

# Monterey College of Law - Hybrid

## EVIDENCE- SEC. 1

### Mid Term Examination

FALL 2023

Prof. S. Chronister

#### **General Instructions:**

Answer All Three Essay Questions.

Total Time Allotted: Three (3) Hours

Recommended Allocation of Time: Equal Time per Question

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#### Question 1

Donald is prosecuted for murder in the case of People of the State of X v. Donald. It is alleged that Donald came up behind Valerie on the sidewalk outside her front door at 10:00pm on the night of December 31, 2023. Donald put a cloth bag over Valerie's head and threatened to kill her if she did not let him inside and sleep with him. Valerie screamed, "Help, he is going to kill me!" but was silenced by Donald throwing Valerie to the ground, where her head hit the curb knocking her unconscious.

Wendy, Valerie's neighbor, heard her scream and came outside to see a man getting into a white car and drive away. The streetlights were shining on the man's face, and Wendy thinks she got a good look at the man. Wendy then called 911, and spoke with Paul, a police officer, about the incident. Paul showed Wendy a photo lineup that night and Wendy picked Donald out of the lineup.

Valerie was taken to the hospital and placed in a medically induced coma. She ultimately died due to severe head trauma.

Assume the following occurred in the jury trial of Donald. Discuss all evidentiary issues and arguments that would likely arise in each section below, including objections, if any, and the likely trial court ruling on the admissibility of the evidence. The State of X has adopted the Federal Rules of Evidence.

1. The Prosecution calls Wendy as a witness. Wendy testifies that she suffered significant anxiety after the incident and is having trouble remembering the night of the attack. Wendy testifies that she saw the assailant after the attack, but that she cannot remember what he looks like now. The Prosecution asks Wendy if she identified Donald as the assailant in the photo lineup and Wendy answered that she could not remember. The Prosecution then calls Paul, the police officer, as a witness. Paul testifies that Wendy identified Donald in the lineup.

2. Next Wendy testifies that she heard Valerie scream "Help, he is going to kill me!"

3. The Defense calls Barry, the hotel manager at ABC Motel, as a witness. Barry testifies that part of his job is to keep the guest ledger, and to check in each guest at the motel. Barry then testified that a man identifying himself as Donald checked into the motel at 9:00pm on the night of December 31, 2023. ABC Motel is located 80 miles away from Valerie's house. The Defense then moves to introduce the motel's guest ledger into evidence. The ledger shows a man with Donald's full name signing into the motel at 9:00pm on December 31, 2023. The ledger does not include a signature, and Barry testifies that it is not ABC Motel's policy to ask for additional guest identification.

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## Question 2

Assume the following fact pattern occurred in California state court.

Paul and Dana both worked at ABC company. Dana worked in HR and had been with the company for 10 years. Paul was hired in 2022 and had just celebrated his one-year work anniversary. Paul, Dana and their team went out for happy hour after work one day to celebrate. The next morning at work another employee told Paul that Dana had sent an email at midnight to their whole team, as well as the management team, saying:

“Paul was belligerently drunk tonight. He has a history of being drunk and violent. He tried to seduce me, so I want you all to be careful!”

Paul filed a defamation lawsuit against Dana. Discuss all the evidentiary issues and arguments that would likely arise in each section below, including objections, if any, and the likely trial court ruling on the admissibility of the evidence.

1. During the Plaintiff's case in chief the Plaintiff calls Ethan, an employee at ABC, who testifies that he heard Brandon, the boss, say “I didn't know that Paul would be so violent or inappropriate when drunk. He just finished his 12 month probationary period and now I don't know if I should recommend him for full time employment.” Brandon did not end up recommending Paul for full employment, and he was instead offered another 12-month contract. After learning about the defamation lawsuit, Brandon moved to Europe and no one at the company knows his new address or phone number.
2. Next, the Plaintiff introduced Dana's email through Camille, Head of HR at ABC.
3. Next, the Plaintiff called Tammy, a good friend of Paul's, to testify. She testified that Dana was always flirting with Paul, and that in her opinion Dana had a crush on Paul. Tammy also testified that she worked with Paul at her last job as well and has known him for 10 years and that in her opinion he is a peaceful person.
4. During the Defense's case-in-chief the Defense called Wally, Paul's college roommate, to testify. Wally testified that during college Paul had been kicked out of his fraternity after being accused of sexual assault and eventually transferred schools.

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### Question 3

Assume the following fact pattern occurred in a jury trial in Federal Court.

While walking from the garage into a department store Polly slipped and fell in the doorway due to rainwater on the ground. Polly had not yet entered the store, but was in a covered pedestrian walkway between the garage and store. As she fell she cried out, “Help me, I’ve slipped and fallen!” Margaret, the department store manager, heard Polly’s cry for help from inside the store, but did not see her actually fall. Margaret walked outside and helped Polly up, saying, “I am so sorry, we really need to get proper weather proofing on these doors – there is always so much rain water!”

Polly sued the department store for negligence. Her injuries included a fractured foot and a back injury. The department store denies liability, on the grounds that the pedestrian walkway was maintained by a separate entity.

Discuss all evidentiary issues and arguments that would likely arise in each section below, including objections if any, and likely court rulings on the admissibility of the evidence. Assume proper objections were made.

1. The Polly’s counsel called Margaret, the store manager, as the first witness. Margaret testified that she was walking by the department store’s front doors when she heard Polly calling for help. She then testified that the doors to the walkway had old weather proofing and let in a lot of water, but that the store was not responsible.
2. Then, Polly’s attorney called the Insurance Agent for the department store. The agent testified that the store was insured for all negligence claims that occurred within the store’s premises, including the garage. Also, the Insurance Agent testified that he offered Polly \$50,000 to settle the lawsuit. Polly had rejected the offer.
3. Next, Carl, the custodian of records for the store, testified. He testified that the store had submitted claims to the insurance company from fifteen (15) other customers who had slipped entering the pedestrian walkway due to rainwater. Also, he testified that after this lawsuit began, the store replaced the weather proofing strips on both the doors to the department store and the doors in the pedestrian walkway.

Evidence SEC. 1

Fall 2023

Prof. S. Chronister

## Answer Outline-Q1

### 1. Wendy's Identification

Logical Relevance – A tendency to prove or disprove a fact of consequence.

Balancing / Legal Relevancy – The probative value of the evidence must be weighed by undue prejudice, waste of time or jury confusion.

Witness competency / Personal Knowledge – Witnesses presumed to be competent until contrary demonstrated. A witness needs to have personal knowledge of the facts to which they are testifying.

Hearsay - Out of court statement offered for TOMA. Hearsay is typically inadmissible unless there is an exception.

Prior Identification – The declarant testifies and is subject to cross examination about the statement and, the declarant identifies a person as someone the declarant perceived earlier. Here, W identified D in a photo lineup the same night as the incident. W is testifying and subject to cross examination. Even though W does not currently remember the man she identified, she does testify that she identified the assailant directly after the attack. The police officer then testifies to confirm that W did identify D. With these two testimonies together, the hearsay exception is met. \*Extra analysis: Is W truly subject to cross if she doesn't remember the specifics of the night.

Confrontation Clause – An out of court statement, if deemed testimonial, can be produced against a criminal D only if 1) he has the opportunity to cross-examine the declarant, and 2) the witness is unavailable to testify at trial. Analysis: W is not unavailable she is present testifying and subject to cross.

### 2. Wendy's Testimony re: the scream

Relevance – A tendency to prove or disprove a fact of consequence.

Balancing / Legal Relevancy – The probative value of the evidence must be weighed by undue prejudice, waste of time or jury confusion.

Witness competency / Personal Knowledge – Witnesses presumed to be competent until contrary demonstrated. A witness needs to have personal knowledge of the facts to which they are testifying. Here, W testifies that she heard V scream out. \*Possible issue of personal knowledge, as the facts don't tell us that W saw V while she screamed. May need additional facts to explain how she could recognize V's voice?

Hearsay - Out of court statement offered for TOMA. Hearsay is typically inadmissible unless there is an exception.

Dying Declaration – In a homicide case, or civil case, a statement that the declarant, while believing they were under the threat of imminent death, made about its cause or circumstances. The declarant must now be unavailable. Here V died from her injuries and is thus unavailable. If we can show that W does have knowledge of V's voice, "Help, he is going to kill me" seems to meet the requirement that V believed her death was imminent.

Present Sense Impression - A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

### 3. Barry's testimony

Logical Relevance – A tendency to prove or disprove a fact of consequence.

Balancing / Legal Relevancy – The probative value of the evidence must be weighed by undue prejudice, waste of time or jury confusion.

Witness competency / Personal Knowledge – Witnesses presumed to be competent until contrary demonstrated. A witness needs to have personal knowledge of the facts to which they are testifying.

Hearsay – Out of court statement offered for TOMA. Hearsay is typically inadmissible unless there is an exception.

Business Record Exception – 1) recording of an act or event, 2) made by a person with personal knowledge, 3) made at or near the time of the event or act, 4) by a person under a duty to keep the records in the ordinary course of business. Here, the ledger is made by the hotel manager, but the information came from the motel guest. There is no business duty by a guest to give the hotel manager correct information. Therefore the source of information is not reliable and would not satisfy the business record exception. \*Extra analysis: Could be admissible to show someone with D's name was present, but would need additional info to prove it was D.

## Answer Outline-Q2

### 1. Ethan's testimony

Logical Relevance – A tendency to prove or disprove a disputed fact of consequence. The email is relevant because it constitutes the basis of the defamation lawsuit and is in dispute. It is clear that Brandon read the email (libel) because he made a reference to P being violent. The remaining portion of the statement that he might not recommend P for full employment shows that B believed the email was truthful and it influenced his decisions regarding P's employment.

Balancing / Legal Relevancy – CEC 352, probative value of the evidence must be weighed by undue prejudice, waste of time or jury confusion. Here the email is relevant because it supports the defamation allegation since character (violence) is directly in issue.

Witness competency / Personal Knowledge – Witnesses presumed to be competent until contrary demonstrated. A witness needs to have personal knowledge of the facts to which they are testifying. Here Ethan is testifying to something he heard, which he has personal knowledge of. He is also an employee of ABC and the facts tell us he knows who Brandon is and was in a place to overhear him. The facts do not tell us that he is incompetent to testify.

Hearsay – Out of court statement offered for TOMA. Hearsay is typically inadmissible unless there is an exception. The declarant, B, can't be found and is arguably unavailable. P will argue that B's statements are not hearsay, because they are going to show his state of mind in deciding whether to recommend P for full employment, and not to the truth (proving that P is violent). Alternatively P will argue that if the statements are deemed hearsay, that they can still be admissible under an exception. D will argue that the statements are inadmissible hearsay.

State of Mind – the underlying reason that P was not recommended for full employment. B specifically voiced his concern to others (E) about P's violent history and the fact that as a boss, he was unaware of. Here, a declarant's then

existing state of mind is admissible to show the condition or mind set. It is likely a court will view the B statement as a state of mind exception.

Independent act of Legal Significance (non-hearsay) – P may argue that the B's statement is not hearsay because they have independent legal significance. B's statement about P being violent is allegedly a defamatory statement in a defamation lawsuit. This is likely a successful argument. Also it may be argued that P was not recommended for full time employment because B believed P was a violent person.

## 2. Camille's testimony

Logical Relevance – A tendency to prove or disprove a disputed fact of consequence.

Balancing / Legal Relevancy – Probative value of the evidence must be weighed by undue prejudice, waste of time or jury confusion.

Witness competency / Personal Knowledge – Witnesses presumed to be competent until contrary demonstrated. A witness needs to have personal knowledge of the facts to which they are testifying.

Hearsay – Out of court statement offered for TOMA. Hearsay is typically inadmissible unless there is an exception.

Business record exception – 1) recording of an act or event, 2) made by a person with personal knowledge, 3) made at or near the time of the event or act, 4) by a person under a duty to keep the records in the ordinary course of business. C is Head of HR, she may qualify as the custodian of records / a qualified witness. However, it is unlikely this email from D to the other employees would qualify under this exception because there is arguably no duty on the part of ABC to record the email, and from the facts given it does not seem like the email was within the normal scope of business or in furtherance of the business operations. Thus, the email might not qualify as a business record, but may still be admissible as an act of legal significance (discussed above).

Opposing party statement – Statement may be admissible if made by a party and offered by the opponent. It does not need to be against the declarant's interest. In this case, the statement was made by D and offered against her at trial. P may need to authenticate the email.

Spontaneous Statement – Statement must be made while under the stress of the event and be trustworthy. The "be careful!" statement is in the email and may be argued as more of a caution than an actual relaying that P is indeed violent. Unlikely this exception will apply because the startling event is too vague, innuendo of P's history of being violent.

Limiting Instruction: The court may allow in the violent temper portion of the statements, but may redact the "be careful!" portion unless it can be established that this was a fear element that may have resulted in P not being recommended for full employment because B believed the email, that P was violent. Court may also allow the email but advise jury to only consider it for a specific purpose.

## 3. Tammy's testimony

Logical Relevance – A tendency to prove or disprove a disputed fact of consequence.

Balancing / Legal Relevancy – Probative value of the evidence must be weighed by undue prejudice, waste of time or jury confusion.

Witness competency / Personal Knowledge – Witnesses presumed to be competent until contrary demonstrated. A witness needs to have personal knowledge of the facts to which they are testifying.

Character evidence – Is usually inadmissible to prove conduct in conformity. However, in this civil case, it may be admissible since a character trait – violence – is directly in issue in the defamation case. Here, T's testimony is being offered to show the falsity of D's violence email about P.

Bias – May be explored on cross-examination by D because T is a good friend of P's for the past 10 years. Might have an incentive to lie?

#### 4. Wally's testimony

Logical Relevance – A tendency to prove or disprove a disputed fact of consequence.

Balancing / Legal Relevancy – Probative value of the evidence must be weighed by undue prejudice, waste of time or jury confusion.

Witness competency / Personal Knowledge – Witnesses presumed to be competent until contrary demonstrated. A witness needs to have personal knowledge of the facts to which they are testifying.

Character evidence, Specific Acts – Other crimes and bad acts may be used as specific instances. Here Wally is giving an account from college that P was violent – accused of sexual assault. The accused sexual assault is a prior act of violence. This testimony is being used to counter the testimony of T. Character of the victim (P) is offered by Defense to rebut, and may be deemed admissible since there was testimony that P is a peaceful person. The prior college incident may give rise to truth of violence and truth is a defense to a defamation lawsuit.

### Answer Outline-Q3

#### 1. Manager's testimony

Logical Relevance – Evidence having any tendency to make the existence of any fact of consequence to the determination of the action more or less probably than it would be without the evidence.

Balancing / Legal relevance – Court must balance the probative value of the evidence against the danger of unfair prejudice, confusion of the issues, misleading the jury, or undue consumption of time. If prejudice is substantially greater than the probative value of the evidence the court will exclude the evidence.

Hearsay – Out of court statement offered for its truth. Inadmissible unless exception applies.

Excited Utterance – Evidence of a statement is not inadmissible by hearsay if the statement relates to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

Present Sense Impression – A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it. \*Extra rule: note, the CEC exception is narrower than the FRE, only applies to statements made while engaging in the conduct.



State of mind – Declarant's then existing physical or mental condition is admissible to show that condition (the fall). Declarant's cry for help when she fell and could not get up is an emotional response to slipping and falling.

## 2. Insurance Agent's testimony

Logical Relevance – Evidence having any tendency to make the existence of any fact of consequence to the determination of the action more or less probably than it would be without the evidence.

Balancing / Legal relevance – Court must balance the probative value of the evidence against the danger of unfair prejudice, confusion of the issues, misleading the jury, or undue consumption of time. If prejudice is substantially greater than the probative value of the evidence the court will exclude the evidence.

Settlement offers – Offers to settle are inadmissible to prove liability of the amount of the disputed claim, or the validity of the claim. Statements made during settlement negotiations are excluded against public policy. The Insurance Agent's settlement offer is inadmissible to prove damages or medical expenses amounts or the store's liability for negligence.

Premises liability – Evidence of liability insurance is not admissible to prove negligence. It IS admissible to prove "ownership or control" of the premises. Manager denied the store is liable because the walkway is operated by another entity. However, the insurance policy specifically provides that all the store premises are covered against negligence claims.

Limiting instruction – Trial court could instruct the jury that they may consider the insurance coverage for the "ownership and control" issue, but not for fault.

## 3. The Custodian of Record's testimony

Logical Relevance – Evidence having any tendency to make the existence of any fact of consequence to the determination of the action more or less probably than it would be without the evidence.

Balancing / Legal relevance – Court must balance the probative value of the evidence against the danger of unfair prejudice, confusion of the issues, misleading the jury, or undue consumption of time. If prejudice is substantially greater than the probative value of the evidence the court will exclude the evidence.

Similar happenings – The fact that the grocery store had 15 previous slip and fall claims does not establish fault. However the fact that there were 15 complaints of slip & falls due to rainwater in the same area where Polly fell may establish that the store had knowledge of the causation and did nothing, and therefore breached the duty of care.

Limiting instruction – Court could instruct the jury that the 15 claims be used as putting the store on notice that there was a problem with the door's weather proofing. However, that can't be used as a basis for fault.

Subsequent remedial measures – Evidence of safety measures or repairs are inadmissible to prove negligence. The fact that the store replaced the weatherproofing strips after the lawsuit is inadmissible to prove fault. However, like with similar happenings it could be admissible to show something else, like knowledge and ownership.

Hearsay – the claims (if offered for TOMA) are hearsay. Like discussed above, if they are offered only to prove knowledge of the problem or ownership of the doors, the court may use a limiting instruction.

Business Record Exception - 1) recording of an act or event, 2) made by a person with personal knowledge, 3) made at or near the time of the event or act, 4) by a person under a duty to keep the records in the ordinary course of business. Here, Carl, as custodian of records, has access to the records of events in the "regular course of business" at the store. He is under a duty to record events at or near the time of the event. With that foundation the records may be admissible. But consider the limiting instruction above for similar happenings.

1)

Is Wendy's identification of Donald admissible:

✓  
In order for any piece of evidence to be admitted in a criminal trial, it has to be logically and legally relevant.

*good!*  
Logical Relevance: A piece of evidence is considered logically relevant if it can serve to prove or disprove a fact of consequence. Here, Wendy's identification of Donald can help to prove that she saw Donald driving away from the scene of the crime on the night of the incident. Thus, Wendy's identification of Donald is logically relevant.

Legal Relevance: A piece of evidence is considered legally relevant when its probative value is not outweighed by its prejudicial value. The piece of evidence must not confuse the jury or the issues in the case, it can not be cumulative, and it can not... Here, Wendy is the only surviving witness of the incident involving Valerie. Her testimony is prejudicial to Donald however, a judge would likely determine that Wendy's statement's probative value would weigh more than its prejudicial value.

*+ must be competent to testify*  
Personal Knowledge: In order for someone to testify to something, they had to have experienced it with one of their senses. The witness must have been present at the scene where the incident took place. Here, Wendy was Valerie's neighbor. Wendy was home when she heard Valerie scream, "Help, he is going to kill me!" Wendy went outside and saw Donald driving away. Wendy called police and immediately told them what she saw. Thus, a court would likely allow Wendy to testify because she has personal knowledge of the event.

Hearsay: Hearsay is an out of court statement that is being offered to prove the truth of the matter asserted. Generally, hearsay is inadmissible unless it falls under an exception. Here, Officer Paul's statement that Wendy identified Donald in a lineup is hearsay

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✓ because the prosecution is trying to prove that Wendy saw Donald at the scene. Wendy is not testifying to this herself. Paul is saying that Wendy told him that she saw Donald that night. *wendy is also testifying to her prior ID, she just can't remember if D was who she identified. P's testimony confirms it was*

✓ Previous Identification: One of the exceptions to the hearsay rule is "previous identification." Under this exception, a statement where a witness identified a defendant could be allowed into evidence if the witness testifies that she does not currently remember who she identified at the time of the initial identification. The witness must also testify that they recall having made the identification. The witness' identification of the defendant must have been recorded in some way. The identification must have also occurred close in time to the actual incident. *not part of rule. Prior ID = delusory & is subject to cross examination about a prior ID. Because W doesn't remember, we also need P's testimony*

✓ Here, Wendy testified that she saw the assailant after the attack but she can not remember what he looks like now, this means that she made an identification on the night in question. Wendy did not know if she actually identified Donald or not. The facts state that officer Paul showed Wendy a photo lineup that night and Wendy picked Donald out of a line up. Thus, Paul's statement of Wendy's identification of Donald would likely be admitted into court. *W's testimony about the prior ID*

Is Wendy's testimony of Valerie's statement, "Help, he is going to kill me!", admissible?

*good!*  
Logical Relevance: See rule supra. Here, Wendy's testimony would help prove or disprove that the person she saw leaving the scene had something to do with Valerie's injury and death. Also, Valerie's statement would be logically relevant because it would tend to prove that Valerie was aware that her death was imminent. Thus, a court would find that the statement was logically relevant.

✓  
Legal Relevance: See rule supra. Here, Wendy's testimony of Valerie's statement would not be cumulative, it would not confuse the jury, it would not confuse the issues, and it would not cause the court undue delay. Although, the defense could argue that Wendy's

testimony about what she heard is prejudicial for Donald, a court would determine after a balancing test that the information's probative value outweighs its prejudicial value. Thus, Wendy's testimony of Valerie's statement would be considered legally relevant.

Personal Knowledge: See rule supra. Here, the facts state that Wendy heard Valerie scream, "Help, he is going to kill me!" Wendy experienced this herself and was able to report it accurately to police. Assuming that Wendy is competent to testify, the court would likely find that Wendy is able to testify to this fact because of her personal knowledge.

how do we know W recognizes V's voice?

Hearsay: See rule supra. Here, Valerie's statement, "Help, he is going to kill me!" is a hearsay statement that would not be admissible in court without any applicable exceptions. The defense would likely object to this statement being allowed in.

Why? what is the argument that it is hearsay?

Dying Declaration: There is a dying declaration hearsay exception that requires that the declarant be unavailable, that the declarant <sup>(believed)</sup> knew their death was imminent, that the declarant made a spontaneous statement regarding what they believed was happening at the time, and the statement the declarant made was heard by someone else. → not part of rule, but yes

Here, Valerie is an unavailable declarant because she can not testify because she is dead. One can infer that when Valerie yelled, "Help, he is going to kill me!" she believed her death was imminent. Also, one can assume that Valerie was talking about what was happening at the time of the incident, not a situation in the past. Lastly, Wendy overheard Valerie's statement and is willing to testify to it. Thus, Wendy's testimony of Valerie's dying declaration would likely be admissible. → IF we can show W has knowledge of V's voice

Is Barry's testimony regarding Donald admissible?

Logical relevance: See rule supra. Here, Barry's testimony can be used by the defense to prove that Donald was 80 miles away from the scene of the crime and therefore could not



have committed the crime in question. Thus, Barry's statement that Donald checked into the hotel would be found to be logically relevant.

Legal relevance: See rule supra. Here, Barry's testimony's probative value is not substantially outweighed by its prejudicial value. The testimony is not cumulative based on the facts. Thus, this information would be found legally relevant.

Personal knowledge: See rule supra. Here, Barry is testifying that it is part of his job to check in each guest at the motel. Barry testified that a man identifying himself as Donald checked into the motel on the night in question at 9pm. Here, the prosecution would argue that although Barry checked the man in, Barry can not say for certain that the man is Donald the defendant because Barry did not testify that he identified Donald through asking for an ID card or by remembering what Donald looked like. The defense might argue that Barry's testimony serves to show that a man named Donald checked into the hotel but without further proof that this was in fact Donald the defendant this may not stand. Thus, a judge would likely keep this information out as there is no way to confirm whether it was actually Donald the defendant who checked into the motel and all information provided to the jury must be trustworthy.

Personal knowledge does not mean B can only testify if he knows who D is. He just needs to have personal knowledge of what he is testifying to.

Is the motel's ledger admissible into evidence? (Someone wh said name was D came to hotel, it is in up to jury to decide if they believe etc).  
that person was D.

Logical relevance: See rule supra. Here, the motel's ledger could help prove or disprove that Donald was at the scene of the crime. Thus, it would be found to be legally relevant.

Legal relevance: See rule supra. Here, the motel's ledger's probative value outweighs its prejudicial value because it is not cumulative, it is not confusing to the jury,

Best evidence rule: The best evidence rule states that if some type of record or document must be admitted into evidence, it should be the original document. Here, the guest ledger

\* missing hearsay & analysis.

need to determine if evidence is hearsay before moving on to hearsay exceptions

Barry provided was the one he used the night in question to check Donald into ABC motel therefore it is likely the best evidence one could have provided.

Business records exception: Business records could be allowed in to evidence if they are kept in a regular course of business, if they are trustworthy, and if a person could testify to their validity. Here, Barry has testified that the records are valid and are kept in the regular course of business by Barry himself. However, the prosecution would argue that the records are not trustworthy because Barry does not ask the guest for additional identification. This record is being brought in by the defense to show that Donald checked into a hotel 80 miles away from the scene of an accident however, it is not trustworthy. A judge would likely not allow this piece of evidence to be examined by the jury.

★ But could be admissible to show \*someone\* with D's name was present @ motel, but would need additional evidence to prove it was D.

how do we know? Reasonable to assume a motel keeps a log of guests.

2)

1) Admissibility of Ethan's testimony : Ethan Testifying he heard Brandon make comments about Paul. Brandon cannot be brought to court himself.

✓ Evidence is relevant if it has any tendency to make a <sup>good!</sup> disputed fact more or less probable than without the fact. The fact is of consequence in determining the action. Evidence is legally relevant if its probative value is outweighed by the risk of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, unnecessarily presenting cumulative evidence. Evidence must be relevant to be admissible. It must be both logically and legally relevant.

✓ Here the evidence is logically relevant to show Paul suffered consequences arising from Dana's defamatory statements. Whether this occurred is a disputed fact. It is also legally relevant because here there is low risk of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or unnecessarily presenting cumulative evidence by introducing Ethan's testimony. The damages resulting from the defamation are material to the case and will help determine the outcome therefore proving damages resulting from the defamatory statements outweighs any risks. Thus the evidence has logical & legal relevance.

### Personal Knowledge

✓ Here Ethan is testifying about comments he himself heard from Brandon. Because Ethan has first hand knowledge as to Brandon's comments there are no issues of authenticity.

+ competency rule & analysis

### Hearsay

✓ Hearsay is an out of court statement offered to prove the truth of the matter asserted. Here Ethan is not offering the statement made by Brandon to prove the truth of the statement made by Brandon. Rather the statement is being offered because we have a



defamation case and to prove damages resulting from the defamation. Because this not a statement being offered for the truth of the matter asserted this is not hearsay.

↳ This is a strong argument, however other side will argue it is hearsay and you'll want to include that analysis.  
Legal Significance ex: Exceptions: State of Mind

good! Evidence offered irrespective of its truth for its legal significance is admissible. Here, Ethan's statement is being offered to prove Paul suffered damages resulting from Dana's defamatory statements. We do not need to prove the truth of the statements asserted.

This testimony is legally significant to prove damages from the statement irregardless of truth. Therefore, it is admissible due to its legal significance. Evidence has independent legal significance because this is a defamation case. Truth is a defense to defamation.

Confrontation Clause

Dana may argue inadmissible under confrontation clause because we Brandon cannot be found. Here non-applicable cause this is a civil matter not a criminal matter and Dana is not being deprived of a constitutional right. Rather, she will or will not be liable in this civil suit.

## 2) Admissibility of Dana's email via Camille Head of HR at ABC.

### Relevance

Evidence is relevant if it has any tendency to make a disputed fact more or less probable than without the fact. The fact is of consequence in determining the action. Evidence is legally relevant if its probative value is outweighed by the risk of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, unnecessarily presenting cumulative evidence. Evidence must be relevant to be admissible. It must be both logically and legally relevant.

Here the email is material to prove or disprove if Dana made a defamatory statement which is the cause of action in this claim. Therefore, we have logical relevance. It is also legally

relevant as the probative value in determining if defamation occurred or not is outweighed by any other legal risks. Here we have legal and logical relevance.

\*missing personal knowledge/witness comp.

### Hearsay

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

Double Here an email is being offered to prove the truth of the matter asserted which is the defamatory statement found in the email. Here we have hearsay. Absent a valid exception hearsay is generally inadmissible. Double hearsay requires both the inner and outer layer to fall under a hearsay exception to be admissible.

### Business Records (outer layer)

Here the email is a business record an email presented through Camille, head of Hr. For the business record to be admissible it must be a record that is made in the normal course of business, it must have been made while or soon after the event occurred, the person must recollect writing the record, and it must not have significant issues regarding veracity. Here, Dana sent the email to all of her and Paul's team. This email is being offered through Camille and if it meets the business records requirements it will be admissible.

\*custodian of the record

was the record made in the normal course of business?  
Expand on analysis - each four factors

### **3) Admissibility of Tammy's testimony that Dana was always flirting with Paul, opinions about Dana flirting and Paul is a peaceful person**

#### Character Evidence

Character evidence is about a person's nature, character or traits. Character evidence can be of opinion, reputation, or specific instances of conduct. Here, Tammy is giving opinion testimony about Dana that she is always flirting and about Paul that he is a peaceful person. Character evidence is generally inadmissible unless being offered for

\*missing inner layer: opposing party statement / spontaneous statements

\*missing relevancy, personal knowledge, witness comp.

something because the character/trait is at question, if specific instance of conduct only if an exception applies, or to prove something else besides character.

Here we have a civil not a criminal case. The character evidence as to Dana will be inadmissible and the character evidence about Paul's peaceful character is also inadmissible. X

admissible because in a defamation case character is "at issue" - one of the exceptions to the ban on character evidence.

#### 4) Wally's testimony

#### Relevance

✓ Evidence is relevant if it has any tendency to make a disputed fact more or less probable than without the fact. The fact is of consequence in determining the action. Evidence is legally relevant if its probative value is outweighed by the risk of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, unnecessarily presenting cumulative evidence. Evidence must be relevant to be admissible. It must be both logically and legally relevant.

X Here whether Paul sexually assaulted someone in the past is not a disputed fact. Therefore it is not relevant to this case and this is inadmissible.

hypo does not tell us that Paul stipulated / agrees with this fact.  
Arguably is disputed & relevant.

\* missing personal knowledge, witness comp, character evidence



3)

The first issue is whether the court will admit Margaret's testimony regarding the doors in the doorway.

### Logical Relevance

✓ Evidence is relevant if it has (1) any tendency of fact or consequences (2) to make the existence more or less probable, than without the evidence. Irrelevant evidence is not admissible.

✓ Here, Margaret is testifying in a negligence case regarding the conditions of the door to the walkway, has old weather proofing, and let in a lot of water. Paul slipped and fell in the doorway due to the rainwater on the ground. Although Polly has not entered the store, she is testifying that she heard Polly calling for help. This is more probable to the material element of negligence. Thus, this evidence is legally and logically relevant. *What does this mean? incorporate facts from hypo into analysis.*

### Legal Relevance

✓ The court may exclude evidence if the (1) probative value is substantially outweighed by (2) the danger of unfair prejudice or confusion.

✓ Here the evidence is not legally relevant because the issue of whether Polly slipped and fell in the doorway due to rainwater is more probative than the prejudicial to the jury.

Thus, the evidence is legally relevant.

*Why? need to use facts.  
Analysis needs to be more than "Here..." + restating the rule*

### Personal knowledge

✓ The competency of a witness to testify is presumed under the FRE. A witness may testify if they have personal knowledge, memory, ability to communicate and sincerity. ✓

Here, Margaret has personal knowledge of the incident because she was present at the time and heard Polly yell "Help me, I've slipped and fallen" because Margaret was present she has personal knowledge and is testifying under oath with sincerity. Thus, Margaret has personal knowledge.

Hearsay: Rule, analysis, conclusion. Then move on to hearsay exceptions  
Opposing party statement

An statement made by the declarant being offered by the party opponent is admissible.

here, Margaret stated that the the store was not responsible, however. on the date of the incidence she stated "I'm sorry , we really need to get proper water proofing on these door," However at trial she staid the store was not resonsblitiy margarets statement could be admitted an opposing party statement against in this trial for impeachment.

Hearsay statement made by P, offered by P, (not opposing party)  
This exception does not apply

\* missed: excited utterance, present sense impression, state of mind  
The next issue is whether the Insurance agent can testify the store was insured for all negligence claims and settlement offers.

\* missing Relevancy, witness comp/ personal knowledge  
Liability insurance

Liability insurance against public policy and is inadmissible to prove fault of liability  
However, liability insurance be admissble to prove ownership, or control. good

Here, P is intersteing testimony of an insurance agency that the store was insured for all neglience claims. However, because store is claim they walkway is maintied by a sperarte entity the liability insuance be admissible to show ownerhsip or control of the sidewalk.  
Thus, testimony is admisbbble to prove liablity however it is admissble to prove ownerhsip or control. good

## Settlement offers

✓ Settlement offers are inadmissible in a to prove a dispute of fault and liability. However, settlement offers can be admissible for impeachment or bias

here, the agent is testifying that she made an offer to P for \$50,00 to settle the dispute, this is conduct of statement the court find are against public policy because they want to encourage people to settle. ✓ Thus, the statement of a settlement offer is inadmissible.

Finally, the issue is whether the court would admit Car's testimony of the store 15 other insurance claims.

\* missing relevancy, personal knowledge, witness comp.  
Liability insurance

"Similar happenings"

See rule above.

Similar public policy rule. 15 other slip & falls, inadmissible to prove negligence, but admissible to show knowledge of problem.

Here, as discussed above, the liability insurance is inadmissible to prove fault or liability.

Thus, this liability insurance is inadmissible

Admissible to show knowledge.

Here, the court may not introduce the liability insurance to show fault. However, the court may admit the evidence based on knowledge of warning. The court may allow the evidence to show that the store had knowledge of the slippery condition because 15 other customers have slipped and fell in the walkway due to water. Thus, the evidence of the liability insurance may be used to show knowledge.

## Subsequent remedial measures

Subsequent remedial measures are inadmissible to prove negligence, culpable conduct, but admissible to prove something else, like knowledge.

Here, Carl is testifying the store repeated the water proof strips on both doors after the lawsuit began. This is against public policy and is inadmissible to prove negligence. Thus, this evidence is admissible because this is the kind of conduct the courts want to support.

↳ could be admissible to show knowledge.

\*Missing hearsay for introducing  
**END OF EXAM** insurance claims  
+ hearsay exceptions