

San Luis Obispo College of Law

EVIDENCE

Mid Term Examination

FALL 2019

Professor S. Lizardo

INSTRUCTIONS:

There are three (3) questions in this examination.

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

MIDTERM EXAMINATION FALL 2019 EVIDENCE

QUESTION #1

Payne was injured in a slip and fall accident at the Dreamer Resort when he dove off a diving board into the swimming pool. He struck his head on the bottom of the pool, rendering him unconscious. Prior to the dive, Payne had put on a pair of aqua shoes (swim shoes) for stability in the preparation for the dive.

Larry Lifeguard rescued Payne and Manager Max called for medical assistance. Once the ambulance arrived, Payne had regained consciousness and declined medical help.

Payne brings a cause of action against Dreamer Resort, contending the resort was negligent in permitting food to be served in the pool area. Further, Payne alleged he slipped and fell on ketchup that was on the diving board. This caused Payne to slip on the ketchup and not make a proper dive.

One month after Payne's accident, the Dreamer Resort removed the diving board from the pool area and posted "No Food" signs in the pool area. However, the Dreamer Resort denies liability stating that the Food Court had a lease on the pool area and is solely responsible for the accident, not the resort.

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

Answer according to California Law.

1. During Payne's case-in-chief, he testified that he placed aqua shoes on for stability. Also, that he received a **properly authenticated letter** from Manager Max of Dreamer Resort offering him \$75,000 to resolve the lawsuit. He declined the offer.
2. Next, Larry Lifeguard testified that months before Payne's accident, he observed six people slip and fall on a food item on the diving board. He filled out accident forms and gave them to Manager Max, of the Dreamer Resort.
3. Over objection, Payne introduces into evidence a **properly authenticated** Dreamer Resort premises liability coverage policy. The policy includes coverage of the pool area, the diving board area, the Food Court and the surrounding area.
4. Then, Payne introduces a **properly authenticated** paid invoice from Manager Max from Dreamer Resort. The paid invoice was for the diving board removal in the pool area. The invoice was for services rendered one month after Payne's fall.

MIDTERM EXAMINATION FALL 2019 EVIDENCE

QUESTION #2

Mike is federally prosecuted for robbery and money laundering. Mike is the founder and CEO of the non-profit "Robbin' Hood" foundation. Prosecutors allege Mike created the Robbin' Hood foundation in January 2018 as a vehicle to launder money he obtained from robbing banks. Mike is alleged to have committed two bank robberies – one on July 1, 2018 and one on September 1, 2018. During each robbery, the person who robbed the bank wore a robin hood costume and a mask.

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

1. In her case in chief, the Prosecutor seeks to introduce evidence that in February 2018 Mike was arrested for stealing a Robin Hood costume and a Mask from a costume store.
2. Next, the Prosecutor calls Betty. Betty was outside the bank on September 1, 2018 when she saw a man in a Robin Hood costume and mask run out of the bank with a bag of money. She saw the man's face when he took off his mask while running away. A week later, a police officer came to her house and showed her a photo lineup. She identified the robber but testifies at trial that she cannot remember the man she identified in the lineup. The prosecutor then calls the police officer and represents that the officer will testify that when he showed Betty the photo lineup, she pointed to Mike's photo and said, "That's the bank robber." The defense objects to the police officer's proposed testimony.
3. Next, the Prosecutor calls Investigator Ramirez. Ramirez spoke to Ed, the Chief Financial Officer for Robbin' Hood Foundation. Ed told Ramirez that on July 2, 2018 and September 2, 2018 (one day after each of the bank robberies occurred), Mike brought Ed a duffle bag full of money and instructed Ed to deposit the funds into various different foundation accounts. Ed asked Mike where the money came from. Mike said, "I robbed a bank". Ed thought Mike was joking and deposited the money as Mike requested. Ed was subpoenaed by the prosecution to testify at Mike's trial. However, at the time of trial, despite the diligent efforts of police, Mike cannot be located. The

Q2 continued...

prosecutor establishes that a \$50,000 payment was made to Ed from the Robbin' Hood foundation a week prior to Ed's scheduled testimony in this trial. The Prosecutor seeks to introduce:

- a. A **properly authenticated** text message from Mike's phone to Ed's phone that says: "I hope you take a well-deserved, very long vacation." and
 - b. Ed's statements to Investigator Ramirez.
4. Next, the Prosecutor calls Mary, Mike's former secretary. Mary saw Mike bring a duffle bag full of money into Ed's office on July 2, 2018. Mary jokingly said to Mike, "where did you get all that money? Did you rob a bank?" Mike responded with a smile and a nod.

MIDTERM EXAMINATION FALL 2019 EVIDENCE

QUESTION #3

Danielle is 36 years old, has no medical training whatsoever, and opened a doctor's office at the beginning of 2019. She pretended she was a physician. She advertised locally as a family practice doctor. Several families took advantage of her extremely low rates and group discounts. In order to keep up appearances, Danielle gave injections, gave physicals, and even drew her patients' blood, providing made-up blood test results. Toward the end of the summer, Danielle advertised that she offered discounts for physicals for high school athletes. A number of local parents took advantage of the discount and brought their high school students for physicals.

During this time, Danielle used the intimate environment created by the physical to make overtures to the male high school students. She had sex with several of her male patients, including two thirteen year olds and one fifteen year old. One night, the police were called to Danielle's house regarding a domestic disturbance. When police arrived, they found Danielle's husband suffering severe injuries from where Danielle, according to her husband, had beaten him with a tire iron about his head and shoulders. The subsequent investigation brought to light all of Danielle's illegal activities in her alleged illegal practice of medicine.

Danielle was charged with practicing medicine without a license, battery on the theory that each injection, physical exam, and blood draw constituted a battery, sexual molestation of several minors, and spousal abuse.

Several months prior to trial, the prosecution informed Danielle's attorney that they intended to introduce the following evidence at trial:

- 1) A 2015 conviction for spousal battery in which the arresting officer responded and found Danielle's husband suffering from a minor stab wound. Danielle pleaded no-contest and was found guilty.
- 2) A 2012 conviction for fraud and forging a prescription in which Danielle had posed as a nurse practitioner under the pseudonym "Dane," and wrote opiate prescriptions to anyone who paid her to do so. She pleaded not guilty but was found guilty by a jury.
- 3) Testimony from a former high school student, Will. In 2008, Will, who has the mental development of a six year old, was in a special education class where Danielle was a teacher's aid. Will's mom noticed Will drawing sexual positions and when she asked Will about it, he said he had sex with Danielle. Police arrested Danielle, but the District Attorney declined to prosecute.

Please analyze the admissibility of each item of evidence under both the Federal Rules of Evidence and California Rules of Evidence. **Do not discuss use as witness impeachment.**

EVIDENCE-FALL 2019-QUESTION #1 ANSWER OUTLINE PAYNE – S.LIZARDO

PLEASE NOTE: Student answers may argue different outcomes but should determine the issues. This Payne essay concerns Special Relevancy Issues and Public Policy Exclusions as per CEC. The students should know CEC 352 and 250, but specifically listing code sections numbers is not required.

Also, Authentication is not intended as an issue because that is covered next semester. This is the reason the call of the question may state "properly authenticated."

1. THE DREAMER RESORT LETTER: OFFER OF \$75,000 to Payne

Logical Relevancy/CEC 250 Tendency Test

As per CEC 350, only relevant evidence is admissible

Evidence is logically relevant if there is a tendency to prove or disprove any disputed fact that is of consequence in the determination of the cause of action.

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

The offer by Dreamer Resort of \$75,000 to Payne may be considered a settlement offer and has a tendency to establish that the resort was negligent in not removing the diving board from the pool premises. The letter is highly relevant to establish fault or negligence of the Dreamer Resort.

Legal Relevancy/Balancing Test CEC 352

The trial court has the discretion under CEC 352 to exclude evidence if the probative value is substantially outweighed by the danger of unfair prejudice. Here, the danger of unfair prejudice exists because the jury may equate the \$75,000 offer to Payne as a signal that the resort is liable.

Special Relevancy

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

Here, the letter offer by Dreamer Resort by Max was for \$75,000 in settlement of Payne's negligence claim. There is a reasonable inference that Max is an authorized person to deal with

the resort's issues. The fact Payne rejected the claim and the offer should be inadmissible as it is against public policy.

Payne's testimony about the letter would be deemed inadmissible.

PAYNE'S COMPETENCY AS A WITNESS

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

Here, although Payne was initially unconscious, it does not appear this injury affected his memory. His testimony is relevant because he is a **percipient witness** and is the plaintiff in this civil negligence cause of action. His testimony is based on **personal knowledge of the diving fall**.

Lay opinion must be based on rationally based perceptions. The fact that Payne put on aqua shoes or swimmer shoes was because he was aware of the diving board associated conditions will be admissible.

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

2. LARRY LIFEGUARD'S TESTIMONY

Logical Relevancy- defined above.

Larry's testimony as a percipient witness has a tendency to establish that Payne was injured by an diving board with ketchup on it. fraudulent claims or that he is comparatively negligent by not being diligent in his diving form. The resort may argue that Payne was careless by not investigating the diving board beforehand. The resort may be able to make an offer of proof that it was the ketchup from the Food Court, not the resort that caused Payne to slip and fall off the diving board.

Legal Relevancy- CEC 352 defined above.

The trial court has discretion to weigh the probative value of the 2018 prior insurance claim against unfair prejudice.

See Special Relevancy below.

Similar Happenings: Six Claims and Prior Claim by Payne

Six Prior Claims: Notice of Dangerous Diving Board

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

3. THE DREAMER RESORT PREMISES LIABILITY INSURANCE POLICY

As per CEC 350, only relevant evidence is admissible.

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

Here, the insurance policy has a tendency to establish that the Dreamer Resort does in fact own or control the pool premises. Part of a negligence claim includes duty, breach of a duty, causation and damages. Therefore, the policy may assist in proving the control of the pool area. Since the insurance policy has a tendency to establish a duty, it may be significant in the disputed claim.

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

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

Special Relevance-Relevant Policy Exclusions

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

Here, Dreamer Resort, a party, is denying that the business has any dealings with the maintenance of the pool area and diving board. To prove otherwise, the policy will be admitted in since the premises maintenance is disputed. The Resort is "blame shifting" to the Food Court. Which leased the area. The premises liability policy is highly relevant because it tends to establish that Dreamer Resort is in fact doing business and since the business is denying liability, the policy may help establish "ownership or control" of the pool area.

However, the Dreamer Resort may argue that it is not the owner or manager of the pool area and pool area is the responsibility of the Food Court company. This is a weak argument because a business does not insure premises where it has no business interest.

The liability coverage policy is admissible to show that in fact, Dreamer Resort did "own an/or control" the premises where Payne slipped and fell off the diving board. Most likely, the diving board and pool area where Payne fell will fall under "premises."

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

Thus, the policy is admissible to prove that the resort had "ownership or control" over the pool area, but not that the resort was negligent.

4. SUBSEQUENT REMEDIAL MEASURES: INVOICE

Logical Relevancy- defined above.

The paid invoice has a tendency to establish Dreamer Resort knew of the diving board problem and did nothing to repair or fix the problem until after Payne's fall. Also, the subsequent remedial measure effort to minimize the dangerous conditions indicates that the Dreamer Resort, not the Food Court, controlled the premises. Also, the fact that the resort paid for the diving board removal and posted signs has a tendency to establish that the business had a duty to maintain the pool area and diving board and breached its duty.

See Special Relevancy below.

Legal Relevancy- CEC 352 defined above

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

See Special Relevancy below.

Special Relevancy- Subsequent Remedial Measures

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

Here, the paid invoice is after Payne's fall in the pool area of the Dreamer Resort. The invoice is for the removal of the diving board. The fact the resort removed the diving board and posted no food signs may show that there was an dangerous problem in the pool area because a service was hired to remove the diving board. However, the invoice will not be allowed in as evidence of fault as that is against public policy.

In the alternative, if the invoice is used to establish the Dreamer Resort, because the business paid for the removal of the diving board, the court could allow the invoice in for the **limited purpose of establishing ownership or control.**

Evidence-AnswerOutline-F19-JDavenport-MCL&SLO

Mike is federally prosecuted for robbery and money laundering. Mike is the founder and CEO of the non-profit "Robbin' Hood" foundation. Prosecutors allege Mike created the Robbin' Hood foundation in January 2018 as a vehicle to launder money he obtained from robbing banks. Mike is alleged to have committed two bank robberies – one on July 1, 2018 and one on September 1, 2018. During each robbery, the person who robbed the bank wore a robin hood costume and a mask.

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

1. In her case in chief, the Prosecutor seeks to introduce evidence that in February 2018 Mike was arrested for stealing a Robin Hood costume and a Mask from a costume store.

Prior Bad Act Evidence that is Independently Relevant:

Evidence of other crimes or misconduct is admissible if these acts are relevant to prove some issue other than the defendant's character or disposition to commit the crimes charged. Such crimes or acts may be admissible for other purposes (such as to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, ect.) whenever those issues are relevant in either a civil or criminal case. (FRE 404(b))

Evidence that Mike was arrested for stealing a Robbin Hood costume and mask would be relevant to show a plan/preparation to commit the bank robberies. It could also be relevant in establishing Mike as the bank robber if it could be established that the costume and mask Mike stole is the same costume and mask used in the bank robberies.

403 Analysis:

Mike will argue that the probative value of the evidence is substantially outweighed by the risk of unfair prejudice of allowing the prior arrest for theft. Although there is a risk that the jury could use the arrest for the theft of the costumes for a propensity theory, the probative value of the evidence is strong and a court would allow it to come in.

2. Next, the Prosecutor calls Betty. Betty was outside the bank on September 1, 2018 when she saw a man in a Robin Hood costume and mask robbing the bank and taking away the money. She saw the man's face when he took off his mask while running away. A week later, a police officer came to her house and showed her a photo lineup. She identified the robber but testifies at trial that she cannot remember the man she identified in the lineup. The prosecutor then calls the police officer and represents that the officer will testify that when he showed Betty the photo lineup, she pointed to Mike's photo and said, "That's the bank robber." The defense objects to the police officer's proposed testimony.

Relevance: The police officer's testimony is relevant because it connects Mark to the bank robbery.

Prior Identification

1. The declarant testifies and is subject to cross examination about the statement, and
2. The declarant identifies a person as someone the declarant perceived earlier

Under the Federal Rules, a prior statement of identification that meets these requirements is not considered hearsay. Betty made the prior identification a week after the robbery. Betty was on the witness stand and subject to cross examination. Although Betty has no present recollection of the man she identified, she does verify that she made a prior identification of the robber. Thus, the statement of identification is admissible.

3. Next, the Prosecutor calls Investigator Ramirez. Ramirez spoke to Ed, the Chief Financial Officer for Robbin' Hood Foundation. Ed told Ramirez that on July 2, 2018 and September 2, 2018 (one day after each of the bank robberies occurred), Mike brought Ed a duffle bag full of money and instructed Ed to deposit the funds into various different foundation accounts. Ed asked Mike where the money came from. Mike said, "I robbed a bank". Ed thought Mike was joking and deposited the money as Mike requested. Ed was subpoenaed by the prosecution to testify at Mike's trial. However, at the time of trial, despite the diligent efforts of police, Mike cannot be located. The prosecutor establishes that a \$50,000 payment was made to Ed from the Robbin' Hood foundation a week prior to Ed's scheduled testimony in this trial. The Prosecutor seeks to introduce:
 - a. A properly authenticated text message from Mike's phone to Ed's phone that says: "I hope you take a well-deserved, very long vacation." and
 - b. Ed's statements to Investigator Ramirez.

Text Message:

This statement is being offered to show that Mike procured the unavailability of Ed so that he would not testify against him at trial. It is an out of court statement, being offered for the truth of the matter asserted.

Statement of a Party Opponent: The text message was made by Mike, who is a party opponent of the Prosecution. Thus, it would be admissible as an exception to the hearsay definition.

Police Officer's Testimony:

The police officer seeks to testify to the out of court statements made by Ed. The statements are being offered for their truth – that Mike brought a duffle bag full of money and instructed Ed to deposit them into different accounts.

There is a hearsay-within hearsay issue as well. Ed, in his statement to police relates a statement Mike made to Ed.

Forfeiture by wrongdoing

The statements of a person who is unavailable as a witness is admissible when offered against a party who engaged in or acquiesced in wrongdoing that intentionally procured the declarant's unavailability. (FRE 804(B)(6)) A party forfeits his right to object on hearsay grounds to the admission of an unavailable witness' statements when the party's deliberate wrongdoing procured the unavailability of the witness.

Mike's statement to Ed would qualify as an exception to the hearsay definition as a statement of a party opponent.

Not Former Testimony:

There is no indication that Ed ever previously testified at a hearing under oath against Mike or that Mike ever had a chance to cross examine, so the statement would not fall under this exception.

Confrontation Clause:

A defendant who procures the absence of a witness forfeits the defendant's confrontation clause rights as to that witness, so there would not be a confrontation clause issue.

4. Next, the Prosecutor calls Mary, Mike's former secretary. Mary saw Mike bring a duffle bag full of money into Ed's office on July 2, 2018. Mary jokingly said to Mike, "where did you get all that money? Did you rob a bank?" Mike responded with a smile and a nod.

Relevance: The relevance of the duffle bag full of money is that it has some tendency to support the allegation that Mike robbed the bank. He had a duffle bag full of money the day after the robbery.

The statement Mary made to Mike and his response is potentially relevant to show that Mike in fact robbed the bank.

Mary can testify to what she observed as she has personal knowledge that Mike came into Ed's office with a bag of Money.

Hearsay:

Implied adoptive admission

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

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

Mary made a statement to Mike asking him, "where did you get all that money? Did you rob a bank?" Mike responded to that statement with a smile and a nod, so it appears that he heard the statement and had an opportunity to deny it. The smile and nod are an equivocal reply. The issue here is whether a reasonable innocent person would have immediately denied the allegation. Mary was joking when she asked Mike if he robbed a bank. Thus, Mike could have not taken her statement seriously and thus, not have felt it was necessary to deny the allegation.

The students can argue it either way as long as they identify the issues.

EVIDENCE -ANSWER OUTLINE
MIDTERM EXAMINATION-FALL 2019 -
QUESTION #3

1) Item 1

- a. Relevance:
 - i. Conclusion: it is relevant
- b. Character evidence:
 - i. Rule against propensity
 - ii. MIMIC/MIAMI COP exceptions
 - 1. More likely exceptions are intent, motive, absence of mistake
 - 2. Not enough information to know whether they will apply.
 - iii. Statutory exception in CA – 1109
 - 1. Notice requirement met
 - 2. Not outside 10 year window
 - 3. FRE doesn't have DV statute (must use MIMIC)
 - iv. Conclusion: will likely be admitted under CA
 - v. Conclusion: more likely to be excluded under FRE
- c. 403/352:
 - i. Exclusion:
 - 1. Impermissible inferences of propensity
 - ii. Admission:
 - 1. Not remote in time
 - 2. Under CA – 1109 contemplates admission for policy reasons
 - 3. Limiting instruction as to how it can be used
 - iii. Conclusion: will like be admitted in CA
 - iv. Conclusion: more likely to be excluded under FRE

2) Item 2

- a. Relevance
 - i. Conclusion: it is relevant
- b. Character evidence:
 - i. Rule against propensity
 - ii. MIMIC/MIAMI COP exceptions
 - 1. Most likely theories are Common scheme, Intent, Motive
 - iii. Conclusion: admissibility likely depends on 403/352 analysis
- c. 403/352:
 - i. Exclusion:
 - 1. Impermissible inferences of propensity
 - 2. Somewhat remote in time (7 years old)
 - 3. Confusing of issues due to similarity
 - 4. Confusing of issues due to pseudonym
 - 5. No MIMIC use particularly effective

ii. Admission:

1. Limiting instruction as to how it can be used
- iii. Conclusion: likely be admitted to prove

3) Item 3

a. Relevance

- i. Conclusion: it is relevant

b. Character evidence:

i. Rule against propensity

ii. MIMIC/MIAMI COP exceptions

1. Most likely theories are common scheme, intent, motive

iii. Statutory Exceptions:

1. Federal: FRE 414

- a. Notice requirement met

- b. FRE 414 "Child molestation" only includes victims under 14, which does not apply to one of the victims in the current case. May only be admissible as to the 13-year-old victims.

2. CA 1108

- a. Notice requirement met

- b. Broader, applies to sex offenses including child molest

- c. No time limit on age of evidence

c. 403/352:

i. Exclusion:

1. Impermissible inferences of propensity
2. Remote in time
3. No conviction
4. Confusion of the issues
5. Mental development of witness adds emotional element that does not add to probative value

ii. Admission:

1. Limiting instruction as to how it can be used
2. Statutory exemption(s) contemplates admission for policy reasons.
3. Any MIMIC/MIAMI COP exceptions beyond statutory exceptions

iii. Conclusion: will like be admitted in CA

iv. Conclusion: will likely be admitted under FRE

d. Competence of witness

i. Ability to perceive and recollect

ii. Was able to draw and tell his mother about sex suggests ability to testify; not age-determinative

iii. Conclusion: likely competent with proper voir dire

1)

1. Payne's Case and Chief.

Relevance

Rule: All relevant evidence is admissible. Relevance is determined by the Balancing Test and the Tendency Test.

Tendency Test

The Tendency Test will determine whether or not a piece of evidence tends to make a matter of fact more or less probable. Here Payne (P) is asserting that he put on the aqua shoes to ensure he did not slip. He is offering this evidence to show that he took an abundance of caution and is not contributorily or comparatively liable for the event that caused his injury. For a Negligence case he must demonstrate that Dreamer Resort (D) breached their duty and the result of that breach caused P's injury and P suffered damages. The aqua shoe tends to show that P was abundantly cautious and tends to make his claim more likely. The testimony about the aqua shoes is relevant and admissible. P also asserts that the manager of D offered him 75k to resolve the lawsuit. This information tends to make P's claim more likely as well because if they were not negligent then they would not offer to settle. P's testimony about the settlement is relevant and is admissible

Balancing Test

The Balancing test weighs whether the probative value is greater than the prejudicial value. If it is more probative than prejudicial it is relevant. Here, P's testimony about the aqua sox is more probative than prejudicial because it does not cast blame on D, causing any undue prejudice. The settlement offer is more prejudicial but it is probative to demonstrate the likelihood that D feels responsible. This evidence may be barred by public policy (see below)

Competency of the Witness

In order to testify a witness must be competent. Competency is determined by whether or not the witness is of sound and reasonable mind, has personal knowledge about the items that she will testify about and if the testimony that is being offered is of value to the jury. Here Payne is testifying about his behavior. It is direct evidence and he has personal knowledge of all the circumstances. He is a competent witness.

Hearsay

Rule: Hearsay is an out of court statement offered to prove the matter asserted. It is generally inadmissible unless it falls under and Exemption or Exception.

Here, P is testifying that he received a properly authenticated letter from the Manager offering him a 75k settlement. This was an assertion stated, outside of court offered as proof of the matter asserted. P is using the letter to demonstrate that D is liable because they offered to settle. We know the letter was a valid offer from D because the fact pattern states that it was properly authenticated. This letter is hearsay and is inadmissible based on Special Relevancy.

Special Relevancy

Rule: Certain types of evidence are excluded because it goes against Public Policy. They are forbidden to allow for incentives to negotiate, compromise and settle prior to court. Public Policy encourages individuals to be properly insured and conduct themselves responsibly. Examples are; Subsequent Remedial Measures, Evidence of Liability Insurance, Offers to pay medical bills, Offers of Settlement, Retraction of guilty pleas.

Here the offer to settle falls under Special Relevancy and is barred to prove negligence.

Conclusion

The direct testimony of P about his aqua shoes will be allowed in but the offer to settle will be barred by public policy

2. Larry Lifeguard Testimony

Relevance

Rule: All relevant evidence is admissible. Relevance is determined by the Balancing Test and the Tendency Test.

Tendency Test

The Tendency Test will determine whether or not a piece of evidence tends to make a matter of fact more or less probable. Larry is testifying to two things. One, that he witnessed six people slip and fall on food items on the diving board and two, that he filled out accident forms and gave them to D. This evidence demonstrates that there had been a number of similar injuries and that D was on notice. This evidence has a tendency to make the plaintiffs case more likely and is relevant.

Balancing Test

The Balancing test weighs whether the probative value is greater than the prejudicial value. If it is more probative than prejudicial it is relevant. The probative value of the the prior injuries and the notice has a strong probative value that would outweigh the prejudicial concerns. It would pass the balancing test unless it is prohibited by either the hearsay rule or specific instances.

Competency of the Witness

In order to testify a witness must be competent. Competency is determined by whether or not the witness is of sound and reasonable mind, has personal knowledge about the items that she will testify about and if the testimony that is being offered is of value to the jury. Here Larry is testifying that he personally witness others fall. He is a lifeguard and may be considered an expert witness. He would have to be properly qualified through a series of questions which examine his knowledge and competency. If he is qualified, he may provide expert testimony as to the safety or lack thereof of the diving board and possibly the victims injuries. Otherwise Larry can give lay person testimony and if his testimony is of value you to the jury and trustworthy, it will be admissible.

Hearsay

Rule: Hearsay is an out of court statement offered to prove the matter asserted. It is generally inadmissible unless it falls under and Exemption or Exception.

Here, Larry is testifying to the fact that he as a result of the falls he witnessed, he filled out accident forms and gave them to the manager. These forms are hearsay within hearsay and the document must be properly authenticated as well as each item of hearsay would have to pass the relevancy and hearsay test. The forms assert out of court statements by others, written by Larry about prior

incidents that are offered as proof of the matter asserted. They would be barred unless they fall under one of the CEC exceptions.

Business Records

The business record exception allows documents that are prepared during the course and scope of business to be admitted despite being hearsay. The record must be completed by an employee during or shortly after an incident in order to meet the criteria. A custodian of the records must authenticate the record but it is not necessary for the custodian to have personal knowledge of the incident. They must have personal knowledge of the business protocol that directs the record.

Here, if the accident forms that Larry filled out met the aforementioned requirement and Larry or a custodian can authenticate them, they would be admissible.

Prior Similar Instances

Rule: Evidence of Prior Similar Instance is generally inadmissible. Prior Similar Instances are only allowed in cases that involve prior sexual bad acts (FRE) and in CEC sex crimes against minors, elder abuse and domestic violence. Prior Similar Instances is not permitted in Civil Cases unless the evidence of character is an element of the crime, such as defamation. Specific instance may sometimes be used to demonstrate notice however.

Here Larry witnessed six other people fall by food items previously. These circumstances are very similar and he filled out a claim form each time noticing his employer. The fact that the situations were so similar and the notification happened to the employer may allow for the evidence to come in as Notice.

Conclusion

The accident forms and the prior similar instances are admissible under Business Record Exception and as Notice by Prior Similar Instance.

3. Liability Policy

Relevance See Supra

The evidence of the liability coverage will be inadmissible due to Special Relevancy as discussed above. Public policy forbids the use of proof of insurance to prove liability. It may however come in to demonstrate ownership or control of the property especially because it lists the food court. A limiting instruction from the judge will be required to properly instruct the jury how to use the evidence that is provided.

Hearsay

Rule: Hearsay is an out of court statement offered to prove the matter asserted. It is generally inadmissible unless it falls under and Exemption or Exception.

Here, as above the documents are hearsay, they could come in under business records but they are forbidden as a matter of public policy

Conclusion the objection will be sustained.

4. Diving Board Invoice

Relevance See Supra

Here the diving board invoice will be relevant in the tendency test because it has a tendency to demonstrate that the hotel recognizes the problem and took steps to remove it. It will likely be more prejudicial than probative because it tends to show a guilty conscience and subsequent remedial measures. It will likely not be admissible based again on public policy.

Hearsay

Rule: Hearsay is an out of court statement offered to prove the matter asserted. It is generally inadmissible unless it falls under and Exemption or Exception.

Here, as above the documents are hearsay, they could come in under business records but they are forbidden as a matter of public policy because Subsequent Remedial measures cannot be used civilly to demonstrate liability. They can be used if D had said that it was too costly to make necessary changes and then did so later but here the fact pattern is silent to that premise.

Conclusion

The invoice will be barred as a matter of public policy.

END OF EXAM

2)

Mike is being sued in federal court for robbery and money laundering, so FRE will be used.

1.

In order to be admissible, evidence must be both logically and legally relevant.

Logical Relevance

Logical relevancy (tendency test) is if the evidence tends to prove or disprove a disputed fact of consequence. This tends to show that Mike did own a Robin Hood costume (possibly towards identity) and that he has a history of stealing.

Legal Relevancy

Legal relevance (balancing test) looks to if the probative value of the evidence outweighs the dangers of unfair prejudice, undue delay, confusion of the issues, waste of time, and misleading the jury. The evidence of a past crime may confuse the issues for the jury and is unfairly prejudicial because the jury is likely to think once a thief, always a thief. However, it is valuable to show identity for the robbery, so it would be logically relevant.

Character Evidence

Character evidence is generally inadmissible to prove conduct in conformity. There are three types: opinion, reputation, and specific instance. Here, the prosecution is trying to bring in a specific instance of a prior theft to show that Mike is likely to have stolen again. This is inadmissible.

Relevant misconduct (MIMIC)

However, the prosecution in a criminal trial is allowed to bring in relevant misconduct to show motive, intent, absence of mistake or accident, identity, or common scheme or plan (modus operandi). Here, the Robin Hood costume points towards Mike's identity as the robber who wore a Robin Hood costume and mask. It also points towards common scheme, because it potentially shows preparation for the robbery. The defense would say that it was for his foundation, called Robbin' Hood and was just a coincidence, but it should still be heard by the jury.

Likely Ruling

The evidence would not be admissible for the character evidence purpose, but it may be admissible for the purposes of identity and common scheme, alongside a limiting instruction so that it is not used to show a propensity for theft.

2.

In order to be admissible, evidence must be both logically and legally relevant.

Logical Relevance

Logical relevancy (tendency test) is if the evidence tends to prove or disprove a disputed fact of consequence. There are multiple parts to this. What Betty witnessed is admissible because it tends to show what actually occurred during the bank robbery. The officer's testimony tends to show that Mike is the bank robber because Betty identified him as such.

Legal Relevancy

Legal relevance (balancing test) looks to if the probative value of the evidence outweighs the dangers of unfair prejudice, undue delay, confusion of the issues, waste of time, and misleading the jury. This is not likely prejudicial because it is just what occurred. No evidence that the lineup was prejudicial. However, words coming from a police officer have more weight than they might from an ordinary person. See confrontation clause issue below.

Competency of the witness

Betty claims to have seen a man in a Robin Hood costume run out of the bank with a bag of money, and that he saw his face as he took off the mask. The defense would want to figure out how far she was from the bank at the time and whether it was possible to actually see features with detailed (in order to pick out in a photo lineup) from that distance.

Hearsay

Hearsay is an out of court statement offered to prove the truth of the matter asserted. Betty's testimony is what she experienced as a percipient witness, so they are not hearsay. The officer's statement is hearsay because it was made outside of court by Betty and is being offered to prove that Mike actually is the bank robber.

Hearsay exceptions

Prior identification (FRE hearsay exemption)

A prior statement of identification may be admissible if it was made while fresh in their mind and the declarant can testify that the statement was accurate when made. Here, Betty is not testifying on the stand that her statement was accurate when made, the Officer is testifying to her statement. This exemption not applicable.

Past recollection refreshed

The prosecutor could have tried to refresh Betty's memory and it would not have been hearsay, but he did not do so.

Excited utterance

A statement made during the stress of excitement of an stressful event are admissible because there was likely not enough time to craft the statement. Betty would likely not still be excited a week later when she was interviewed.

Present Sense Impression

Also not present sense impression due to the length of time in between the event and the statement.

Catch All

If no other exception applies, it is trustworthy, and relevant. Here, likely trustworthy because from police officer.

Confrontation Clause

Per the 6th amendment, even if a hearsay exception applies, hearsay is inadmissible against a criminal defendant where the declarant is unavailable, there was no prior opportunity for cross-examination, and the statement is testimonial (Crawford). Testimonial statements are those made describing a past event in anticipation of trial, not for an ongoing emergency. The FRE lists lack of memory as a basis for unavailability and Betty testified that she cannot remember the man identified, so even though she is present, she is unavailable. She could not be cross-examined on the subject because she does not remember it. The statement was not made during an emergency, but rather a week later in anticipation of trial.

Likely Ruling

This is likely inadmissible based on the confrontation clause.

3.

In order to be admissible, evidence must be both logically and legally relevant.

Logical Relevancy

Logical relevancy (tendency test) is if the evidence tends to prove or disprove a disputed fact of consequence. This is logically relevant because that Mike had large sums of money and was asking for them to be spread out amongst accounts points tends to show he was laundering money. Mike's own admission also tends to show he did it. Ed's actions show a possible conspiracy. And, the text from Mike tends to show that he possibly caused Ed's unavailability.

Legal Relevancy

Legal relevance (balancing test) looks to if the probative value of the evidence outweighs the dangers of unfair prejudice, undue delay, confusion of the issues, waste of time, and misleading the jury. On it's face the text message is normal, nothing prejudicial. Everything else directly points to the crime so are not prejudicial.

Hearsay

Hearsay is an out of court statement offered to prove the truth of the matter asserted. These are statements made by Ed outside of court to the investigator and are being offered for what they are saying, so they are hearsay. The text message from Mike is also an out of court statement. It may be used to show intent; not that Mike intended Ed take a vacation, but rather the implied meaning that Ed does not show up at court. It could possibly come in as non-hearsay circumstantial evidence of state of mind of Mike.

Statement of a Party Opponent (non hearsay exemption)

A statement by a party may be used against that party by the opposing party (not by the party themselves). When Mike said "I robbed a bank", this was an admission and would be a hearsay exemption (non hearsay). However, note, this is layered hearsay. This exemption allows the statement from Mike to Ed to come in, but an exception will be needed to bring in Ed's statement to the investigator. (see below)

Co-conspirator statement (non hearsay exemption)

A statement by a co-conspirator may be used if it was made in furtherance of the conspiracy, while the co-conspirator was a member of the conspiracy, during or prior to the party's membership, and it must have been made before the objective of the conspiracy was met. It must be proven that there was a conspiracy. This likely does not apply because the objective of the conspiracy was met (the robbery was complete), however if the objective was further money-laundering (e.g. the \$50,000 payment to Ed), then it might be okay. There is also the issue of proving the conspiracy because Ed said he thought it was a joke. There would need to be additional evidence.

Unavailability

One basis for unavailability is absent despite reasonable efforts. Here, at the time of trial despite diligent efforts of police, Mike cannot be located. Mike is unavailable

Statements Against Interest

This is how the statements from Ed to the investigator could come in. Any statement against an unavailable declarant's pecuniary, proprietary, or penal interest is admissible. Ed's statements are against his penal interests. They show that he possibly was a member of a conspiracy, that he took stolen goods after being told they were stolen, and aided in the money laundering. There may be an issue that Ed may not have realized they were against his interest because he thought he was innocent and that Mike was joking, but it still looks bad for him since he was directly told. Ed is unavailable

Confrontation Clause

Per the 6th amendment, even if a hearsay exception applies, hearsay is inadmissible against a criminal defendant where the declarant is unavailable, there was no prior opportunity for cross-examination, and the statement is testimonial (Crawford). Testimonial statements are those made describing a past event in anticipation of trial, not for an ongoing emergency. Mike is unavailable. Mike's statements were made describing past events (money, instructions, depositing, etc.) to an investigator for trial, so they are testimonial. As such, they would normally be inadmissible.

However, it is possible that Mike caused Ed's unavailability by paying him \$50,000 to take a vacation (or something more sinister). If that is the case, then the protection of the confrontation clause does not apply. The confrontation clause does not protect those who caused the unavailability of the declarant.

Likely Ruling

The text message is likely admissible to show circumstantial state of mind as non hearsay. The rest is not kept out by the confrontation clause and is likely admissible.

4.

In order to be admissible, evidence must be both logically and legally relevant.

Logical Relevance

Logical relevancy (tendency test) is if the evidence tends to prove or disprove a disputed fact of consequence. That the bag went into Ed's office shows that Mike had the money and possible conspiracy. Mike's response to Mary tends to show that he did rob the bank.

Legal Relevancy

Legal relevance (balancing test) looks to if the probative value of the evidence outweighs the dangers of unfair prejudice, undue delay, confusion of the issues, waste of time, and misleading the jury. No issue.

Hearsay

Hearsay is an out of court statement offered to prove the truth of the matter asserted. Mary seeing Mike bring the duffle bag into Ed's office is her experience as a eyewitness and is not a statement. Her statement and Mike's reply are hearsay because they are statements offered outside of court, at the office, to show that Mike did rob the bank.

Adoptive admission (non hearsay exemption)

Statements by someone other than the party that the party replies to via an action, word, or lack thereof are admissible as non-hearsay. It must be proven that the person replying knew and understood the statement. Mary asked where Mike got the money and if he robbed a bank. He replied affirmatively with a smile and nod. Sometimes people smile and nod even if they don't hear what was said, but most often it is an actual response and there is nothing to indicate he could not hear or understand her. Mary's statement is needed to show what Mike was replying to.

Likely Ruling

Both what Mary said and what Mike replied are likely admissible.

END OF EXAM

3)

1.

In order to be admissible, evidence must be both logically and legally relevant.

Logical Relevance

Logical relevancy (tendency test) is if the evidence tends to prove or disprove a disputed fact of consequence. This prior conviction for spousal battery tends to show that it is within Danielle's character to abuse her husband.

Legal Relevancy

Legal relevance (balancing test) looks to if the probative value of the evidence outweighs the dangers of unfair prejudice, undue delay, confusion of the issues, waste of time, and misleading the jury. It may be prejudicial depending on how gory the description is. It also may confuse the jury. However the probative value may outweigh.

Character Evidence

Character evidence is generally inadmissible to prove conduct in conformity. There are three types: opinion, reputation, and specific instance. The prior conviction would be an example of specific instance and would typically be inadmissible.

Exceptions

Prior abuse

However, per FRE evidence of past sexual abuse or child abuse is admissible. CEC allows evidence of past sexual abuse, child abuse, elder abuse, and domestic abuse and restricts the use to criminal cases. In either case, the door does not need to be opened by the defendant. This evidence of the prior spousal battery could be used in a California court (because this is a criminal case), but not in a Federal court (under this exception).

Mercy Rule (Open the door)

The prosecution is not allowed to bring in character evidence of the defendant or victim unless the defendant brings in evidence of their own good character or the bad character of the victim (opinion

or reputation). Here, no indication that the defendant brought in any character evidence, so not applicable.

MIMIC

The prosecution in a criminal trial is allowed to bring in relevant misconduct to show motive, intent, absence of mistake or accident, identity, or common scheme or plan (modus operandi). The prior abuse of the husband could show that Danielle had a motive to injure him again in the future. This may be a way in could come in under FRE or CEC.

Prop 8

In California state courts, all evidence against criminal defendants is admissible unless an exception applies. These exceptions include hearsay, the defendant still must open the door to character evidence (if applicable), relevancy balancing test, privileges, etc. It is already admissible under the CEC exception for domestic abuse.

Likely admissible.

2.

In order to be admissible, evidence must be both logically and legally relevant.

Logical Relevance

Logical relevancy (tendency test) is if the evidence tends to prove or disprove a disputed fact of consequence. The evidence of past fraud and forgery tends to show Danielle has a character for lying.

Legal Relevancy

Legal relevance (balancing test) looks to if the probative value of the evidence outweighs the dangers of unfair prejudice, undue delay, confusion of the issues, waste of time, and misleading the jury. A past conviction may confuse the issues and may be unfairly prejudicial because they jury could think negatively of her because of her past acts. However, the probative value of showing her intent may outweigh.

Prop 8

In California state courts, all evidence against criminal defendants is admissible unless an exception applies. These exceptions include hearsay, the defendant still must open the door to character evidence (if applicable), relevancy balancing test, privileges, etc. The exception of character evidence applies.

Character Evidence

Character evidence is generally inadmissible to prove conduct in conformity. There are three types: opinion, reputation, and specific instance. This is a specific instance of a past conviction to show character of lying, etc.

Her character is not essential element of battery, spousal abuse, practicing without a license or sexual molestation.

MIMIC

The prosecution in a criminal trial is allowed to bring in relevant misconduct to show motive, intent, absence of mistake or accident, identity, or common scheme or plan (modus operandi). This past similar conviction may show that she had the intent to continue this operation in the future. Showing that she had intent may be an element of practicing without a license. It also may show that impersonating people in the medical profession to defraud people is her modus operandi. This is applicable under CEC and FRE.

Exceptions

Mercy rule

See definition above. No evidence defendant opened the door, inadmissible.

Prior abuse

See definition above. Not applicable.

3.

In order to be admissible, evidence must be both logically and legally relevant.

Logical Relevance

Logical relevancy (tendency test) is if the evidence tends to prove or disprove a disputed fact of consequence. This is logically relevant because it tends to show that she has a character for acting inappropriately with children, and that she intends to continue to do so.

Legal Relevancy

Legal relevance (balancing test) looks to if the probative value of the evidence outweighs the dangers of unfair prejudice, undue delay, confusion of the issues, waste of time, and misleading the jury. Again, possible chance of confusing the issues. There is a possibility of unfair prejudice because the jury's heart will go out to Will and be adverse to Danielle due to her actions. But the probative value of showing her character may outweigh.

Competency of the witness

Will has the mental development of a 6 year old and he is describing events that occurred over a decade ago. It will need to be determined if he is able to understand the concept of telling the truth.

Prop 8

In California state courts, all evidence against criminal defendants is admissible unless an exception applies. These exceptions include hearsay, the defendant still must open the door to character evidence (if applicable), relevancy balancing test, privileges, etc. The exception of character evidence applies, but the character evidence will be admissible (see below).

Hearsay

Hearsay is an out of court statement offered to prove the truth of the matter asserted. If Will just describes the events then they are admissible as a percipient witness because it occurred to him. If he says that he told his mom that "he had sex with Danielle" then that is hearsay. Even if the declarant is the witness, their own statements can be hearsay. It would be being used to show he had sex with Danielle.

Hearsay exception

Present state of mind

This is a declarant's statement showing their present state of mind, emotion, physical state, etc. Here, Will's present state of mind was focused on processing what happened to him (combined with the act of drawing). This may apply.

Character Evidence

Character evidence is generally inadmissible to prove conduct in conformity. There are three types: opinion, reputation, and specific instance. This is a specific instance of past child abuse to show Danielle has a character for abusing children.

Exceptions

Prior abuse

Per FRE evidence of past sexual abuse or child abuse is admissible. CEC allows evidence of past sexual abuse, child abuse, elder abuse, and domestic abuse and restricts the use to criminal cases. In either case, the door does not need to be opened by the defendant. This is a criminal case. This evidence of the prior child abuse could be used in both a California court and a Federal court.

Habit

At this point, it may be questioned whether Danielle has a habit of drawing minors into intimate environments and abusing them. A habit is a repeated response to specific stimuli (knee-jerk reaction). In this case, it is likely not habit because all of the circumstances are different.

Authentication on questions 1-2: All recordings (writings, photographs, etc.) need to be proven to be what the offeror says they are. All are likely in official court records and can be authenticated in that manner.

END OF EXAM