

EMPIRE COLLEGE OF LAW
EVIDENCE CLASS
FALL 2024
Prof. V. Dewan

MID-TERM EXAMINATION

INSTRUCTIONS

This examination is timed for 3 hours. It is closed-book. You are not permitted to use study aides, codes, case law, or online research of any kind.

ESSAY INSTRUCTIONS:

Read each essay carefully before beginning work. If the essay calls for the California Evidence Code (CEC) analysis, do not include a Federal Rules of Evidence (FRE) analysis; and vice versa.

If an essay prompt does not indicate whether the issues should be analyzed under CEC or FRE, assume you are to analyze both.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

ESSAY Question 1

Alex is charged in Sonoma County Superior Court with misdemeanor battery, which allegedly happened on June 1, 2023, at the Swinging Pig bar in Santa Rosa. The discovery shows the following:

Alex arrived at the Swinging Pig at 8:00 pm on June 1, 2023. He was recorded on the bar's surveillance footage sitting at the bar for an hour drinking what appeared to be cocktails. The video records only one frame every 5 minutes, and the image looks like a slideshow rather than a movie. The camera recording this footage is set up in the corner of the ceiling, at an angle to the bar area, looking downwards. Alex is seen at the very left edge of the footage, nearly out of frame.

At about 9:00 pm that night, Jim Turner walked up to the bar next to Alex. A fight erupted between the two. Alex broke his cocktail glass on Jim's head, causing a minor bruise to Jim's scalp. The video footage does not show Jim because Jim is completely out of frame. The bouncer arrived within 2 minutes of the fight and broke it up. He ordered Jim out of the bar and pushed him out the door.

Jim called 911 as soon as he was outside the bar. When police arrived he told them that he walked up to the bar to order another beer (he had been at the bar for 2 hours with friends and had drank 3 beers up until then). Jim said that while at the bar Alex spit on him, and Jim grabbed Alex's shirt collar and demanded Alex apologize. That is when Alex hit Jim on the head with the cocktail glass.

The police spoke to Alex. Alex said that he did not know how many drinks he had that evening at the bar—maybe 2 or 3. He said he was very shaken up by the events. Alex claimed that Jim walked up to the bar and started manhandling him for no reason, and that he had reacted in self-defense to Jim's aggression. Alex said he hit Jim with the cocktail glass.

The case is in trial proceedings. It is motions *in limine*. The following is occurring:

The DA wants to have their investigating police officer testify as a "fighting expert." The DA claims that the officer was trained how to deal with people using fists while in police academy, and he has knowledge relevant to how Alex could have handled the situation differently. The defense objects.

The DA wants all of Jim's friends present at the bar that night to testify at trial. There are three of them. All three were at the same table with Jim before he got up to go to the bar. All of these friends say essentially the same thing, with some variations based on their angle of views. The defense objects.

The DA wants to call the county coroner to testify. The DA says that the coroner is a medical expert and will testify about the injury Jim suffered. The coroner is expected to say that had the glass broken on Jim's head with slightly more force it could have caused a concussion and possibly long-term memory problems. The defense objects.

The defense wants to introduce into evidence Jim's Facebook posts after the incident. These posts are from Jim's Facebook account. Two of the posts were made an hour after the police arrived and merely said that he was a victim of a bar fight. The third post, made a month after the incident, says that Alex attacked Jim unprovoked. The fourth post, made 2 months after the incident, says that Alex got what Alex deserved because of the way Alex "was looking at me when I was sitting with my friends." The DA objects.

PROMPT:

Based on the above, fully analyze all the issues raised in the motions *in limine*. Provide a thorough explanation of each matter for the court. Your answers should include a suggested evidentiary ruling for the court on each of the *in limine* issues described above. Apply the CEC.

ESSAY Question 2

Dana is suing MegaCorp for negligence after she fell on a wet floor in one of their stores and suffered serious injuries. Dana claims that the store failed to properly maintain the premises and that the slippery floor caused her fall. MegaCorp denies responsibility, arguing that Dana was distracted and not paying attention to her surroundings, and that the store had appropriate warnings in place.

At trial, the parties are trying to present following evidence:

Dana's friend, Sam, testifies that she overheard a store employee telling another customer, "We've had multiple complaints about this floor being slippery, but management hasn't done anything about it." Sam also claims that Dana mentioned right after the fall, "I didn't even see the sign—they must have just put it up." MegaCorp's lawyer immediately objects to this testimony.

MegaCorp calls Dr. Taylor, a biomechanics expert, to testify that based on his analysis of Dana's injuries and the store's surveillance footage, it is highly unlikely that the wet floor caused Dana's fall. Dr. Taylor relies on a newly developed method of injury reconstruction that has only been used in a handful of cases nationwide. Dana's lawyer objects to this expert testimony.

Dana calls Dr. Lee, a specialist in vehicle accident reconstruction and the mechanics of bodily injury due to hard surface impacts, who will testify that in her opinion, the wet floor was the primary cause of Dana's fall. Dr. Lee's expertise has been challenged by MegaCorp, which argues that she is not qualified to testify on this specific type of accident.

PROMPT:

Based on the facts above, analyze the admissibility of the evidence presented at trial under the FRE. Your essay should address all relevant issues, including any objections that may be raised and the potential outcomes of those objections. You are expected to identify and apply the appropriate FRE rules to each piece of evidence, considering any possible exceptions or challenges to admissibility.

ESSAY Question 3

In Santa Clara, California, David is on trial for the murder of his business partner, Rachel. The prosecution alleges that David shot Rachel during an argument over their failing company. David claims he was not present at the scene and that he is being framed by a disgruntled former employee. The prosecution's case hinges on several key witnesses and pieces of evidence.

Testimony of Charlie (Prosecution Witness):

Charlie, a neighbor of Rachel's, claims to have seen David fleeing the scene shortly after Charlie heard gunshots. During cross-examination, it is revealed that Charlie suffers from severe dementia. On re-direct examination, the prosecutor attempts to rehabilitate Charlie, who says that while he misremembers things from time to time, he has no problem taking care of himself, making doctor's appointments, or speaking with people. On re-cross examination, Charlie says he does not know if he may have misremembered anything during his testimony in court—people have to tell him if he got something wrong because he doesn't know. The defense attorney at sidebar objects to the entirety of Charlie's testimony.

Clergy Privilege Claim (Defense Witness):

David's long-time friend, Father Michael, is called to testify by the defense. Father Michael says that David arrived at Father Michael's house a few hours after Rachel's death. Father Michael claims he granted David sanctuary for three days until David gave himself up to the police. During cross-examination, the prosecution asks Father Michael about a conversation he had with David four days after the murder, while Father Michael went to see David at the jail as a visitor classified by the jail as a "family member." Father Michael refuses to answer, claiming clergy-penitent privilege under California law. The prosecutor asks the court to direct Father Michael to answer the question.

Chain of Custody for the Murder Weapon:

The prosecution presents the alleged murder weapon, a gun found in David's home. The defense objects, arguing that the prosecution has not provided sufficient foundation to show that the gun is actually the murder weapon. The defense points out that the gun was found two weeks later by the police during a search after David's home had been broken into since David had been taken to jail and the home had been unattended.

Challenge to Witness Credibility:

During the trial, the prosecution calls a former employee of David's, Mark, who testifies that David had threatened to kill Rachel in the past. On cross-examination, the defense attempts to challenge Mark's credibility by introducing evidence of a prior conviction for fraud that Mark had 15 years ago. The prosecution objects, claiming that this evidence is irrelevant and unduly prejudicial.

Using the CEC, analyze all of these issues for the court. Your answer should include a suggestion about how the court should rule on each problem.

ESSAY I ANSWER OUTLINE

I. Police Officer's Testimony as "Fighting Expert"

● **Relevant Issues:**

- o **CEC §720: Expert Witness Qualifications.**
 - Determine if the officer qualifies as an expert on the topic of "fighting" given only police academy training. Does this background sufficiently establish specialized knowledge?
- o **CEC §801: Scope of Expert Testimony.**
 - Analyze whether the officer's testimony would aid the jury in understanding self-defense alternatives that may have been available to Alex.
- o **CEC §352: Probative Value vs. Prejudicial Effect.**
 - Evaluate whether the potential prejudicial effect of suggesting Alex could have acted differently outweighs any probative value.

● **Suggested Ruling:**

- o Likely ruling to exclude or limit the officer's testimony, based on whether his knowledge of bar fights adds sufficient expertise or is deemed too speculative or prejudicial without foundational training specific to such settings.

II. Testimony of Jim's Friends at the Bar

● **Relevant Issues:**

- o **CEC §352: Cumulative Evidence.**
 - Evaluate whether testimony from all three friends is cumulative, especially as they all claim to have similar views of events.
- o **CEC §1240: Spontaneous Statements Exception.**
 - Assess whether any spontaneous statements made by Jim to his friends directly after the fight could be admissible as exceptions to hearsay under the CEC.
- o **CEC §1220: Party Admissions.**
 - Determine if Jim's statement about Alex's conduct might be introduced as evidence of Jim's version of events or relevant context for the altercation.

● **Suggested Ruling:**

- o Likely ruling to permit limited testimony from one or two friends to avoid cumulative evidence. The court might also admit any relevant spontaneous statements under §1240 if necessary to understand Jim's reactions or state of mind.

III. Coroner's Testimony on Potential Injury Severity

● **Relevant Issues:**

- o **CEC §720: Expert Qualifications.**
 - Establish whether the coroner, as a medical expert, has relevant expertise to testify about head injuries and possible outcomes.
- o **CEC §801: Expert Opinion and Speculative Testimony.**
 - Consider whether the coroner's statement about hypothetical outcomes (i.e., risk of concussion or long-term issues) is too speculative and, therefore, inadmissible under CEC.
- o **CEC §352: Probative vs. Prejudicial.**
 - Assess whether the probative value of this testimony is outweighed by the prejudicial risk of emphasizing potential long-term harm that did not actually occur.

● **Suggested Ruling:**

- o Likely ruling to exclude or restrict the coroner's testimony regarding potential harm beyond the actual bruise, as it may be deemed speculative, lacking relevance to the actual injury sustained, and prejudicial.

IV. Defense's Motion to Admit Jim's Facebook Posts

- **Relevant Issues:**

- o **CEC §1200: Hearsay Rule.**
 - Analyze whether these posts constitute inadmissible hearsay or fall under an exception, particularly as they reflect Jim's statements after the incident.
- o **CEC §1250: State of Mind Exception.**
 - Consider if any of these posts reveal Jim's state of mind directly after the incident, especially regarding his motive or his perception of Alex's behavior.
- o **CEC §352: Potential for Misleading or Prejudicial Statements.**
 - Evaluate whether the posts may mislead or unduly prejudice the jury by presenting Jim's possibly evolving account of the incident, particularly posts made long after the event.

- **Suggested Ruling:**

- o Likely ruling to admit the posts made directly after the incident (first two posts) as potentially relevant statements reflecting Jim's initial perspective. Posts made significantly later (e.g., one month or two months after the incident) may be excluded due to diminished reliability and relevance to Jim's initial state of mind and increasing potential for prejudice. Jim's statements would not be admissible under CEC 1220, party opponent statement, because Jim is not considered a "party" under California law in a criminal case because he is an alleged victim, not a "party" to the case.

ESSAY 2 ANSWER OUTLINE

I. Sam's Testimony Regarding Store Employee's Statement

- **Relevant Issues:**

- o **FRE 801(d)(2)(D): Statement of a Party's Agent or Employee**
 - The store employee's statement about management's inaction on complaints could be admissible as a statement made by an employee within the scope of employment, concerning a matter within the scope of that relationship.
 - Analyze whether the employee's statement about management's knowledge of the floor's condition and inaction could be imputed to MegaCorp as an admission.
- o **Hearsay Objections:**
 - MegaCorp may object, claiming the statement is hearsay and should be excluded, arguing it lacks sufficient foundation about the employee's authority to speak for MegaCorp.
- o **FRE 803(1): Present Sense Impression or FRE 803(2): Excited Utterance**
 - Sam's testimony about Dana's statement after her fall, "I didn't even see the sign—they must have just put it up," could be considered under exceptions for statements made immediately after an event.
 - Determine if the statement qualifies as a present sense impression or excited utterance based on timing and Dana's reaction after the fall.

- **Suggested Ruling:**

- o **Employee Statement:** Likely admissible as an agent's statement under FRE 801(d)(2)(D) because it concerns a relevant matter within the employee's job responsibilities.
- o **Dana's Statement:** Likely admissible under FRE 803(1) or (2), as the immediacy and nature of the statement suggest it was a spontaneous reaction to observing the condition after the fall.

II. Dr. Taylor's Testimony as a Biomechanics Expert

- **Relevant Issues:**
 - **FRE 702: Expert Witness Qualification and Reliability**
 - FRE 702 sets the standard for expert testimony, requiring that the testimony be based on sufficient facts, reliable principles, and applied reliably to the case.
 - **FRE 702(c) & Daubert Standard:**
 - Dr. Taylor's "newly developed method" raises questions under the Daubert standard, which requires the method to be tested, peer-reviewed, and generally accepted in the relevant scientific community.
 - Discuss the novelty of Dr. Taylor's methodology and whether it has been validated by widespread application or scientific scrutiny, as required for reliability.
 - **FRE 403: Balancing Test:**
 - Dana's counsel might argue that Dr. Taylor's testimony is overly prejudicial if the jury cannot fairly evaluate the reliability of this unfamiliar methodology.
- **Suggested Ruling:**
 - Likely ruling to exclude Dr. Taylor's testimony due to concerns under FRE 702 and Daubert. The court may find the new method insufficiently tested and lacking general acceptance, thus deeming it unreliable and potentially misleading under FRE 403.

III. Dr. Lee's Testimony on the Cause of Dana's Fall

- **Relevant Issues:**
 - **FRE 702: Relevance and Expertise:**
 - Dr. Lee's background in vehicle accident reconstruction and bodily injury from hard surface impacts suggests expertise in biomechanics, but MegaCorp contests her qualifications specifically regarding slip-and-fall incidents.
 - Evaluate whether Dr. Lee's expertise in biomechanics sufficiently overlaps with the case facts, enabling her to provide relevant testimony on the injury mechanisms associated with a fall on a wet floor.
 - **FRE 104(a): Preliminary Question of Qualifications:**
 - MegaCorp's challenge goes to Dr. Lee's qualifications, prompting the court to decide as a preliminary matter under FRE 104(a) whether she is qualified to testify based on her experience in injury mechanics.
 - **FRE 703: Basis of Opinion Testimony by Experts:**
 - Determine whether Dr. Lee's opinion on causation is based on reliable principles and a proper foundation within her area of expertise, despite her focus on vehicular impacts.
 - **FRE 402: More Prejudicial Than Probative:**
 - Even if Dr. Lee's expertise somehow covers some aspects of physical trauma on the human body, the fact that Dr. Lee's actual expertise is vastly different from the scenario encountered in this case might trigger FRE 402 factors. The jury may be confused by the testimony, Dr. Lee seemingly does not have sufficient background and experience to discuss fall-related injuries, and the attempt to link vehicle accident injuries to simple fall-related injuries may be unduly prejudicial with minimal probative value.
- **Suggested Ruling:**
 - Likely ruling to admit Dr. Lee's testimony, as her knowledge of biomechanics and bodily injury from impacts is arguably broad enough to cover the mechanics of Dana's fall. However, there is also a significant concern under FRE 402 factors. If the court allows Dr. Lee to testify, it would need to carefully limit the scope of that testimony to exclude any commentary about vehicle accidents (except for qualification questions); the court may also need to set reasonable limits on the specific kinds of questions Dr. Lee can be posed.

I. Charlie's Testimony

1. Credibility Due to Dementia:

- o **CEC § 780:** *The credibility of a witness may be attacked by any party. The fact that Charlie suffers from severe dementia is highly relevant to his credibility as a witness. The defense's objection to his testimony may hinge on this point.*
- o **Testimony Assessment:**
 - *Charlie's claim of seeing David fleeing the scene could be undermined by his cognitive impairments. The prosecution's attempt to rehabilitate him does not effectively address the fundamental issue of his reliability due to dementia.*

2. Objection by Defense:

- o *The defense attorney's objection at sidebar is likely to be grounded in concerns about the reliability of Charlie's memory. The statements made during cross-examination indicate significant doubt about Charlie's ability to recall events accurately.*

3. Suggested Ruling:

- o **Motion to Exclude:** *The court should consider excluding Charlie's testimony due to its questionable reliability given his severe dementia, which significantly undermines its credibility. The court may decide that the prejudicial effect of this testimony outweighs any probative value under CEC § 352.*

II. Clergy Privilege Claim (Father Michael)

1. Clergy-Penitent Privilege:

- o **CEC § 1032:** *Under California law, communications made in the context of a religious confession or spiritual advice are generally protected from disclosure. Father Michael's claim of clergy-penitent privilege is grounded in this statute.*
- o **Nature of the Communication:**
 - *The key point here is whether the conversation about David's actions falls under this privilege. The prosecution's inquiry into Father Michael's visit to the jail and the nature of conversations four days post-murder may be considered privileged if it pertains to spiritual counseling or confession.*

2. Prosecution's Request:

- o *The prosecutor's request for Father Michael to answer could be challenged. If the conversation about David's state of mind or actions directly pertains to advice or confession, it is protected. The prosecutor might argue that while the Clergy Privilege might more clearly apply when the defendant is physically at the clergyman's premises seeking sanctuary, that clarity dissolves when the clergyman travels to the jail after the defendant has been charged with the crime. On the other hand, the defense would argue that the presence of the clergyman at the jail after charges are filed is an even clearer demonstration that this is a religious meeting that is covered under the Clergy Privilege.*

3. Suggested Ruling:

- o *The court should uphold Father Michael's refusal to answer based on the clergy-penitent privilege under CEC § 1032, unless the prosecution can demonstrate that the conversation does not pertain to any confidential communications within the clergy context.*

III. Chain of Custody for the Murder Weapon

1. Foundation for Admissibility:

- o **CEC § 1401:** *The prosecution must lay a proper foundation to establish that the evidence (the gun) is what it claims to be (the murder weapon). The defense argues that there are gaps in the chain of custody due to the gun being found weeks after the murder, and there was a break-in at David's home.*
- o **Chain of Custody Requirements:**
 - *The prosecution must establish that the gun was maintained in a secure manner from the time it was collected until it is presented in court, which may be complicated by the intervening events.*

2. Defense's Argument:

- o *The defense's objection about insufficient foundation raises a critical question regarding the integrity of the evidence. The defense could argue that the prosecution has not adequately shown that the gun was not tampered with or that it was indeed the murder weapon.*

3. Suggested Ruling:

- o *The court should sustain the defense's objection if the prosecution cannot sufficiently demonstrate a continuous and unbroken chain of custody under CEC § 1401. If there are legitimate questions about the gun's handling and identification, it may be deemed inadmissible.*

IV. Challenge to Witness Credibility (Mark)

1. Prior Conviction for Impeachment:

- o **CEC § 788:** *A witness may be impeached by evidence of a prior felony conviction, provided the conviction is not too remote (generally, remoteness is defined as more than 10 years under CEC § 788(b)).*
- o **Relevance and Prejudice:**
 - *The defense's introduction of Mark's 15-year-old fraud conviction could be relevant to challenge his credibility but may also be subject to the prosecution's objection regarding undue prejudice under CEC § 352.*

2. Prosecution's Objection:

- o *The prosecution argues that the evidence is irrelevant and unduly prejudicial. However, given that it pertains to Mark's character and credibility, it should be admissible unless the court finds that its prejudicial effect substantially outweighs its probative value.*

3. Suggested Ruling:

- o *The court should allow the defense to introduce evidence of Mark's prior conviction for impeachment purposes under CEC § 788, as it is relevant to his credibility, but may consider a limiting instruction to mitigate undue prejudice under CEC § 352.*

Essay 1 Max 120P

30P

1) — Max 30P

1) Whether the court should allow the investigating officer testimony as a "fighting expert".

14P
Evidence that is relevant is presumably admissible. Irrelevant evidence is inadmissible. The DA wants to their investigating officer to testify as a "fighting expert" because he was trained in how to deal with people using fists and it is relevant to how Alex could have handled the situation differently. This testimony in fact would be irrelevant and should be excluded from trial under CEC 352 because it confuse the issues before the jury. The proposed expert must be qualified as an expert by his skill, knowledge, experience, education, or training. While this officer may have the training and education as a fighting expert, that really isn't the issue here. The issue is whether or not Alex committed a misdemeanor battery. Additionally, expert testimony is only relevant if it will help the trier of fact understand the evidence to determine a fact at issue, if the testimony is a product of reliable principles and methods and those principles and methods were applied to the facts. Here the DA is not offering his testimony for that, rather, the DA is offering it as a means to show that Alex could have handled the situation different. Not only is this testimony irrelevant, and should be excluded for being irrelevant, it does not provide any clarity of the issue for the trier of fact. Rather, it runs the risk of confusing the issues with jury. The DA could make an offer of proof of how this could be relevant, however, as it is, this evidence should be excluded. 10P

2) Whether the DA should be allowed to have all 3 of Jim's friends testify at trial. — Max 30P

25P
If the DA can prove that any one of the friends testimony is relevant, or that the friends have any actual knowledge of what transpired between Alex and Jim, the DA should be instructed to limit the testimony to only one of the friends that were present at the time. The facts are silent as to what they will be testifying to in general. From what is provided the friends were still sitting at the table when Jim went up to the bar and the altercation occurred. If the court rules that this evidence should be excluded, the DA can offer proof of what the friends could testify to specifically and how their testimony is relevant. But because the DA is offering testimony of 3 separate witness that will testify to essentially the same thing, it will be needlessly cumulative and a waste of time for the court and jury. Unless the witnesses can testify to separate things they saw that are different and distinct from each other, only one witnesses testimony would suffice - if that witness had actual personal knowledge of what transpired. He cannot testify to what he thinks happened, it must be based on what he knows and saw happen. The court has the power to streamline the process and prevent wasting judicial resources. Therefore, until the DA can proffer relevant evidence that shows these witnesses saw anything that would be beneficial to the jury in determining the issues of the case, the court should deny all the witnesses. Or in the alternative, limit the testimony to one of the witnesses proffered by the DA. 35P

3) Should the county coroner be permitted to testify as a medical expert regarding Jim's injury? — 30P Me

30P
The coroner's expert testimony should be excluded as confusing the issues and and potentially impassioning the jury under CEC 352. While the coroner meets the requirements of an expert, his expertise usually would be for post mortem injuries, resulting in death. Here, the coroner's expertise is not relevant to the issue. There is no foundation provided for how this expert reviewed Jim's injuries and came to a conclusion on these facts. His conclusion that that Jim could have suffered a concussion or long term memory problems are irrelevant. This is the wrong expert to testify regarding Jim's injuries. Jim's treating physician or ER doctor should exactly

testify to the injuries he actually sustained. Speculation is not a foundation for which this expert should be allowed to testify. The court should deny the DA motion to have this expert testify.

4) Should the defense be allowed to admit Jim's four Facebook posts? — 30P Mx

The facts are silent as to the relevance of the Facebook posts. What exactly are they trying to prove? In addition to being irrelevant, they are hearsay. The defense may argue that the first two would fall under the present sense exception to the hearsay rule, however, the post merely states that Jim was in a bar fight, and it was made an hour after the actual incident. This is not immediately or shortly thereafter describing an event that happened. The third and fourth post could be used as impeachment evidence of prior inconsistent statements as Jim initially told the police that Alex had spit on him, and that is why he grabbed him. However, this evidence would only be admissible if Jim were to testify to something different. At this juncture, the court should exclude the evidence as hearsay without an exception unless Jim testifies then it could be used to impeach him.

Essay 1 Total: 115/120

2) — Max 100P

1) Sams testimony — Max 30P

Hearsay as to what the employee told another customer.

Hearsay is an out of court statement offered for the truth of the matter asserted. Here, Sam is testifying that he overheard an employee tell another customer that they have had many complaints about the floor being slippery and that management hasn't done anything about it. If Sam is offering this statement to prove that store knew the floor was slippery and didn't do anything about it would be hearsay. It may come in under as an exception since the employee is an agent of the employer if they are acting within the scope of their employment when the statement was made. Here, it is reasonable to infer that the employee was acting within the scope of his employment when he made the statement to the other customer, so the statement would be admissible over a hearsay objection. The statement could also be offered for another purpose, such as providing proof that the store had knowledge of the slippery conditions i.e. constructive notice, and did nothing to rectify it, thus being negligent. The court will overrule the objection and allow the testimony based on the hearsay exception, or for the other purpose for which the testimony could be provided for.

Sam's testimony about Dana's comment will further lay the foundation that perhaps there was no notice that the floor was slippery. Additionally, Dana's comment's would come in under the present sense exception, as it is a comment made right after she fell and she was describing what she saw and felt at the time it occurred.

2) Biometrics Expert — 30P Mx

This expert would be not qualified as an expert for this particular case. An expert is qualified as an by his skill, knowledge, experience, education, or training. While this expert may have the training and education it is biomechanics, not slip and fall injuries. Additionally, expert testimony must rely on sufficient facts or data personally observed or made aware of and the will help the trier of fact understand the evidence to determine a fact at issue, if the testimony is a product of reliable principles and methods and those principles and methods were applied to the facts. Here, the expert reviewed the store security camera however, he is not qualified to offer his testimony about would could of or not caused Dana's injuries because his expertise is in

unreliable. Based on the information presented, these statements do not describe the event as they were happening and fail under the second prong of PSI. The Court should not admit the first two posts as PSI.

Excited Utterance would not apply since the statement was not made close enough to the actual event.

Additionally, based on the facts presented it does not seem to be at issue that it was Jim who was injured. Relevance, *supra*. These posts do not make a fact more or less probable and are not of consequence and should also be excluded as being irrelevant.

Further, if this has already been established through other evidence (like the bar camera footage) then these posts would be excluded under CEC 352 as being needlessly cumulative.

- Relevance: they don't really add anything new so they would really just be a waste of time.

How the Court should rule: Don't let all three of them testify.

B. Post 3: made a month after the incident saying Alex attacked Jim unprovoked.

- Too far in time to be PSI or EU.

-Impeachment with inconsistent statement

How the Court should rule: don't admit, no exception to hearsay, no probative value.

C. Post 4: 2 months after the incident saying that Alex got what he deserved because of the way Alex "was looking at me when I was sitting with my friends"

How the Court should rule: Don't allow- again too far in time, and what does this add? How is it relevant? CEC 352 exclusion for waste of time

2)

Dana v. MegaCorp

I. Dana's friend, Sam

A. Statement Regarding Management Not Doing Anything

Hearsay is an out of court statement that is offered to prove the truth of the matter asserted. Hearsay is generally inadmissible, unless an exclusion to or exception from the hearsay rule apply. Here, Sam is testifying to an out of court statement that she overheard from the store employee. Not only is this hearsay, but this constitutes multiple hearsay, or hearsay within hearsay. For multiple hearsay to be admissible, an exclusion or exception must apply to each level for it to be admissible.

Level 1: Sam testifying about what the store employee said.

The FRE permits admission of hearsay statements from a party opponent. Here, MegaCorp is the party opponent. While it was not MegaCorp who made the statement, the FRE permits admission of hearsay statements from a party opponent through their

agent. To be an agent, the statement must have been made during the course of the declarant's employment with the company, during the event, and be a fact in dispute. Since Sam heard this from an employee talking to another customer, it is likely that this statement was made during the course of their employment and would constitute a party opponent statement. Since this is a case for negligence, it would be a fact in dispute that management knew that the floor was slippery and didn't do anything about it. Dana's attorney has a strong argument that this statement should be admitted as a statement of a party opponent. +10P

Level 2: What the employee said to another customer.

As discussed above, there must be an exception to each level of hearsay. Since the employee is an agent of MegaCorp, as previously discussed, this statement may be admitted as a party opponent.

B. Dana's statement: "I didn't even see the sign- they must have just put it up"

This is an out of court statement offered to prove the truth of the matter asserted and is therefore hearsay. Here, Sam is trying to testify about what Dana said right after the fall. For Sam to be able to testify as a witness, she must have personal knowledge. The facts do not indicate how Sam knows what Dana said right after the fall. If this has not been established elsewhere during the trial, MegaCorp's attorney should first and foremost object for lack of foundation and personal knowledge. +10P

Assuming that Sam was present at the store during Dana's fall, and she does have personal knowledge about what Dana said then this statement may constitute a Present Sense Impression (PSI) exempting it from the hearsay rule. PSI is an exception to the hearsay rule that allows statements made at or near the time of the event that describe what was happening as it was happening. The facts indicate that this statement was made right after the fall, satisfying the first prong. However, the statement "I didn't even see the sign--they must have just put it up" does not describe anything about the event. This statement is being offered to try to prove that the store somehow put up a sign after Dana's fall, increasing the likelihood that MegaCorp was negligent. This is not a PSI as it does not describe the event happening, only the fact that Dana did not notice there was a sign until after she fell. For this reason, this statement is likely inadmissible as hearsay without an exception. present sense impression also excluded +5

II. Dr. Taylor

A. Expert Testimony - not 30P

To testify as an expert, a witness must have special knowledge or skill, more than that of a lay person. An expert witness also must be able to testify to how they formed their opinion including the methods used. MegaCorp calls Dr. Taylor to testify that based on his analysis of Dana's injuries and the store's surveillance footage, that it is highly unlikely that the wet floor caused Dana's Fall. 30P

The facts state Dr. Taylor is a biomechanics expert. First, Dana's attorney should inquire about Dr. Taylor's expertise- how much schooling has he had, how much experience does he have working on these types of cases, has he ever testified for negligence cases before, was he paid to testify. These would all be grounds to impeach Dr. Taylor's credibility as an expert. +10P

Second, it is unclear how as a biomechanics expert that makes him qualified to testify on this case. If he is simply an expert in biomechanics, but that doesn't have anything to do with what he is testifying about then he should not be allowed to testify, let alone render an expert opinion.

As an expert, Dr. Taylor must also testify to the methods he used to reach his opinion. Given Dr. Taylor is attempting to testify about a newly developed method of injury reconstruction that has only been used in a handful of cases nationwide, there is ample opportunity for Dana's attorney to demonstrate on cross-examination that this new method may be unreliable. While an expert does not have to disclose everything they rely on to form their opinion, they are subject to questioning about it on cross-examination. To have this testimony excluded, Dana's attorney should have done ample research about this method (or have an expert of her own) to contradict the methodology being employed by Dr. Taylor.

B. Ultimate Issue

As an expert, Dr. Taylor may testify to causation, but he cannot testify to the ultimate issue of the case: whether MegaCorp was negligent. The stated testimony does not include such a finding but would be another ground for Dana's attorney to object if it is offered.

If Dana's attorney is successful in attacking Dr. Taylor's credibility, she should move for an order to have Dr. Taylor's testimony excluded and the Court should approve it.

III. Dr. Lee

A. Expert Testimony

Dana calls Dr. Lee, a specialist in accident reconstruction and the mechanics of bodily injury due to hard surface impacts. For Dr. Lee's testimony to be admissible, she must establish herself as someone with special knowledge or training. Relevant questions may include: (1) What kind of training does she have in accident reconstruction? (2) Does she have any special certifications or education? (3) How long has she worked in this field? (4) What methods does she use to reconstruct accident? (5) What evidence from this case has she looked at to make this determination? Dr. Lee's answers to these questions would indicate whether or not she would be qualified to offer an expert opinion here and would be needed to make a determination of whether or not she should be permitted to testify.

B. Ultimate Issue

The purpose of introducing her testimony is to have her say the wet floor was the cause of the accident. If she is qualified as an expert, she would be able to testify to causation but she could not say the MegaCorp is or is not liable as that would be the ultimate issue.

3)

People v. David

1. Testimony of Charlie (Prosecution Witness)

Charlie, neighbor of Rachel claims to have seen David fleeing the scene shortly after hearing gun shots. Under the CEC, a witness must be competent in order to testify. In a criminal case, every witness is presumed competent, unless they are shown to be incompetent. In order to exclude Charlie's testimony, the Defense must demonstrate that Charlie is incompetent.

On cross-examination it is revealed that Charlie suffers from severe dementia. The Defense must show that the fact he has dementia renders him incompetent to testify. Given the fact that Charlie's dementia is severe and not early onset dementia, the Defense has a strong argument. Additionally, later on re-cross-examination Charlie says he does not know if he may have misremembered because people normally have to tell him if he got something wrong because he doesn't know. This statement alone raises several red flags about Charlie's competency. For these reasons, the Court should not let him testify if he can't remember without people telling him that he misremembered things. *Forget credibility issue.*

If the Court was somehow feeling extra sympathetic that day, and allows Charlie to testify even though his competency is questionable, then the Defense should object under CEC 352. Under CEC 352, the Court at its discretion may exclude relevant evidence if the probative value of the evidence is outweighed by the following factors: confuses the issues, undue delay, misleads the jury, unfairly prejudicial, needlessly cumulative or waste of time. Since Charlie can't remember clearly, his testimony could certainly confuse the issues, mislead the jury and create undue delay if he has to be re-asked several questions since he can't remember.

2. Father Michael - Clergy Privilege Claim

Under the CEC, a conversation between a clergy and penitent may be privileged and therefore inadmissible. To satisfy the privilege, the statement must be made within the scope of the clergy-penitent relationship. It is not enough that a conversation happened with a member of the clergy to render it privileged. Thus, the first pertinent question is whether this conversation was within Father Michael's scope of his role as a clergy member? The Defense should introduce the fact that he registered himself as a family member with the jail to show that he was not acting in his official capacity as clergy, but rather as a friend/family member to David and his conversation should not be covered by this privilege. If the Defense is able to show he was not acting in his role as a clergy, then the Court should direct him to answer the question. However, this question calls for hearsay.

Hearsay is an out of court statement offered to prove the truth of the matter asserted. Hearsay is generally inadmissible, unless an exclusion to or exception from the hearsay rule apply. So the prosecution may try to object that this question calls for hearsay. The Defense would need to be prepared to show why this would not be hearsay - (1) that it is not being offered to prove the truth of the matter asserted or (2) that it falls within an exclusion or exception to the hearsay rule. Additional facts regarding what his testimony would entail would be needed to make such a determination.

3. Chain of Custody for the Murder Weapon

The Prosecution attempts to introduce the alleged murder weapon - a gun found in David's home. The Defense should rightfully object for a lack of foundation based on the stated facts. The Prosecution would need a witness to testify to the gun's authenticity, how

Not authenticate
But COC.

they know that this gun was the murder weapon, and the chain of custody. Based on the stated facts, the Prosecution has not established these things in order for the gun to be admitted. *Correct - "not admitted" city*

The Defense should also object on the grounds of reliability given the gun was found two weeks later after the murder and the fact that David's home had been broken into. Any other person (maybe the disgruntled former employee that David claims committed the murder) could have entered into his home and placed the murder weapon (or any other gun for that fact). In addition to the burglary, the home was left unattended allowing ample opportunity for the gun to be planted. All of these factors contribute to an argument that this gun should not be introduced as the "alleged murder weapon." *+DP*

If the Prosecution is able to pull some sneaky tactics, and establish foundation for the gun. The Defense could ask for a limiting instruction that the gun is only being admitted for a specific purpose- that it was the murder weapon - but not to show that David was the one who did it because he had the gun in his house. *interesting*

The Defense should also always object under CEC 352 to try to kill this evidence and argue that its probative value is outweighed by its prejudice. Since there are so many questions regarding the chain of custody and access to David's house during the two weeks following, it could be reasonably found this evidence is too prejudicial to be admitted.

4. Mark's Testimony (David's former employee) — *Max 30P*

A. David's Past Statement About Killing Rachel

David's Past Statement About Killing Rachel would constitute hearsay. So to be admitted an exclusion or exception must apply.

The CEC permits admission of hearsay statements from a party opponent. Here, David is the party opponent so his statement would be admissible. However, the Defense should inquire when this statement was made, what the circumstances were surrounding the statement (was David saying this as a joke?). *+15P*

Adoptive Admission: did Mark believe David's statement to be true or was this a joke?

B. Mark's Prior Conviction

Any witness's credibility for truthfulness or untruthfulness may be attacked. One method for doing so is introducing a prior conviction. For a witness, you can only introduce prior convictions for crimes of moral turpitude: fraud, forgery, etc. (This is a charge for fraud, so it would be allowed to be introduced to attack his credibility as a witness. *irrelevant +15P*

P claims the evidence is irrelevant: it is relevant because it has to do with his credibility as a witness and his propensity for truthfulness.

P claims the evidence is unduly prejudicial: but does the probative value outweigh it? Here, the jury should know that he has a prior crime for fraud.

END OF EXAM

Essay 3 Total: 115/120

Average : $300 / \frac{340}{340} = 88\%$

Good work.