here, Nurse Nan (NN) is testifying in Dusty's (D) case-in chief for medical malpractice against Dr. Doom (DrD). NN has personal knowledge of DrD's proclivities and methods for cataract surgery. NN knows that he drank gin prior to the surgery and that DrD's hands were unsteady during the procedure. Based on the facts it seems NN is a competent witness.

Thus, NN's testimony will not be excluded based on lack of witness competence.

Hearsay

Hearsay is an out of court statement offered for the truth of the matter asserted (TOMA). Hearsay (HS) is generally inadmissible unless the statements are subject to an exclusion or offered for a non-TOMA purpose.

Percipient Witness

Here, NN is a percipient witness as she was working with DrD on the day of the surgery at issue and was in the operating room while the procedure took place. As NN is a percipient witness her testimony is admissible as it is not considered HS.

2. DrD's Testimony

Logical Relevant - Tendency Test

See rule above.

Here, DrD, the surgeon who performed the procedure is taking the witness stand. As the doctor is the only one, based on the facts, in the operating room who was awake and had the apparent skill to perform the procedure, his testimony would have a tendency to prove, or disprove, many facts at issue.

Thus, DrD's testimony is logically relevant as he is the party which the suit is being brought against.

Legal Relevance - Balancing Test

See rule above.

Here, there are a limited number of people who were present in the operating room, and there is only one person who the suit is being brought against. As DrD's medical practice is being challenged, what he says is legally relevant before, during, and after the procedure.

Thus, DrD's testimony is legally relevant.

Witness Competency

See rule above.

Here, DrD is testifying after NN has testified that he took two shots of gin prior to performing a surgery. If a doctor is willing to drink alcohol before a medical procedure, there is at least enough information to question whether DrD would drink alcohol before offering his testimony. As the facts do not suggest either way whether DrD did consume alcohol prior to his testimony, so his testimony would likely be considered admissible.

Thus, as witnesses are generally presumed competent, DrD would be considered competent to testify.

Hearsay

See rule above.

Here, DrD is bringing up a statement he made to D during a follow-up appointment. That statement was made out of court, and even though DrD is the one who made the statement and he is currently testifying, (a defendant cannot testify to their own out of court statements.) Thus, DrD's statement is HS and excluded from evidence unless allowed in by an exception discussed below.

they can if HS exception applies.

Public Policy

Settlement Offers & Negotiations

As the court wants to encourage parties to negotiate in good faith in an attempt to try to settle prior to taking a case to trial, settlement offers and negotiations are inadmissible as they are out of court statements subject to HS. As the facts state that a claim for medical malpractice was made prior to the facts stating that DrD made the statement of "I am sorry for the pain. I am offering you \$40,000 for a settlement," DrD is presumed to have been aware that a claim, or the intent to file a claim, was at issue.

Thus, if DrD knew D had filed a claim, or intended to file a claim, his statement offering her \$40K would likely be considered inadmissible as it is part of a settlement offer.

Sympathy

California courts want to encourage citizens to be charitable in the acts and words and, therefore, exclude statements of sympathy. DrD does state "I am sorry for the pain" as

good

part of the statement at issue. As discussed above, that statement would likely be considered a settlement offer and would likely be excluded, but it would also be excluded under the California Evidence Code (CEC) as an expression of sympathy.

Thus, DrD's ^{both} statements to D would likely be inadmissible.

3. Liability Insurance

Logical Relevant - Tendency Test

See rule above.

Here, the fact that DrD has liability insurance is relevant as it has a tendency to prove that DrD is the owner of his practice and is responsible for maintaining insurance to run a functioning practice.

Thus, DrD's insurance is logically relevant.

Legal Relevance - Balancing Test

See rule above.

Here, if D is going to win a settlement it will likely be paid by DrD's insurance or DrD himself.

Thus, the presence of insurance is legally relevant.

Hearsay

See rule above.

Here, D wants to offer evidence of DrD maintaining liability insurance. This is an out of court statement/writing that would not be able to be offered to prove that DrD could pay or that DrD was liable. Doctors are not allowed to practice without medical malpractice insurance. Courts want to encourage practitioners to maintain their insurance and their practices, thus, the presence of liability insurance is generally inadmissible. Liability insurance is only allowed to be offered for control or ownership.

Limiting Instruction

If D wants to offer evidence of DrD's liability insurance D would only be able to offer it for the limited purpose of showing that DrD is in control, or the owner, of his practice. D would not be able to offer evidence of DrD's insurance to show that DrD has the ability to pay.

4. Dr. Better's Deposition Transcript

Logical Relevant - Tendency Test

See rule above.

Here, how a surgery was performed is subject to opinion. As the facts state Dr. Better (DB) was the only other ophthalmologist who offered their opinion of DrD's performance.

Thus, another practicing physician's opinion expressed under oath, subejct to cross exam is relevant to prove, or disprove, facts at issue.

Legal Relevance - Balancing Test

See rule above.

Here, DB says the eye lens that DrD placed was too low and his surgical practice deviates from the standard of care. These statements are the essence of a malpractice claim stating that DrD deviated from the standard of care.

Thus, the value of his testimony is highly probative and has a low risk of unfair prejudice, so the testimony of DB is legally relevant.

Hearsay

See rule above.

Here, D wants to introduce statements made at a deposition by DB. DB died before the present trial and is, as a result, unavailable. As DB's statements were made out of court, the statements are subject to HS.

Former Testimony

If a declarant is unavailable (due to death, privilege, refusal to testify, etc) but offered testimony regarding the present issue where the party was under oath and was subject to cross-examination, then that testimony can be admitted as a hearsay exception.

Here, all parties were present at the deposition and DB was subject to cross exam. DB was testifying to the poor performance of DrD on D's surgery.

Thus, the subject of the testimony was the same, the parties had a chance to examine DB, and he was under oath, so his deposition testimony would be admitted.

END OF EXAM

*argument was very good!
could be more broken argumentation
good organization & incorporation
of facts. Hit main issues.*

80

2)

Call 1) Medical Records and Following Statements by Bob

Logical Relevancy (Tendency Test)

Evidence is found logically relevant when the evidence has a tendency to prove or disprove a disputed fact of consequence.

Here, the subpoenaed and authenticated medical records from Victor's hospital trip and statements made by Bob are logically relevant because they have a tendency to prove that Victor was suffering from a gun shot wound.

A court would find the medical records and statements logically relevant.

Legal Relevancy (Balancing Test)

Courts have the discretion to find evidence inadmissible when the probative value of the evidence is substantially outweighed by prejudicial value. Additionally, courts have the discretion to find evidence inadmissible if they cause a substantial waste of time or mislead the jury, *or confuse the jury.*

Here, the probative value of the medical records and Bob's statements outweigh the prejudicial influence the statements may have on the jury. Both the statements made and the medical record are important to prove the truth of the matter asserted, and they do not create undue influence on the jury against the defendant.

A court would find the medical records and statements legally relevant.

Competency

All witnesses are found to be competent unless otherwise shown the witness. does not recall the events due to vision, hearing, or failure to understand the truth.

Here, the medical staff will be found competent because there are no facts to indicate otherwise. There is also insufficient evidence to support Bob being incompetent.

A court would find all parties competent.

Hearsay

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

Here, the statements made by Bob to the hospital staff and the medical records would be considered hearsay on the face, but there are several exceptions discussed below.

A court would likely find the medical records and statements by Bob hearsay on the face. Exceptions to admit the evidence below.

Hearsay exception: Medical Records

A hearsay exception is a medical record exception, which allows evidence to be admissible if the medical record was recorded for the medical purposes-- not testimonial purposes.

Here, the medical record stated "Patient brought into the emergency room. . . victor is in a lot of pain because he was just shot by dan. ." would be admissible under the hearsay exception of medical records because the statements made by Bob to the medical personal were used in the ordinary scope of medical treatment. The defense would likely assert that hospital personal for medical records are interested in finding the issue and resolving the problem, and the knowledge of how or why Victor got shot is irrelevant; however, the prosecution would likely get all the statements into evidence. What the

injury was will fall under medical record exception, and the remaining statements fall under present sense impression and / or excited utterances.

A court would likely find the statement "Victor is in a lot of pain because he was just shot" into evidence under the medical record exception. - Court would likely not allow who shot V there would be redaction

Hearsay exception: Business Records

An exception to hearsay is a business record exception, which allows records kept in the ordinary scope of the business that are recorded by a custodian of ^{records} the business to be found admissible.

Business records require the recorder to be a custodian of the business. Because medical professionals must keep detailed records of all patients and their respective issues, medical staff would be considered custodians of the business, and their records are performed in the scope of business.

A court would likely find the evidence admissible under a business record exception.

Hearsay exception: Present Sense Impression

For the hearsay exception for present sense impression to be applicable, the statement must be made spontaneously, in the scope of the event, where the person makes the statement at the time or shortly thereafter.

Here, Bob stated that "Victor is on a lot of pain because he was just shot by Dan." The use of the word "just" implies that the incident occurred moments before the event. The prosecution would assert that the statement should be admissible under this exception because Bob is still in the present sense, and the act of bringing Victor to the hospital was Bob acting with intent after the event occurred. The defense would likely assert that,

because the time frame is unknown, the statements made in the hospital may be too far removed for present sense, as there is insufficient evidence to show a time frame or if Bob was able to reflect since said statements.

A court would likely find the statements by Bob inadmissible under present sense impression because there is no evidence to support the time frame between when the incident occurred and when the statement was uttered.

Hearsay exception: Excited Utterances

For an excited utterance hearsay exception to be applicable, the statement must be made in a situation that would make a person excited or stressed.

Here, the statements made by Bob would likely be found admissible under the excited utterance exception because Bob brought his friend in right after Dan "just" shot Victor. Additionally, Bob "can't believe Dan shot him [Victor] over \$100." The second quote indicates that Bob at the time of the statement is still in disbelief of the situation.

A court would likely find the evidence admissible under the excited utterances exception.

Call 2) Police officer and Victor's Dying Declaration

Logical Relevance

See above.

Here, the police officers testimony Victors statements in the hospital are logically relevant because they have a tendency to prove that Victor was the victim of a gun wound inflicted by Dan.

A court would find the evidence logically relevant

Legal Relevance

See above.

Here, a court would find the probative value of the officer relaying Victor's statements significantly outweigh the prejudicial effect of admitting the evidence.

A court would find the evidence legally relevant.

Hearsay

See above.

Here, the statements by the police officer would be considered hearsay because the statements are reflective of an out of court statement by Victor used to prove that Victor was the victim of a gun shot wound as a result of being shot by Dan. The statements may fall under the hearsay exception dying declaration and / or excited utterances found below.

A court would find the statements on their face hearsay.

Hearsay Exception: Dying Declaration

For the dying declaration exception to be applicable, the person making the statement must have reason to believe they are about to die and the person must actually die. The reason this exception applies is because people on their death bed typically have no motive or reason to lie.

declarant
not under FRE

Here, the statements "Dan shot me, I'm dying" would ordinarily be admissible under this exception, however, because the doctors and nurses assured the victim that he was

going to be alright, and the doctor stated that the victim was going to recover and was in no imminent danger of dying, the statements are not going to be admissible under this exception. Although Victor did die from Dan through proximate cause, the death was not immediately after or relatively close to the time the statements were made.

A court would likely find the statements inadmissible under the dying declaration exception.

It is the declarant's belief in dying that is key.

Hearsay Exception: Excited Utterance

See above.

Here, the statements "Dan shot me, I'm dying" may be admissible under the excited utterance exception. Victor recently undergone a procedure to drain fluids from his chest and re-inflated his lung. During this procedure, he was likely unconscious. At the time he was conscience again, the excited utterance or stressful state he was in would take effect. Victor was likely extremely stressed due to being shot and waking up in a hospital.

A court would likely find the statement admissible under the excited utterance exception.

Call 3) Oscar: the real shooter?

Logical relevance

See above.

The testimony of Tina is logically relevant because it has a tendency to prove who the potential shooter is.

A court would find Tina's testimony logically relevant.

Legal relevance

See above.

The probative value of finding the actual killer of Victor would substantially outweigh any prejudice against the defendant because the court needs to know who the shooter is.

A court would find Tina's testimony legally relevant.

Hearsay

See above.

Here, the statements made by Tina are out of court statements used to prove that Oscar was the one who fired the gun, resulting in the death of Victor. Because there is no additional proof, no other witnesses, and Tina cannot recall, the statements and testimony by Tina would be found inadmissible.

A court would find Tina's testimony inadmissible.

missed
• statement re
Declar. ag. Felwest
HS exception

Motive **Bias**

Tina had motive to state Oscar was the one who is responsible for Victor's death. Tina is Dan's girlfriend, Victor is unable to testify due to being dead, Oscar is unable to testify due to being dead, and Dan is on trial for murder. Tina had motive to place blame on Oscar to keep her significant other out of jail and place blame on one who could not testify.

• missed main issue
• under FRE, declarant
does not need to die

END OF EXAM

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3)

1. OSCAR'S TESTIMONY

LOGICAL RELEVANCY

Evidence is relevancy if it has a tendency to prove or disprove a disputed fact of consequence.

Here, the plaintiff's would argue that Oscar's testimony about Todd having his license suspended due to previous DUI's and Todd's reputation about being untrustworthy behind the wheel would be logically relevant because it has a tendency to prove or disprove the disputed fact of consequence being that there was negligent entrustment. It would likely prove the disputed fact being that Todd already had a reputation of being untrustworthy behind the wheel making Dun-Middleton to be liable for her injuries sustained.

The Defense would argue that Oscar's testimony about Todd's reputation would not be relevant due to the fact that the testimony Oscar would give would be related to something that happened three years prior. Since Todd's reputation and situation developed 3 years ago it would not be relevant to introduce evidence about this incident considering how long ago it happened.

However, the court would conclude that since the evidence has a tendency to prove or disprove a disputed fact of consequence it is allowed into evidence.

LEGAL RELEVANCY

A court can exclude relevant evidence if its probative value is substantially outweighed by the dangers of unfair prejudice, confuse issues, waste of time, or misleading the jury.

Here, the plaintiff's would argue that since Oscar's testimony is about Todd's reputation which was something the office knew about it would be logically relevant to the case at hand of negligent entrustment and it's probative value would not be substantially

outweighed by the dangers of unfair prejudice, would not waste the court's time , not confuse issues and would not mislead the jury.

Here, the defense would argue that though the evidence is relevant because of Todd's reputation, Oscar's testimony is likely to confuse issues and also create unfair prejudice against Dun-Middleton. The defense would argue that since it was so long ago, it does not necessarily make the defendant liable if Todd had fallen off the wagon (or began drinking again). Though the cases against Todd's driving under the influence had occurred three years prior, it does not necessarily mean that the defendants knew Todd was drinking that morning. The confusion of the issues would be whether the company knew of Todd's current drinking behavior, in which this case they did not. Thus, the court would exclude Oscar's testimony because it is not relevant.

use limiting instruction

COMPETENCY

All witnesses are able to testify as long as they have personal knowledge and are able to accurately tell the truth.

Here, the plaintiff offered Oscar to testify in court. Here, the plaintiff would argue that Oscar is competent to testify due to the fact that he has personal knowledge because Oscar works at Dun-Middleton and has personal knowledge of what happens in the work place.

Here, the defense would argue that Oscar would not be competent to testify to the current knowledge of Todd's reputation. Here, the defense would argue that though in Oscar's opinion Todd is not trustworthy behind the wheel as of 3 years ago, and his personal knowledge of Todd having to get rides to go to work from Ryan doesn't necessarily mean that management was made aware of the convictions. Therefore, likely not making the office not liable for Negligent Entrustment.

Here, the court is likely to rule that Oscar is competent to testify.

2. CREED'S TESTIMONY

LOGICAL RELEVANCY

Evidence is relevancy if it has a tendency to prove or disprove a disputed fact of consequence.

Here, the plaintiff would argue that Creed's testimony has a tendency to prove the disputed fact of consequence being that within the past four years there have been 6 different workers struck by vehicles in the office warehouse parking lot and he reported the incident to management. Here, the Plaintiff would argue that this testimony would be logically relevant to prove that the defendant's knew about the incidents and still decided to continue their acts which led to Meredith's injuries. This would be logically relevant to prove that the defendant's are likely to be found liable.

Here, the defendants would argue that Creed's testimony is not logically relevant to prove or disprove the disputed fact of consequence because it does not necessarily prove that those incidents are connected to Meredith's injuries. Here, the situations are different because there were Staff from the office and not from the warehouse operating that day. By introducing this evidence into court would not prove or disprove that the office would be liable for those incidents as well nor their connection of the warehouse to the injuries

sustained that day. Therefore the court would not likely find that evidence logically relevant.

Thus, it is likely that the court would allow Creed's testimony into evidence.

LEGAL RELEVANCY

A court can exclude relevant evidence if its probative value is substantially outweighed by the dangers of unfair prejudice, waste of time, confuse the issues or misleading the jury.

Here, the plaintiff's would argue that the probative value of Creed's testimony is likely to not waste the courts time, nor cause unfair prejudice, nor mislead the jury or confuse the issues. The plaintiff's would argue that by introducing Creed's testimony into evidence it would likely prove the fact that instances had happened before within the past few years and the company would be liable for the injuries because they knew about it from Creed's reports of those incidents. By the defendant's knowing about these prior incidents and still letting office workers that were unexperienced in warehouse work to manage and drive equipment would be relevant and not the confuse the issue of the defendant's being liable for the injuries incurred.

Here, the defense would argue that Creed's testimony would likely confuse the issues or mislead the jury because those incidents were reported by Creed however, it doesn't necessarily connect the injuries that had occurred prior due to warehouse workers actions to the actions committed by the office staff. Here, Dwight was in charge of the tasks to do that day and assigned each person to do their work. The worker's that were struck does not mean that the office is in fact connected to those events specifically.

Therefore, the court would likely allow the Creed's testimony into evidence.

COMPETENCY

All witnesses are able to testify as long as they have personal knowledge and are able to accurately tell the truth.

Here, the plaintiff's would argue that Creed is competent to testify as to the worker's being struck because he personally saw the workers being struck by the vehicles.

The defense would argue that Creed is not competent to testify the injuries he had seen happen had happened in the office parking lot and since the facts do not state if the accident had occurred in the office parking lot or in the warehouse building it is not likely that there is a connection between the two incidents.

The court is likely to find Creed competent to testify.

SPECIAL RELEVANCY: SIMILAR HAPPENINGS

Similar happenings are generally inadmissible unless offered to prove the existence of the hazard and or prior notice.

Here, the plaintiff's would argue that the similar happenings are admissible in this situation to prove that these incidents had occurred prior and would make the defendant's liable for the plaintiff's injuries due to their prior knowledge and notice of those incidents.

Therefore the court would likely allow this into evidence.

3. TOBY'S TESTIMONY

LOGICAL RELEVANCY

Evidence is relevancy if it has a tendency to prove or disprove a disputed fact of consequence.

Here the plaintiff is likely to argue that Toby's testimony is likely to be relevant to prove that as to each person involved in the incident. The plaintiff's would argue that this evidence would be highly relevant in this case and as to the incident that occurred.

Here the defense would argue that Toby's testimony should be allowed because it would be irrelevant because it does not prove or disprove the fact that Meredith was injured nor whether the employment of each individual is relevant to the situation of an accident that occurred during the employment.

The court is likely to allow Toby's testimony into evidence.

LEGAL RELEVANCY

A court can exclude relevant evidence if its probative value is substantially outweighed by the dangers of unfair prejudice, confuse issues, waste of time, or misleading the jury.

Here, the plaintiff is likely to argue that Toby's testimony does not substantially outweigh the dangers of unfair prejudice, not confuse the issues, nor waste the courts time nor mislead the jury because Toby works at the company and also this does not confuse the issues of a work-related accident.

The defense would argue that though Toby's testimony may be relevant it would be substantially outweighed by the danger so of unfair prejudice because in regards to each person's employment does not have anything to do with the work-related incident that Meredith sustained the day of the incident.

COMPETENCY

All witnesses are able to testify as long as they have personal knowledge and are able to accurately tell the truth.

Here, the plaintiffs would argue that Toby is competent to testify as long as he can recall and accurately tell the truth though he cannot speak his eyes speak for him.

The defense would argue that though Toby is can speak through his eyes it does not indicate as to whether he can accurately tell the truth even through interpretation. Toby's eyes may get irritated and he may need to blink at the time he's being asked a question. Making Toby's testimony unlikely to be accurate.

Therefore the court is likely to find that Toby is not competent to testify.

4. ANGELA'S TESTIMONY

LOGICAL RELEVANCY

Evidence is relevancy if it has a tendency to prove or disprove a disputed fact of consequence.

Here, the defense would argue that Angela's testimony is not relevant because it does not prove or disprove the fact that the injury occurred.

Here, the defense would argue that Angela's testimony would be relevant because it has a tendency to prove or disprove the fact that though Meredith was injured it is likely that Meredith was careless and was comparatively negligent in her own injuries.

LEGAL RELEVANCY

A court can exclude relevant evidence if its probative value is substantially outweighed by the dangers of unfair prejudice, confuse issues, waste of time, or misleading the jury.

Here, plaintiff's would argue that the court should exclude Angela's testimony because it is likely to create unfair prejudice for Meredith's case and likely to confuse the issues of the injury that occurred at work and whether Meredith herself was careless.

The defense would argue that the introduction of Angela's testimony would not be unfair prejudice because by introducing this evidence it would be fair to show that Meredith could have caused her own injury as well.

Here, it is likely that the court would allow Angela's testimony into evidence.

COMPETENCY

All witnesses are able to testify as long as they have personal knowledge and are able to accurately tell the truth.

Here, Angela would be a competent witness because she has a personal knowledge of Meredith's character.

END OF EXAM