

Monterey College of Law - Hybrid

EVIDENCE

Mid Term Examination

FALL 2022

Prof. S. Lizardo

General Instructions:

Answer All Three Essay Questions.

Total Time Allotted: Three (3) Hours

Recommended Allocation of Time: Equal Time per Question

QUESTION 1

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

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

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

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

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

At the jury trial, the following occurred.

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

Question 2

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

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

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

How should the Court rule?

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

QUESTION 3

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

The following proffers are made at trial:

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

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

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

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

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

ANSWER OUTLINE

PLAINTIFF DUSTY – DR. DOOMS -Q1-

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

1. NURSE NAN'S TESTIMONY

As per CEC 350, only relevant evidence is admissible.

Logical Relevancy- CEC 210 Tendency Test

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

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

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

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

Legal Relevancy- CEC 352 Balancing Test

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

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

Witness Competency /Percipient Witness

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

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

2. Dr. Dooms' two statements to Dusty

Logical Relevance- defined above

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

The trial court will rule the statement as logically relevant.

However, there are public exclusion policies. See below.

Legal Relevance- defined above

Probative Value v. Prejudice

a. Dr. Dooms Expression of Sympathy to Dusty

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

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

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

See below.

b. Settlement Offer of \$40,000

Logical Relevancy- defined above

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

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

Legal Relevancy- defined above

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

See below under Special Relevancy Rules.

Special Relevancy- Public Policy Exclusion

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

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

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

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

3. Insurance Policy – Medical Malpractice

Logical Relevancy- *defined above.*

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

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

Legal Relevancy- *defined above*

Probative value v. prejudice

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

See Special Relevance below.

Special Relevancy/Public Policy Exclusion

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

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

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

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

Logical Relevancy- *defined above*

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

Legal Relevancy- *defined above.*

Balance probative value v. prejudicial effect.

Hearsay- *defined above.*

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

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

Hearsay Exception: Dr. Better's Former Testimony

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

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

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

Option: Medical Diagnosis Hearsay

Fall 2022 Evidence Mid-Term Exam Question

Prof. O'Keefe

Answer – Q2

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

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

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

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

How should the Court rule?

Analysis:

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

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

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

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

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

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

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

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

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

Statement for Medical Diagnosis or Treatment:

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

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

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

Analysis:

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

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

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

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

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

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

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

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

Analysis:

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

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

Statements Against Interest:

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

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

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

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

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

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

Proffer 1: Oscar

1) *Relevance*

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

2) *Character*

- a. *Propensity:*
 - i. *Tends to show that Todd had a propensity for poor driving. Without more, this meets the requirements of the rule and would be excluded.*
 - 1. *Propensity objection should be – at this point – sustained*
- b. *Essential Element:*
 - i. *The negligent entrustment claim requires proof that Todd should not have been entrusted with the vehicle, and so his character, especially known to the company, is an essential element that must be proved.*
 - 1. *The earlier objection will be overruled as to this use*
- c. *MIAMICOP (Exceptions):*
 - i. *Knowledge – Tends to suggest that Dun-Middleton was aware of Todd's poor driving and should not have entrusted him with the vehicle.*
 - 1. *The earlier objection will be overruled as to this use*

3) *403*

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

Proffer 2: Creed

1) *Relevance*

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

2) *Character*

- a. *Propensity:*
 - i. *Character objection should be overruled, given that this is not truly character evidence*
 - 1. *Objection should be overruled*
- b. *Essential Element:*
 - i. *Students may want to briefly address this in the negligent entrustment portion*
 - 1. *Initial objection should be overruled.*

- c. MIAMICOP :
 - i. Students may address knowledge, but character analysis should not be overly in depth.
 - 1. Initial objection should be overruled.

3) 403

- a. Students should recognize that, because character propensity is not really present here, the prejudicial effect is quite low, and the probative value is sufficient to outweigh it.
 - i. Objection should be overruled

Proffer 3: Toby

1) Relevance:

- a. Evidence of employment would have a tendency to show that the company was or was not responsible for acts taken by the individuals affected
- b. It is arguable that this evidence might have some bearing on damages
- c. This evidence might also go to duty, given the claims and claimants
 - i. Objection should be overruled

2) Competency:

- a. Students should recognize that there is a legal bias in favor of competency. However, given limited ability to speak and narrate events, the students should delve more deeply into the facts. Specifically, students should note that Toby was able to testify at a deposition.
 - i. Objection should be overruled

3) 403

- a. The primary source of prejudice here should be waste of time, given the accommodations that must be made. However, it is clear that this is relatively basic testimony regarding employment status of employees, so it should not take an inordinate amount of time.
 - i. Objection should be overruled.

Proffer 4: Angela

1) Relevance:

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

2) Character

- a. Propensity:
 - i. Students should recognize that this is propensity evidence.
 - 1. Objection sustained
- b. Essential Element:

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

1. Initial objection sustained.

c. MIAMICOP:

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

3) 403

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

1)

In order to determine the outcome of the evidentiary issues in this case, we must determine what evidence would be admissible in order to prove Dr. Dooms liability to Dusty for medical malpractice.

1) Nurse Nan's Testimony

Relevance

As per CEC 350, only relevant evidence is admissible.

Prop 8

not needed

~~Under this amendment to the California Constitution, all relevant evidence in a criminal trial is admissible, even if it's objectionable. This still allows for exclusions due to hearsay, and other evidence that is not legally relevant. However, as this is a case for the tort of medical malpractice and is not a criminal case, Prop 8 would not apply in this case.~~

non-issue

Logical Relevance (Tendency Test)

Note that the court balances.

Evidence is logically relevant if it shows a tendency to prove or disprove any disputed fact that is of consequence to determine the outcome of the case.

Here, Nurse Nan's testimony is logically relevant because she is a percipient witness, meaning that she is giving a first hand, eyewitness account of what she saw on the day of Dusty's surgery, and Dr. Dooms conduct on that day. Nurse Nan can testify as to what she saw Dr. Dooms doing before the surgery and during the surgery. Nurse Nan's eyewitness observations will have a tendency to prove that Dr. Dooms was under the influence while he was doing the surgery, and may be liable for negligence.

Therefore, Nurse Nan's testimony is logically relevant.

Legal Relevance (Balancing Test)

Evidence is legally relevant if the probative value is substantially outweighed by the danger of unfair prejudice, confusion, waste of time, or misleading the jury.

Here, Nurse Nan's testimony is legally relevant because she can testify to what she witnesses with her own eyes. What adds more to the probative value is that she observed Dr. Dooms behavior over an extended period of time. The facts don't specify how long Nurse Nan was in the room, but if she saw Dr. Dooms before the surgery and also observed that his hand was unsteady during the procedure, it shows that she didn't see the events quickly, where her memory of the events may not be clear. She has a clear memory of what she saw, and is also able to connect Dr. Dooms taking two shots and then observing that his hand was unsteady, which is a clear indicator that Dr. Dooms was under the influence.

organize
* }

* Belongs under Witness Capacity/Competency below

Therefore, Nurse Nan's testimony is legally relevant.

Witness Competency/Capacity

As per the CEC, any person is qualified to testify unless there is a disqualification based on perception, memory, or the witness doesn't understand "truth" or can't communicate.

Here, Nurse Nan is a competent witness because she is a nurse who was observing and most likely assisting with the surgery. Her perception of the events are very accurate because she was close by Dr. Dooms and for an extended period of time.

first hand observation -
so personal knowledge

2) Dr. Dooms Testimony

Logical Relevance (Tendency Test)

Evidence is logically relevant if it shows a tendency to prove or disprove any disputed fact that is of consequence to determine the outcome of the case.

Here, Dr. Dooms testimony is logically relevant because he is a party and the defendant, and under due process requirements of the 14th Amendment, requires an opportunity to be heard. If he is able to give reasons why he believes he performed the surgery to the proper standard, provided a proper duty of care to Dusty, and can deny the allegations that Nurse Nan made, then this will have a tendency to disprove that he was negligent. Dr. Dooms testimony will also serve to counter what Dr. Better said, where Dr. Better said that Dr. Dooms had the lens positioned too low.

Therefore, Dr. Dooms testimony is logically relevant.

Legal Relevance (Balancing Test)

Evidence is legally relevant if the probative value is substantially outweighed by the danger of unfair prejudice, confusion, waste of time, or misleading the jury.

Here, Dr. Dooms testimony is legally relevant because he is able to explain the events, and he can cross-examine any witnesses, ^{+ highly probative} ~~that may testify against him~~. Because Dr. Dooms is present in the courtroom and has adequate representation, there is no danger of unfair prejudice, nor is there a chance that his 6th Amendment rights from the Confrontation Clause will be violated. ^{What is Dce argument?}

Therefore, Dr. Dooms testimony is legally relevant.

Witness Competency

As per the CEC, any person is qualified to testify unless there is a disqualification based on perception, memory, or the witness doesn't understand "truth" or can't communicate.

Here, Dr. Dooms may not be a competent witness because he was under the influence at the time her was performing the surgery. He testified to statements he made a few days

after the surgery, but he also stated during that appointment that he performed the surgery under the proper medical protocols. If he had just taken two shots of gin and did not have a steady hand, his being under the influence may have altered his perception of "proper medical protocols". Therefore, Dr. Dooms testimony may not be admissible as he is not a fully competent witness. *most likely he is competent to testify.*

Special Relevance

The goal of special relevance for evidence is to encourage public policy. This allows some evidence to be admitted that encourages people to settle disputes outside of court. Some of the special relevance examples are: Subsequent remedial measures, Similar Acts, Offers to Compromise, Offers to pay medical bills, Offers to plead guilty, Liability insurance, and expressions of sympathy.

Expression of sympathy

An expression of sympathy is inadmissible to prove liability or fault. This is based on public policy that encourages people to give expressions of sympathy when a person has suffered an injury, without the statement being used against them later to prove fault or liability.

Here, Dr. Dooms says that his statement of "I am so sorry for the pain." were meant to be compassionate and nothing else. This constitutes an expression of sympathy, and would not be admissible to prove that he is admitting liability. However, this statement could be used to show that he is aware that Dusty is in pain as a result of the surgery. *in California only.*

Offers to Compromise

An offer to compromise is inadmissible to prove fault or liability, this is to encourage people to settle their disputes outside of court rather than encourage litigation.

Here, Dr. Dooms statement "I am offering you \$40,000 for a settlement" constitutes an offer to compromise, and is inadmissible to show that Dr. Dooms is at fault. Dr. Dooms may want to settle this case quickly and out of court, and has an insurance policy that he can use to settle Dusty's case. Dr. Dooms may not want any bad press about his practice, but doesn't necessarily admit or believe he is at fault just because he is offering \$40,000 to settle the case. Dr. Dooms may be a compassionate doctor and truly care about his patients. However, this could also be evidence to show that Dr. Dooms has a drinking problem that he is trying to hide, and wants to settle this case quickly so that he doesn't draw any attention to his drinking problem. But this statement would most likely be inadmissible to prove fault or liability. *good points*

Hearsay

Hearsay is an out of court statement offered to prove the truth of the matter asserted. Hearsay evidence is inadmissible unless an exception applies. Hearsay evidence is generally inadmissible because it is unreliable, as the jury must rely on the declarant's memory of the events. The declarant is the person who made the out of court statement. The declarant can also be a party or a defendant, as is the situation with Dr. Dooms. Exceptions to the hearsay rule allow hearsay statements to be admitted if they are offered to prove something other than the truth of the matter asserted. Some non-truth purposes are effect on the listener, state of mind, impeachment, legal act, and knowledge or notice.

Statement by an opposing party / Party admission

A statement by the opposing party is an exception to the hearsay rule, particularly if it's an admission. The theory of reliability is that any statement that the opposing party makes which could be an admission of liability is admissible.

Here, Dr. Dooms admits to making the statement "I am so sorry for the pain. I am offering you \$40,000 for a settlement." Therefore, this statement is no longer hearsay

because Dr. Dooms admits to making this statement. However this statement would most likely not be admissible as a party admission because Dr. Dooms is not admitting that is he is liable, he is only admitting that he made the statements. His reason for making the statements were to offer words of compassion, and to negotiate a settlement for the case. These statements may be admissible to prove that Dr. Dooms was simply making statements of compassion. If they are offered for this purpose, then they are admissible. But if the statements are offered to prove the truth of the matter asserted, that Dr. Dooms is liable for medical malpractice, then they would not be admissible based on public policy exclusions.

3) Dr. Dooms professional liability insurance

Logical Relevance (Tendency Test)

Evidence is logically relevant if it shows a tendency to prove or disprove any disputed fact that is of consequence to determine the outcome of the case.

Here, evidence that Dr. Dooms has liability insurance is not logically relevant to prove medical malpractice. Any reasonable medical practitioner would have liability insurance, and is not proof that they have an intent to injure their patients.

Therefore, evidence of Dr. Dooms professional liability insurance is not logically relevant.

Legal Relevance (Balancing Test)

Evidence is legally relevant if the probative value is substantially outweighed by the danger of unfair prejudice, confusion, waste of time, or misleading the jury.

Here, evidence that Dr. Dooms has professional liability insurance is not legally relevant, and the probative value does not substantially outweighed the danger of unfair prejudice.

Dusty, by asking this question, can mislead the jury by saying that Dr. Dooms is an alcoholic, and in order to continue drinking during surgery, purchased professional liability insurance so he would have coverage in case he injures a patient. It could be used to show that Dr. Dooms intentionally does the surgery with the lens too low or while he's under the influence, and has his liability insurance policy as a security blanket. However, any reasonable and responsible business owner or medical practitioner would have professional liability insurance, and it does not show an intent to have a security blanket to either drink on the job or injure patients.

Therefore, evidence of Dr. Dooms professional liability insurance is not legally relevant.

Special Relevance

The goal of special relevance for evidence is to encourage public policy. This allows some evidence to be admitted that encourages people to settle disputes outside of court. Some of the special relevance examples are: Subsequent remedial measures, Similar Acts, Offers to Compromise, Offers to pay medical bills, Offers to plead guilty, Liability insurance, and expressions of sympathy.

Liability Insurance - Policy Exclusion

Liability insurance is inadmissible to prove negligence, product defect, or a need for a warning. This is to encourage public policy, that everyone should have insurance, and not to discourage people from having insurance if it could possibly be used against them.

Here, Dr. Dooms liability insurance policy is inadmissible to prove negligence.

Impeachment

A witness testimony can be impeached in order to discredit them.

4. Official Deposition Transcript of Dr. Better

Logical Relevance (Tendency Test)

Evidence is logically relevant if it shows a tendency to prove or disprove any disputed fact that is of consequence to determine the outcome of the case.

Here, Dr. Better's testimony is logically relevant because Dr. Better is an ophthalmologist, and would be able to give expert testimony on the specifics of cataract surgery. Dr. Better would be able to examine Dusty and make a professional and expert determination on what exactly caused the injury.

Therefore, Dr. Better's testimony is logically relevant.

Legal Relevance (Balancing Test)

Evidence is legally relevant if the probative value is substantially outweighed by the danger of unfair prejudice, confusion, waste of time, or misleading the jury.

Here, Dr. Better's ^{deposition} testimony is legally relevant because even though Dr. Better is an unavailable declarant, his prior testimony was given where both sides were present and there was opportunity for cross-examination. Even though it wasn't an official trial, in the deposition, the opposing counsel could have taken the opportunity to ask questions for cross-examination. Therefore, even though Dr. Better is unavailable for the current trial, his statements were made under oath as part of the deposition, not in violation of Dr. Dooms' 6th Amendment rights under the Confrontation clause based on the Crawford rule, and it is expert testimony.

Therefore, Dr. Better's testimony is legally relevant.

Authentication

Non-testimonial evidence must be authenticated. Authentication requires that the evidence be what the proponent purports it to be.

Here, the official deposition transcript was properly authenticated.

Hearsay

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

Hearsay evidence is inadmissible unless an exception applies. Hearsay evidence is generally inadmissible because it is unreliable, as the jury must rely on the declarant's memory of the events. The declarant is the person who made the out of court statement.

Out of court can also mean statements that are made outside of the current trial. *The deposition transcript is being offered for the truth of the matter asserted, so it is H.S. (fully analyze)*

Prior Testimony

Prior testimony is an exception to the hearsay rule. This exception applies if the declarant is unavailable, which death qualifies as a reason for unavailability, and if there was an opportunity for cross-examination. The Confrontation Clause of the 6th Amendment says that hearsay evidence is unavailable, even if an exception applies, if the declarant is unavailable, no prior opportunity for cross-examination, or the statement is testimonial. This rule comes from the Crawford, which followed the original Roberts rule, which did not require an opportunity for cross-examination by the defendant to anyone testifying against them.

Here, because Dr. Better's statements were made at the deposition where both parties were present, this would make his testimony admissible under this exception. Had Dusty testified to statements that Dr. Better had made during his hospital visit or in some other setting outside of court, they would most likely not be admissible. However, in this case,

because they were made during the deposition, in the presence of opposing counsel, and properly authenticated, this transcript will be admissible even though Dr. Better is unavailable. Also, because Dr. Better's testimony was testimonial and there was an opportunity for cross-examination because both parties were present, this evidence will most likely be admissible ~~as expert testimony~~.

END OF EXAM

overall, very good.

- Refrain from non-issues (Prop 8) did not apply. (No points taken off) Good understanding of evidence principles.*
- Fully analyze HS*
- Some minor organization paragraphs*

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2)

In order to determine the outcome of the evidentiary issues in this case, ~~we must~~ determine what evidence would be admissible in order to prove whether Dan is guilty for the murder of Victor. *avoid phrase "we" (no prints taken)*

Under the FRE, all evidence must be logically or legally relevant.

Begin here

1) Medical Records from Victor's Hospitalization

Logical Relevance (Tendency Test)

Evidence is logically relevant if it shows a tendency to prove or disprove any disputed fact that is of consequence to determine the outcome of the case.

Here, the medical records are logically relevant because they were taken by the doctor during the regular course of business, when Victor was admitted to the emergency room.

Legal Relevance (Balancing Test) *Note court does balancing*

Evidence is legally relevant if the probative value is substantially outweighed by the danger of unfair prejudice, confusion, waste of time, or misleading the jury.

Here, the medical records are legally relevant because the probative value of Victor's statements about who shot him do not unfairly prejudice Dan, and also because the statements were written by the Dr., there is no reason to believe that these authenticated documents have been falsified. Therefore, this evidence is legally relevant.

Hearsay

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

Hearsay evidence is inadmissible unless an ^{or exemption} exception applies. Hearsay evidence is generally inadmissible because it is unreliable, as the jury must rely on the declarant's

memory of the events. The declarant is the person who made the out of court statement.

(Exceptions to the ~~hearsay~~ rule allow hearsay statements to be admitted if they are offered to prove something other than the truth of the matter asserted.) NO — not so, you may be thinking of common non-truth purposes

Double Hearsay

Double hearsay is when there is an out of court statement that contains another out of court statement within it. Here, the first layer of hearsay are the medical records. The second layer of hearsay are the statements contained in the medical records, which are Dr. Oz notes of Victor's statements that he made after he was brought to the emergency room. Here, ~~we must~~ ^{analyze} both layers of hearsay to determine whether they are admissible. *conclude - then the notes of Dr are being offered for truth?*

Statement for medical treatment or diagnosis

A statement for medical treatment or diagnosis is a statement that that one makes to a doctor or medical practitioner when they are being treated for a medical condition. This is an exception to the hearsay rule. The theory of reliability is that when a person seeks medical treatment, they are more likely than not to tell the truth so that they can get proper medical treatment. Here, the court should allow Dr. Oz's note about Bob's statement, where Bob said "Victor is in a lot of pain because he was just shot" based on this hearsay exception for medical treatment because Bob's statement is so that Victor can get proper medical treatment. Bob's intent is to the tell the doctor why Victor is in a lot of pain. A gunshot is a wound that needs to be treated quickly, and this is what Bob was attempting to communicate to Dr. Oz. However, the defense should object to Dr. Oz's notes about Victor's statement "He can't believe Dan shot him over \$100.00" based on irrelevance. Victor's statements aren't about his medical condition and they are not being offered as part of his medical treatment or diagnosis. If Victor was truly concerned about his medical condition and offered his statement for that purpose, he would be more concerned with his own health, and not mentioning things like Dan shooting him over

→ it is relevant, However, the statement is not for purpose of medical treatment a diagnosis - so be excluded or redacted under this exception.

\$100.00. The court will most likely allow Bob's statement but may sustain the objection for Victor's statement based on irrelevance.

Excited Utterance

An excited utterance is when a person makes a statement while they are still under the stress of a startling event. The statement must have been made very soon after the startling event. The theory of reliability here is that a person is more likely to speak truthfully when they are describing a startling event and are still scared or impacted by it. There is also a greater chance that the person's memory is fresh and their perception of the events are more accurate.

Here, Dr. Oz note with Victor's statement "He can't believe Dan shot him over \$100" will most likely be admissible under the excited utterance exception to the hearsay rule because Victor is in the emergency room and in a lot of pain, and is most likely speaking truthful statements because of his condition. If this shooting happened at a poker game, it's likely that they were all friends there and just playing a game. It's possible that they were playing to gamble and weren't all necessarily friends, but it seems like Victor's perception was that it was a friendly game, and that he won the money fair and square. There are no facts to show that Victor cheated or stole the money from Dan, which does give proof that Victor is not only surprised that Dan shot him, but that Victor is also surprised at the amount of money that Dan shot him for. Money is relative, so \$100 to one person may be a lot, but a reasonable person would argue that \$100 is not worth shooting and killing a person. Therefore, Victor's statement will most likely be admissible based on the excited utterance exception to the hearsay rule.

Business record

A business record is another exception to the hearsay rule, where a statement that is taken during the course of business by a person who is authorized to make the recordings can

custodian of records

be admissible. Here, Dr. Oz is an emergency room doctor, and makes notes as part of his business records when he is treating someone. Therefore, the court will most likely allow the notes that Dr. Oz made under the business records exception to the hearsay rule.

Best Evidence Rule

The best evidence rule requires that documents be original. Here, the prosecution introduced authenticated medical records from Victor's hospitalization prior to this death. The facts don't state that these are copies or duplicates, so they are most likely the original notes that Dr. Oz made when Victor came to the emergency room.

Limiting Instructions

Therefore, as to Dr. Oz's note "Victor is in a lot of pain because he was just shot", the court should overrule the defense's objection and allow these statement based on the statement for medical treatment or diagnosis exception to the hearsay rule. As to Dr. Oz's note where Victor says "He can't believe Dan shot him over \$100.00", the court should sustain this objection by the defense based on ^{Not satisfy the elements of} ~~irrelevance in regards to~~ medical treatment and give a limiting instruction to only admit Bob's statement. However, if the prosecutor offers the statement from Victor "He can't believe Dan shot him over \$100.00" under the excited utterance exception to the hearsay rule, then the court should overrule the defense' objection and allow it into evidence. ^{No, all that is needed is a redaction (stake out), the need)}

2) Police Officer's testimony

Logical Relevance (Tendency Test)

Evidence is logically relevant if it shows a tendency to prove or disprove any disputed fact that is of consequence to determine the outcome of the case.

Here, the police officer's testimony is logically relevant because he spoke to Victor at the emergency room, and this was also within the regular course of an investigation.

Legal Relevance (Balancing Test)

Evidence is legally relevant if the probative value is substantially outweighed by the danger of unfair prejudice, confusion, waste of time, or misleading the jury.

Here, the police officer's testimony is legally relevant because it was taken in the regular course of business, and law enforcement testimony does not unfairly prejudice the defendant, as law enforcement is a neutral party and not biased towards any particular side.

Witness Competency

Any witness is qualified to testify unless there is a disqualification based on perception, memory, or the witness doesn't understand "truth" or can't communicate. Here, the police officer is a competent witness. *First hand knowledge.*

Hearsay

Hearsay is an out of court statement offered to prove the truth of the matter asserted. Hearsay evidence is inadmissible unless an exception ^{or exemption} applies. Hearsay evidence is generally inadmissible because it is unreliable, as the jury must rely on the declarant's memory of the events. The declarant is the person who made the out of court statement.

(Exceptions to the hearsay rule allow hearsay statements to be admitted if they are offered to prove something ~~other than~~ the truth of the matter asserted.)

Not so - this is non-HS & lot HS are exempt / exemption.

Dying Declaration

A dying declaration is when a ^{declarant} person makes a statement under the threat of impending

death. The theory of reliability is that a person is more likely to speak truthfully when they believe that death is imminent. Here, the officer testified that Victor said several times, "Dan shot me, I'm dying." This statement could be offered by the prosecution to show that Dan believed death was imminent, which would allow this statement to be admitted as a dying declaration. The defense offers testimony that at the time of the shooting, Victor had been reassured by the doctor's and nurses that he would recover, and that it was because of the infection that Victor died, not the actual gunshot on the day of the shooting. The prosecution should object to this testimony as misleading the jury by trying to show that Victor's belief of his imminent death was not accurate. Victor is the one with the punctured lung. Victor was most likely in a lot of pain from the shooting and having a hard time breathing. Victor may have had some pre-existing medical conditions, or other reasons why he felt the gunshot was going to kill him. A reasonable person who had been shot in the chest would not be off base to think that they could die. Therefore, even with the doctors' reassurance that the wound was not fatal, if Victor himself believed that his death was imminent, then the court should sustain the prosecution objection to the defenses' evidence about the doctor's statements.

3) Tina's testimony

Logical Relevance (Tendency Test)

Evidence is logically relevant if it shows a tendency to prove or disprove any disputed fact that is of consequence to determine the outcome of the case.

Tina's testimony is not logically relevant, because her statement about what Oscar said at the bar does not corroborate Dan's alibi that he was not at the poker game, where the shooting took place. Even if Oscar did make those statements, it doesn't mean that Dan

did not shoot Victor. Had Tina testified that Dan was with her at the bar, that would have more tendency to prove Dan's alibi. Therefore, this evidence is not logically relevant.
What about third party culpability?

Legal Relevance (Balancing Test)

Evidence is legally relevant if the probative value is substantially outweighed by the danger of unfair prejudice, confusion, waste of time, or misleading the jury.

Tina's testimony is not legally relevant because the probative value does not outweigh the danger of confusing or misleading the jury. Because Tina seeks to introduce another suspect, Oscar, this could mislead the jury away from whether Dan is guilty of the murder. Tina doesn't offer any evidence or any proof of what Oscar said, and Oscar is not unavailable due to the death so he can not be cross-examined, which violates the Confrontation Clause under Crawford. Therefore, her testimony is not legally relevant.

Hearsay

Hearsay is an out of court statement offered to prove the truth of the matter asserted. Hearsay evidence is inadmissible unless an exception applies. Hearsay evidence is generally inadmissible because it is unreliable, as the jury must rely on the declarant's memory of the events. The declarant is the person who made the out of court statement.

(~~Exceptions to the hearsay rule allow hearsay statements to be admitted if they are offered to prove something other than the truth of the matter asserted.~~) *No - you are confused*

Impeachment

If a witness is shown to not be credible, their testimony can be impeached. There are various methods for impeachment, some of which include bias, contradiction, prior inconsistent statements, and sensory deficiencies, among others.

Bias

A person's testimony can be impeached if there is a perception of bias, or if the witness is shown to have a reason to lie or be biased towards a certain party. Here, Tina most likely has a bias because she is Dan's girlfriend, and did not come forward with this information until after Oscar died, which was about a year after the shooting but before Dan's trial.

The prosecution should object to Tina's testimony due to bias and impeach her credibility as a witness.

Sensory Deficiencies

Sensory deficiency is another reason for impeachment. This is when the witness was too far away from the events, was under the influence, or didn't hear things properly. Here, Tina was drinking at the No Good Saloon when she said she heard Oscar boasting that he was the one who shot Victor. The prosecution should object to this testimony and the court should sustain the objection based on (misleading the jury.)

*this is not basis
for objection.
Pros. can cross-X*

*only attorney
would be
objecting
here*

Declarant Unavailable

Tina did not bring this testimony forward until after Oscar died, which means that now Oscar is unavailable for testimony and cross-examination. The court should object to this evidence based on the fact that Oscar is unavailable, he did not make the statements while under oath or at trial, and is unavailable for cross-examination. He was also not cross-examined at the time that he allegedly made the statements.

Objection - Irrelevance

Therefore, The prosecution should impeach Tina as a witness due to bias and sensory deficiencies, and also because ^{Oscar} is not available to cross-examine Tina's testimony. The court should not allow Tina's testimony, and should sustain an objection for Tina's testimony about Oscar based on irrelevance. Tina's testimony that Oscar made these

statements admitting to shooting Victor does not mean that Dan was not at the poker game, which is the alibi that he gave. All it shows is that Oscar made a statement, which is inadmissible hearsay under no exception, and does not give Dan an alibi. Also, there are no witnesses to corroborate Tina's testimony. Therefore, the court should not admit any of Tina's testimony.

What about HS Exception
Declar/Stat against Interest? Fully
discuss

END OF EXAM

overall, good

- missed issue above
- It is "non-truth Purposes" - Common - that you may have intended for part of your HS definition. The Common non-truth purposes are not HS.
- Under FRE, there are both exceptions & exemptions.

3)

1) Oscar's testimony

Logical Relevance (Tendency Test)

Evidence is logically relevant if it shows a tendency to prove or disprove any disputed fact that is of consequence to determine the outcome of the case.

Oscar's testimony is logically relevant because he works at Dun-Middleton, and observed Dwight assigning Ryan to drive Todd to sales calls. Since Oscar is an accountant, he most likely has a lot of contact with the sales department, and has observed with his own senses that Ryan was driving Todd around. Also, because Ryan is a temporary employee, this shows an even higher level of negligent entrustment because Ryan may not be covered by workers comp if he is injured while in the course of his job duties.

Legal Relevance (Balancing Test)

Evidence is legally relevant if the probative value is substantially outweighed by the danger of unfair prejudice, confusion, waste of time, or misleading the jury. *note that Court balances*

Oscar's testimony is legally relevant because there is a high probative value to show a common course in conduct and Todd's prior convictions to show the same pattern of behavior in the current case. Also the fact that Oscar observed the behavior for months shows that there would not be unfair prejudice towards Dun-Middleton from Oscar's testimony.

Character - Reputation

Character evidence is inadmissible to prove conduct in conformity. Three types of character evidence are reputation, opinion, and specific instances. Character evidence is

admissible in cases where a character trait is at issue. This normally is for cases in defamation, negligent entrustment, child custody, and wrongful death. ~~Character is admissible if it's used to show motive, intent, mistake, identify, or common course of conduct.~~ Prior convictions are admissible if they are offered to prove something other than conduct in conformity. *like what? This is CIVIL, MIMIC is used by Prosecution in Criminal cases*

Here, Oscar's testimony that Dwight had assigned Ryan to drive Todd to sales calls constitutes reputation evidence, and is admissible character evidence. This evidence shows ~~a person's~~ ^{Todd's} reputation in the community, especially if the events were done over a long period of time, like in this case, Ryan was driving Todd to sales calls for a few months, which caused Todd to develop the reputation for being untrustworthy behind the wheel. This evidence can be admissible to show that Todd had a reputation for drinking while driving, which shows common course of conduct for him drinking Irish whiskey on the day of the event. This evidence is also admissible because the character trait at issue is negligent entrustment, which would make Dwight liable for negligent entrustment because he allowed Todd to drive when Dwight had both prior knowledge and notice of Todd's reputation of drinking while driving.

Therefore, evidence of Todd's reputation of being untrustworthy behind the wheel would be admissible to show Todd's common course of conduct for drinking while driving. It would also be admissible to show Dwight's negligent entrustment and bad character on his part as the regional manager of the facility.

2) Creed's testimony

Logical Relevance (Tendency Test)

Evidence is logically relevant if it shows a tendency to prove or disprove any disputed fact that is of consequence to determine the outcome of the case.

Creed's testimony is logically relevant because it has a tendency to prove similar happenings based on his experience as a quality assurance representative. Creed is testifying based on his experience and observations over four years.

Legal Relevance (Balancing Test)

Evidence is legally relevant if the probative value is substantially outweighed by the danger of unfair prejudice, confusion, waste of time, or misleading the jury.

Creed's testimony is legally relevant because the probative value of his observations over four years show that there is not unfair prejudice towards Dun-Middleton, and that he has observed similar happenings to the current case over the past four years.

Similar Happenings

Similar happenings are admissible to show incidents that occurred under substantially similar circumstances as the case at bar. Here, Creed's testimony that he has seen six different workers struck by vehicles in the parking lot, and that he reported each of the events, shows a pattern of events and can prove that Dwight had knowledge and notice of these events going on at the premises. Therefore, this evidence of similar happenings will be admissible to show a pattern of events, and to show that Dwight had knowledge but was negligent.

3) Toby's testimony

Witness competency

Any witness is qualified to testify unless there is a disqualification based on perception, memory, or the witness doesn't understand "truth" or can't communicate. Here, even though Toby is unable to speak or type, he can still communicate. Toby still has

perception, and memory, and understands "truth" because he can distinguish between yes, no, and I don't know.

~~Assertive Conduct~~

Communication

Statements can be verbal or written, or they can be gestures to substitute words. Here, even though Toby is unable to speak, he is still able to communicate. Toby uses blinking ~~as assertive conduct~~ to communicate, one time for yes, two times for no, and three times for "I don't know". The court should deem Toby as a competent witness and allow his testimony.

(No assertive conduct - this is communication issue. also "assertive conduct" sounds like part of "hearsay" consideration.)

4) Angela's testimony

Logical Relevance (Tendency Test)

Evidence is logically relevant if it shows a tendency to prove or disprove any disputed fact that is of consequence to determine the outcome of the case.

Here, Angela's testimony is not logically relevant because Meredith is not the one on trial. It would only be logically relevant if this was an argument for contributory negligence. However, Angela was not on the scene and was not a witness to the events, which means that her testimony is meant to be character evidence, which is inadmissible because Meredith's character is not at issue in this case.

Therefore, Angela's testimony about Meredith's alcoholism and carelessness is not logically relevant.

Legal Relevance (Balancing Test)

Evidence is legally relevant if the probative value is substantially outweighed by the danger of unfair prejudice, confusion, waste of time, or misleading the jury.

note that court does the balancing

Here, Angela's testimony is not legally relevant because there very little probative value of contributory negligence, if there is proof that Meredith is an alcoholic and is careless. There's a chance that Meredith could have slipped and fell due to being inebriated, but it is not relevant to prove that she was at fault for Todd driving drunk and causing her injuries.

Therefore, Angela's testimony is not legally relevant.

Character trait not at issue

this is a civil case

With character evidence, ~~only~~ the defense can open the door for character evidence, and then the ~~prosecution~~ can rebut with their own character evidence. Here, Meredith is the plaintiff and is not on trial, she is the one suing Dun-Middleton. Meredith's character is not at issue in this case, and therefore this evidence that Meredith is an alcoholic who is careless is not relevant and is inadmissible. In addition to this, Angela did not offer any proof or other corroborating statements to show why she believes Meredith is an alcoholic and is careless. Dun-Middleton could argue that this evidence is relevant because if Meredith is an alcoholic and is careless, then it's possible that she was contributorily negligent and caused her own injury when she slipped and broke her hip. However, this would still be irrelevant regarding Todd's driving drunk and injuring Meredith.

END OF EXAM

- Include could balance in legal relevancy
- Not MIMIC, Civil case (no prosecution)
- "Communication" - not assertive conduct (competency) - also facts state NO HS discussion - assertive conduct is part of that area