

**Monterey College of Law**

**EVIDENCE**

Mid Term Examination

FALL 2022

**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.

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## **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. Element are offered against the party opponent and said by the party. This is fine, but the student should recognize the public policy to exclude.*

### **3. Insurance Policy – Medical Malpractice**

**Logical Relevancy-** *defined above.*

*Dr. 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.*



*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)

## 1. NURSE NAN'S TESTIMONY AS A LAY WITNESS

LOGICAL RELEVANCE/TENDENCY, Evidence is relevant if has a tendency to make the fact less or more probable and the fact is of consequence in the determination in the action. Here, prosecution is bringing in Nurse Nan to testify as to Dr. state of mind and condition at the surgery. She also has first hand knowledge of what she witnessed during surgery, which is Dr. Dooms unsteady hand. Her testimony is relevant.

LEGAL RELEVANCE/ BALANCE , Trial courts will exclude evidence if the probative value of the facts is substantially outweighed by unfair prejudice, mislead the jury, confuse the jury and waste courts time. Here, the information that Nurse will provide will not mislead or inflame the jurys decision.

SPECIAL RELEVANCY/ POLICY EXCLUSIONS, such as the ones discussed below can be exception to the admissibility of relevant evidence.

COMPETENCY OF A LAY WITNESS - Any witness is deemed competent if they can testify as long as they can accurately narrate and describe the events and the court does not disqualify them for lack of memory or incompetence . Here, Nurse Nan is a competent and a Lay witness who has personal knowledge of the incident.

 CONTEMPORANEOUS EVIDENCE -Under CEC , this evidence is admissible When a declarant testifies and narrates and describes while she was engaged in the conduct and she has first hand knowledge of the events. Under this policy her description of Dr. Doom consuming alcohol and hence being intoxicated can be admissible to show that he was doomed to make errors during surgery, here a cataract surgery which needs precision, control and utmost care.

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STATE OF MIND OF DR. DOOM - State of mind is evidence that can be admissible to show that the doctor was intoxicated and was not able to fit for surgery because of his alcohol consumption. Here, the circumstantial evidence of his drinking before conducting surgery shows that there was a lack or an absence of mistake.

HEARSAY is an out of court statement made by the declarant for the truth of the matter asserted. Unless an exception applies hearsay would be excluded but here Nurse Nan, had first hand knowledge. Here, Defense would argue that her statement is hearsay evidence hence is prejudicial. The exception would be that it would not be hearsay because her testimony stems from her personal account and knowledge of the witness as mentioned above.

## 2. SETTLE OFFERS AND NEGOTIATIONS BY DR DUSTY

RELEVANT - rule supra, this evidence is relevant evidence

Any settlement offers and negotiations between conflicting parties can not be admitted to show guilt or acceptance of fault or negligence. Public policy allows the parties to effectively and mutually negotiate. He offered 40k to settle. Here, this evidence will be excluded however, it can be brought in to show prejudice, bias or prove of ownership and control. Here, the statement can establish that he was willing to own up to his lack of mistake when he performed the surgery and accepts that his patient was in pain.

OFFERS OF SYMPATHY- Human emotions of apologizing can not be admitted to prove fault but it can be brought in as an effect on the listener. Here, the Jury will be able to listen to this statement for the effect but as not to prove guilt.

→ Not Correct

### 3. DR. DOOMS LIABILITY INSURANCE

#### RELEVANT EVIDENCE.

Liability insurance cannot be used to show that Dr. Doom was guilty or to show guilt or negligence, Public Policy encourages Business and medical Practices to carry liability or malpractice Insurance. However, the Insurance can show that Dr. Doom was prepared for such malpractice claims.

*Not correct*

### 4. DEPOSITION TRANSCRIPT OF DR. BETTER

#### RELEVANT EVIDENCE.

HEARSAY- Any out of court statement made by the declarant for the truth of the matter asserted. Unless an exception applies hearsay would be excluded. Here the deposition is an out of court statement. Dr. Better is unavailable to testify during the current trial however his deposition can be admitted under Former Testimony

#### FORMER TESTIMONY

Is evidence when a declarant testifies under oath either at a prior or current trial, the declarant is unavailable and the when the testimony was given, The predecessor had the opportunity to cross examine the declarant. Here, Dr. Better testified at a deposition hearing, and would have been cross examined by the defense. Because, there was no confrontational clause violation, Dr. Better's testimony stating and identifying that there was a deviation from medical standard of care would be admitted under former testimony.

*must have a similar motive*

#### BUSINESS RECORDS

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Records of routine and regularly conducted reports can be admitted as evidence. Here, the medical report prepared by Dr. Better as a second opinion could be admitted to show his medical opinion of Dr. Dooms lack of care in an intricate eye surgery they could potentially make him liable for MALPRACTICE claim.

2)

1.

### Relevance

Evidence is admissible if it is relevant. For it to be admissible, evidence must be material, RELEVANT (probative) and Competent.

### Logical relevance

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

*Good*

Here, the medical records would be relevant to show that Victor indeed was indeed shot and at the hospital. This would be logically relative

### Legal Relevance/balancing test

Courts can exclude evidence if the probative value is substantially outweighed by the prejudice.

Medical diagnosis is something that has slight prejudice affect, thus this has legal relevance to this case.

403

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Judges can excluded evidence if the probative value is substantially outweighs by the prejudice. Also from delay of trial, misleading the jury, unfair prejudice and bias.

Hearsay

*Good*

Hearsay is an out of court statement that is being offered for the truth in the matter asserted (TOMA).

Here, this is an out of court statement that is being offered for the truth in the matter asserted and would be objected to, but there are exceptions that would apply below.

*You need to identify each hearsay exception and write the elements; You missed the hearsay within hearsay issue*

Medical Diagnosis,

When a person speaks of bodily injury, medical diagnosis are and treatment are made which would be an exception to the hearsay.

Here, the Dr has a duty in the normal course a business that Dr do/ to write documents in regards to providing and establishing medical treatment. Because this medical report was done with the intentions of helping and treating the victim (Victor) this information would be admissible.

STATEMENT BY BOB, VICTORS FRIEND

Relevance

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Evidence is admissible if it is relevant. For it to be admissible, evidence must be material, RELEVANT (probative) and Competent.

### Logical relevance

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

Here, the medical records would be relevant to show that Victor indeed was indeed shot and at the hospital. This would be logically relative to show that he was brought by his friend for medical treatment

### Legal Relevance/balancing test

Courts can exclude evidence if the probative value is substantially outweighed by the prejudice.

### Hearsay

### SUPRA

Here, this statements would be considered hearsay because its a statement made out of court proving the TOMA. But there may be exceptions, listed below.

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### Excited Utterance: Hearsay Exception

When a person perceives an event, first hand knowledge, that was stressful or shocking and the statement was made around that time or even hours after if still nervously excited/ in shock, then that statement is admissible under the hearsay exception.

Here, this can be seen as an excited utterance because Bob was in shock from seeing his friend in so much pain and bringing him to the hospital. A normal person would be in shock of this happening so to a friend, therefore, this statement could be let in under the exception

### Medical Diagnosis

SEE ABOVE

SUPRA

Good

Here, the statement made by Bob about Victor being shot after arriving to the emergency room may give a medical diagnosis and treatment exception. Telling the hospital that this person/Victor was shot can help the nurses and Dr quickly start preparing for medical treatment and surgery. This this could be let in under the medical diagnosis exception.

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### Relevance

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Evidence is admissible if it is relevant. For it to be admissible, evidence must be material, RELEVANT (probative) and Competent.

Logical relevance

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

Here, the medical records would be relevant to show that Victor was at the hospital after being shot. This would be logically relative

Legal Relevance/balancing test

Courts can exclude evidence if the probative value is substantially outweighed by the prejudice.

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Judges can excluded evidence if the probative value is substantially outweighs by the prejudice. Also from delay of trial, misleading the jury, unfair prejudice and bias.

Hearsay by the police

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Hearsay is an out of court statement that is being offered for the truth in the matter asserted (TOMA).

Here, the statement made by the police about what he said would not be able to come in as a document, but would come in under a few exceptions listed below to get it in.

Business Records

\* Didn't state all of the elements of the hearsay exception

When a person has a duty to report in the normal occurrence their work activity, this can be an exception.

Here there is a duty to report crimes so this exception may apply with testimony

Past recollection Refreshed

When a person writes something in the normal course of their business and has the duty to write it and later forgets, the Attorney can use this technique to refresh their memory.

Here, there is no indication that the police had the technique used, but would be admissible if he had his memory refreshed during his testimony if he were to be called in as a witness.

Past recollection recorded

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When a statement is written during the normal course of business and the declarant has the duty to write it, if they later forget, first have past recollection refreshes technique used but the attorney, if that does refresh the their memory, then a past recollection recored can be used to refresh their memory. The police has a duty to write this information in the course of an criminal investigation. Only the testimony and not the document can be used.

Here, there is no indication that that this technique was used but if this were to be used, it would be admissible.

### Dying Declaration

Under FRE in homicide case (CEC ALL CASES) if a person feels that they are on the verge of dying , gives up all hope, the statement they make can be used.

Here, Victor said "Dan Shot me, Im dying" which indicated that they gave up all hope and thought that they were going to die. The Dr statement that he was not in imminent death and that the Dr and nurses had assured Victor that he was going to be alright is irrelevant. Under the dying declaration, it is what the victim feels at that time. Victor believed that he was dying and therefore gave the police the information that Dan Shot me. Thus, this statement would be admissible under the dying declaration doctrine.

### Excited Utterance: Hearsay Exception

These  
are not  
the  
correct  
elements

→ Did not write all  
elements of the  
exception

Good  
analysis

When a person perceives an event, first hand knowledge, that was stressful or shocking and the statement was made around that time or even hours after if still nervously excited/ in shock, then that statement is admissible under the hearsay exception.

Here, this could be considered an excited utterance because Victor was still in shock from being shot by Dan. This would likely be another exception of hearsay.

### Competency

A witness is deemed competent if they have first hand knowledge of the facts. In addition, they could be disqualified if they have memory loss, perception difficulties or can't remember the facts at hand.

Here, the Police would be competent to testify for having first hand knowledge of the information from the report he made while talking to the victim.

### Conclusion

The what Victor told police would be admissible in court.

3.

### Relevance

Evidence is admissible if it is relevant. For it to be admissible, evidence must be material, RELEVANT (probative) and Competent.

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### Logical relevance

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

Here, Tina hearing Dans statement would be logically relevant to the case.

### Legal Relevance/balancing test

Courts can exclude evidence if the probative value is substantially outweighed by the prejudice.

7  
1 Medical diagnosis is something that has slight prejudice affect, thus this has legal relevance to this case.

Here, the judge may look at the prejudice value being outweighed by the probative value, because a jury hearing this statement would turn them biased and want to convict based on that statement.

403

Judges can excluded evidence if the probative value is substantially outweighs by the prejudice. Also from delay of trial, misleading the jury, unfair prejudice and bias because nobody else heard this other person/Oscar make this comment.

Here, the judge would likely want to exclude this evidence because of the MISS LEADING THE JURY and Trustworthiness, due to no other witnessess that thet heard OSCAR make this statment. it could have on a jury.

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\* Missed the Dying Declaration Issue

### Competency

A witness is deemed competent if they have first hand knowledge of the facts. In addition, they could be disqualified if they have memory loss, perception difficulties or cant remember the facts at hand.

Here, Tina would likely not be admitted for her testimony on several grounds. The trustworthiness is one factor, 403 for misleading the jury and finally hearsay. She does not have first hand knowledge and the perception of memory that she has, by not remembering other people is at question. Thus her testimony would likely not be admitted.

### Conclusion

Based on the facts indicated, the trustworthiness as well as misleading the jury comes into question. Therefor. the judge would not allow the testimony of LISA.

### Stipulations

When both attorney's agree for the parties to use or concede evidence in the court proceedings.

There were some stipulations during the limine but were not discussed in the facts

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Relevance

Evidence is admissible if it is relevant. For it to be admissible, evidence must be material, RELEVANT (probative) and Competent.

Logical relevance

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

Here, the testifying person, Oscar is past recollection may be relevant to the case.

Legal Relevance/balancing test

Courts can exclude evidence if the probative value is substantially outweighed by the prejudice.

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403

Judges can excluded evidence if the probative value is substantially outweighs by the prejudice. Also from delay of trial, misleading the jury, unfair prejudice and bias.

### Business Records

When a person has a duty to report in the normal occurrence in their work activity, this can be an exception.

Here, Meridith called Oscar who was would testify that three yrs earlier that Todds licwnse was suspended for DUI. This would not come in because there is no duty to report this information

### Knowledge

Knowledge can show breach of duty of care of assumption of risks.

Here The statement made by Oscars would not come in under the business exception but may under knowledge.

### Character Evidence

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The information about a persons character may come into question based on certain crimes if there is a propensity. and past occurrences, reputation and opinions.

Here, Todds reputation would come into a question along with opinion based on what happend. IF there is a repuation of this happening, it can be used in Civil courts. Opinion also can be used in this case.

### Competency

A witness is deemed competent if they have first hand knowledge of the facts. In addition, they could be disqualified if they have memory loss, perception difficulties or cant remember the facts at hand.

Here, there is no indication that Oscar would be disqualified, he has first hand knowledge of the facts at hand

and has no loss of memory or perceptions on the facts in this case.

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### Relevance

Evidence is admissible if it is relevant. For it to be admissible, evidence must be material, RELEVANT (probative) and Competent.

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### Logical relevance

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

### Legal Relevance/balancing test

Courts can exclude evidence if the probative value is substantially outweighed by the prejudice.

403

Judges can excluded evidence if the probative value is substantially outweighs by the prejudice. Also from delay of trial, misleading the jury, unfair prejudice and bias.

### Business Records

When a person has a duty to report in the normal occurrence in their work activity, this can be an exception.

Here, Creed, who writes the business reports by the quality assurance representative shows a business related activity, also since they are QA, this is the normal type of business writing and they have a duty to write this information down/recorded it. Thus, this would be admissible evidence in court because of the Business Records.

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### Public records

Public records are made that are made public by business, governments and also, legal information/cases/

Here, the evidence may be brought in about what QA wrote because if people are hurt, this may be news worthy and or medical/litigations/criminal charges may have happen. Based on different scenarios, this could come in under Public records.

### Character Evidence

The information about a persons character may come into question based on certain crimes if there is a propensity. and past occurrences, reputation and opinions.

### Competency

A witness is deemed competent if they have first hand knowledge of the facts. In addition, they could be disqualified if they have memory loss, perception difficulties or cant remember the facts at hand.

Here, the QA has no indication that he is not competent. He has first hand knowledge of these events as per he wrote out the records and has no loss of memory or perceptions on the facts in this case.

## Conclusion

This testimony would be allowed

3.

## Relevance

Evidence is admissible if it is relevant. For it to be admissible, evidence must be material, RELEVANT (probative) and Competent.

## Logical relevance

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

Here, Toby has first hand knowledge of past workers as to their employment, which would be logically relative to showing which person is able to do certain jobs.

## Legal Relevance/balancing test

Courts can exclude evidence if the probative value is substantially outweighed by the prejudice.

403

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Judges can excluded evidence if the probative value is substantially outweighs by the prejudice. Also from delay of trial, misleading the jury, unfair prejudice and bias.

### Competency

A witness is deemed competent if they have first hand knowledge of the facts. In addition, they could be disqualified if they have memory loss, perception difficulties or cant remember the facts at hand.

Here, the competency of Toby might come into question because of his injury. The point of blinking answering questions can be a little confusing with answering because people normally blink which may cause wrong answers. Since he broke his neck, it can be apparent that his head may or may not have been affected, which makes his memory come into question. Based on the judge, Toby disposition may or may not be admissible in court.

### Conclusion

Tobys testimony would likely not be allowed.

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### Relevance

Evidence is admissible if it is relevant. For it to be admissible, evidence must be material, RELEVANT (probative) and Competent.

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### Logical relevance

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

Here, the way Meredith is at work may be relevant to the accident.

### Legal Relevance/balancing test

Courts can exclude evidence if the probative value is substantially outweighed by the prejudice.

Here the statement made by Angela would cause a prejudice to the case because it would make the jury feel as though it is Meredith's fault. Calling someone an alcoholic and very careless is not only bad, but can bias a jury. Secondly, saying that a person worked in a nearby desk clutter shows that they are careless, messy and don't pay attention to detail.

### Balancing test below

403

Judges can exclude evidence if the probative value is substantially outweighed by the prejudice. Also from delay of trial, misleading the jury, unfair prejudice and bias.

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Here, this statement is highly prejudicial and would likely be excluded because the statements made by Angela about Meredith working in a desk clump and a alcoholic who is very careless can influence a jury, causing bias.

Character Evidence

Supra

See above

Here, the opinion and reputation of another person can be used in certain instances. The statement if limited to she works at a desk clump and is careless can show opinion. If everyone says this and it has been going on for years, then it can be a reputation. Limiting the words in this context opinion can be used, but there is not enough information to conclude reputation. Overall these statements as is would not be allowed

Competence

SEE ABOVE

SUPRA

Here, there is no indication that Angela is not competent because she has first hand knowledge.

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Conclusion

Angela testimony would likely not be allowed.

**END OF EXAM**