

QUESTION 1

Poe was the singer for the Ravens. During a rehearsal at the Nevermore Theater, Poe walked onto a bridge suspended 35-feet over the stage to get ready for a performance that night. Poe fell through an open trap door and suffered severe injuries to his right hip.

Hasty, a backstage operator for the theater, controlled the trap door. Hasty failed to look at the display monitors showing that the trap door had not been closed because he was playing a video game on his personal computer. Hasty heard Poe yell, "Help, I am hurt!" As he was helping Poe, Hasty said, "I am so sorry you are hurt. These bridge trapdoors are unsafe."

Poe sued the Nevermore Theater for negligence. The theater denies liability, on the grounds that the bridge trapdoor was operated and maintained by Trapper Company, a separate entity. Trapper denies liability alleging that that the actual cause of the accident was human error by Hasty.

Assume the following occurred in a jury trial in a California state court. 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. Assume proper objections were made.

Answer according to California Law. During the trial the following was offered by Poe:

1. Poe testified after he fell through the trap door, he yelled for help and Hasty assisted. Hasty told him that he was sorry, and the trapdoor was unsafe.
2. Then, Poe called the insurance agent for the theater to testify. The insurance agent testified that the theater was insured for all negligence claims that occurred within the theater's premises. Also, there were three other claims about the trapdoor in the last year. Further, the insurance agent testified that he offered Poe \$600,000 to settle the lawsuit. Poe had rejected the offer.
3. Next, Poe presents evidence that after he filed the lawsuit, the Nevermore Theater removed the bridge trapdoor from the premises.
4. Finally, Poe offers evidence of the Nevermore Theater premises insurance liability policy. The policy specifically stated that there was additional insurance coverage for the Trapper Company.

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QUESTION 2

Windy sued the Wings Corporation for the wrongful death of her husband, Ace, a pilot. The theory was based on products liability due to the aircraft equipment malfunctioning. Windy alleged that the stabilizer trim jackscrew in the tail of the aircraft was defective and caused the accident. At the federal jury trial, the dispute was whether pilot error or equipment malfunction had caused the crash.

Skyler was an air traffic controller. He saw Ace’s aircraft losing altitude in a severe nose down position with the tail assembly in a locked down position. Ace’s radio transmission yelled, “I’ve got no control! Mayday!” Skyler saw the aircraft crash and burn. There were no survivors.

Chase, an aviation enthusiast, was at the end of the runway taking pictures. He saw Ace’s aircraft in a severe nose down position with the tail assembly in a locked down position. He took pictures. Chase testified at a deposition and authenticated the pictures. He died before trial.

The National Transportation Safety Board (NTSB) conducts civil aviation accident investigations. The NTSB team conducted a six- week long examination of the accident.

Goldie is an NTSB expert metallurgist. She analyzed the stabilizer trim jackscrew. Her vast experience includes how different metals react. Her findings concluded that the jackscrew was constructed from steel, but the acme nut housing was constructed with a softer copper alloy. This resulted in excessive wear to the nut ridges in the housing which had worn down and caused the accident. The softer copper alloy was inferior and should not have been used.

Based on the observations by Skyler and Chase, the pictures, the cockpit voice recordings, Goldie’s analysis and the examination of the wreckage, the NTSB investigatory report findings were that there was a product defect and no pilot error.

Discuss all the evidentiary issues and arguments that would likely arise in each section below, and the likely trial court ruling on the admissibility of the evidence. Assume proper objections were made. Apply the Federal Rules of Evidence.

- 1 At trial, Windy offers Skyler’s testimony about the aircraft’s severe nose down position, the locked down tail, the meaning of the Mayday transmission, and his observations.
- 2 Windy offers a properly authenticated deposition of Chase and the pictures he took.
- 3 Next, Windy offers the testimony of Goldie, the expert metallurgist, and her analysis of the stabilizer trim jackscrew. The parties have stipulated her qualifications.
- 4 Finally, Windy offers the NTSB investigatory report. The defense had been given reasonable notice that Windy was offering the report into evidence.

## EVIDENCE EXAM

FALL 2023

Prof. J. O'Keefe

### QUESTION 3

At 11:30 p.m. Dr. and Mrs. Oz returned to their home from a night out. As Dr. Oz entered the living room, he was attacked by a knife-wielding man coming from the dining room. Dr. Oz and the stranger struggled for some minutes, but the intruder escaped, leaving the doctor wounded on the floor. Mrs. Oz rushed to help her husband. She noticed that Dr. Oz had been stabbed and was bleeding. They got into their car to go to the hospital, with the doctor behind the steering wheel. Proceeding down the curvy road leading from the Oz house, the doctor noticed a man running along the side of the road. As the car drew even with the man, it swerved sharply to the right, striking the man and coming to rest in a ditch at the side of the road. Dr. Oz was slumped over the wheel unconscious. An ambulance called to the scene took both Dr. Oz and the injured pedestrian, Darren, to the hospital. Dr. Oz died of his knife wounds. Darren recovered from his injuries and was subsequently charged with attempted robbery and the murder of Dr. Oz. Darren's defense is mistaken identity.

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

1. At Darren's trial the prosecution offers Mrs. Oz's testimony about the identity of the assailant. She testifies that she was so traumatized by the event, she cannot remember the description of the assailant even after reviewing the police officer's report who took down her statement at the hospital immediately after the incident. The prosecutor seeks to introduce her statement to the officer into evidence.

2. The prosecution offers Dr. Oz's properly authenticated hospital records which indicate Dr. Oz died as a result of his stab wounds. The defense objects to a notation included in the records written by Nurse Nan. The note reads:

Dr. Oz regained consciousness and is in great pain and gasping for air. Dr. Oz said he drove his car into the pedestrian because he thinks that is the man who stabbed him.

3. The prosecutor seeks to introduce evidence that in 2016, Darren was convicted of an unarmed robbery. The 2016 crime involved David breaking into a house at night. When the occupant of the home, an 80-year-old man, confronted Darren, he punched him in the face breaking his nose.

4. In Darren's case in chief, he calls Walter. Walter will testify that he was cellmates with Willie. Willie was in custody on a residential burglary charge that was ultimately dismissed. While they were cell mates, Willie told Walter he (Willie) stabbed the doctor at his house and got away with \$10,000 in gold coins. Willie died before Darren's trial. No other evidence connects Willie to this crime.

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**EVIDENCE - ANSWER OUTLINE**  
**FALL 2023 EVIDENCE EXAM – SLO & MCL**  
**PROFESSORS O'KEEFE & LIZARDO**

**QUESTION 1: POE ANSWER OUTLINE**

Note: Students may argue for different outcomes so long as the rules and argumentation are solid. Below are the main issues.

**4. POE'S TESTIMONY**

**Logical Relevance-** evidence is logically relevant if there is a tendency to make the existence of a disputed fact more or less probable than it would be without the evidence. The testimony is that Hasty assisted Poe after the fall and said comments about the trapdoor being unsafe. This tends to show that Poe did in fact fall within the theater premises and the open trapdoor was part of causation. The acknowledgement by Hasty tends to establish the theater's duty of care to performers and breach on part of the theater by having an unsafe equipment.

The trial court will rule the testimony is logically relevant.

**Legal Relevance-**the trial court has the discretion under CEC 352 to exclude evidence if the probative value is substantially outweighed by the danger of unfair prejudice. It does not seem likely that this is a waste of the court's time or amount to juror confusion or misleading the jury.

Therefore, the trial court will rule Poe's testimony is legally relevant.

**Hearsay-** is an out-of-court statement or assertion offered for the truth of the matter asserted. The real problem with Poe's statements is that he is the declarant, who is repeating what Hasty said. This will be inadmissible absent an exception under the CEC.

**Poe's Spontaneous Statement Exception, "Help, I am hurt!"**

This exception applies when the declarant (Poe) makes statements under the stress of a startling event. The statement, "Help, I am hurt!" described an event, the fall through a trapdoor which resulted in a broken hip.

Here, Poe fall qualifies as a stressful event for this exception and is admissible.

**Contemporaneous Statement Exception-** when a declarant (Poe) is describing an event (like a fall) while the declarant (Poe) is experiencing the event. The statement will be admissible.

**State of Mind Exception –** the declarant (Poe) then existing physical or mental condition is admissible to show that condition (the fall.) Poe's yell for help and that he is hurt when he fell in and could not get up is an emotional response to falling down a trapdoor. The statement will be admissible.

**Poe repeating Hasty's two statements, "I am so sorry you are hurt. These bridge trapdoors are unsafe."**

Hasty is not on the witness stand. Poe is repeating two statements of what Hasty said to him. This is hearsay and may be admissible unless there is an exception or special relevancy policy exclusion.

**Expression of Sympathy**

The first statement said by Hasty, "I am sorry you are hurt," may qualify as CEC 1160, expression of sympathy regarding Poe's suffering from the fall. CEC recognizes that a declarant potentially at fault in an accident may show remorse without it being held against them. This is based on special relevancy principles and the goal of public policy. However, a statement of fault may be a different situation. See below.

**Hearsay**, see rule above.

### **Admission by a Party Exception; Authorized Admission**

It may be argued that Hasty's statement, "These bridge trapdoors are unsafe," is a statement of fault which is attributed to the theater since Hasty is an employee. The argument may be more of an authorized admission. The theater may argue that Hasty was not an authorized person and did not speak on behalf of the theater.

It may be argued that since Hasty oversaw the backstage area, he was in charge and his statements about the unsafe trapdoor will be admissible. There may be an argument by Trapdoor Company is not liable because it was the sole negligence by Hasty that created the accident. If Hasty had been properly monitoring the trapdoor instead of playing video games, Poe would not have been injured.

## **2. INSURANCE AGENT'S TESTIMONY**

**Logical Relevance-** defined above. The premise liability coverage tends to show that the theater does have "ownership and control" over all premises, including the bridge trapdoor. Part of the negligence claim includes duty and breach, so the liability coverage tends to negate what the theater argues- that it is Trapdoor Company's responsibility.

The insurance coverage has limited admissibility for "ownership and control, "but not to show for fault.

**Legal Relevance-** defined above. The court has the discretion to exclude evidence if the insurance coverage demonstrates a danger of unfair prejudice. Special relevance rules may mandate a Limiting Instruction. See below.

**Settlement offer of \$600,000-** offers to settle are inadmissible to prove liability or the amount of the disputed claim, or the validity of a claim. Any statements made during settlement negotiations are excluded as against public policy.

Here, the insurance agent's settlement offer to Poe is inadmissible to prove fault, damages, or medical expenses.

## **3. SUBSEQUENT REMEDIAL MEASURES & KNOWLEDGE- Removal of trapdoor**

**Logical Relevance** – defined above. The evidence of the removal of the trapdoor has the tendency to establish that the theater knew of the problem with the bridge trapdoor since there were three prior claims. The decision to remove the trapdoor after Poe's lawsuit filing may be viewed as the theater being at fault. However, special relevance rules may exclude the evidence. See below.

**Legal Relevance-** defined above. The trial court has discretion to weigh the probative value of the other claims against the unfair prejudice to the theater.

*Here, there is a great likelihood that the jury may weigh the three other claims as the sole basis of finding the theater liable for negligence. See below for special relevancy.*

**Special Relevancy- Similar Happenings (other claims)**

*The fact that the theater had three prior trapdoor claims does not by itself establish fault. However, the fact that there were prior complaints of trapdoor incidents may establish that the theater and Trapper Company had prior knowledge of the danger and the causation and breached the duty of care.*

**Limiting Instruction-** *the court may instruct the jury that the three prior claims be used as putting the theater and Trapper on notice that there was a problem with the trapdoor. However, the claims cannot be used as a basis for fault.*

**Subsequent Remedial Measures-** *evidence of safety measures, repairs or a removal after an accident is inadmissible to prove negligence. This is due to public policy concerns. The fact that the theater removed the bridge trapdoor after the lawsuit is inadmissible to prove fault.*

**Hearsay- defined** *above. If the prior claims are offered to prove the truth of the matter, that the theater was negligent, the evidence is hearsay. However, if the proponent is offering the prior claims as a basis that the theater was aware of dangers with the trapdoor and injuries, the court may use a limiting instruction. See below.*

**Business Records Hearsay Exception-** *if there is a Custodian of Records, who has access to the prior claims of events in the “regular course of business” at the theater and is under a duty to record events at or near the time of the event. As such, the prior claims may be considered business records and admissible.*

**Non- Hearsay: Prior Knowledge or Notice**

*The three prior claims against the theater may be admitted for the non-hearsay purpose of proving the theater’s knowledge.*

**4. NEVERMORE THEATER POLICY**

**Logical Relevancy-** *see rule above.*

**Legal Relevancy-** *see rule above.*

**Premises Liability –** *Evidence of liability insurance is not admissible to prove negligence. However, it is admissible to prove “ownership or control” of the premises.*

*Here, the theater denied liability because the bridge trapdoor area is operated by another entity, Trapper Company. However, the insurance policy provides that **all premises** are covered against negligence claims and Trapper Company is listed. Since the theater is disputing the coverage for the bridge trapdoor, the policy is logically relevant because it established that Trapdoor is included.*

**Limiting Instruction-** The trial court will instruct the jury that they may consider the insurance coverage for the “ownership and control” issue, but not for the theater’s fault.

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## QUESTION 2: ANSWER OUTLINE (Ace)

**PLEASE NOTE:** in each section of the four- part answer, both **Logical Relevancy and Legal Relevancy** are issues to be discussed in full by the student. Below is a summary of the main issues. Some other hearsay exceptions were included but may be minor issued.

### 1. SKYLER’S TESTIMONY

**LOGICAL RELEVANCE-** defined under FRE 401 as having any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action.

Here, Skyler’s personal observations are based on of the aircraft’s nose down with the tail assembly in a locked position tend to establish an equipment malfunction. Further, as an air traffic controller, Skyler would be able to recognize an aircraft in distress. He would be familiar with the Mayday distress signal and the emergency procedures. Not only is he a percipient witness but hears the distress call by Ace.

**LEGAL RELEVANCE-** to be legally relevant, under FRE 402, the court must balance the probative value of the evidence must be weighed by undue prejudice, waste of time or jury confusion.

#### **HEARSAY:**

Hearsay- out of court statement offered to prove the truth of the matter asserted. Generally, hearsay is inadmissible unless there is an exception or exemption.

**STATE OF MIND** -declarant’s (Ace’s) then existing state of mind or emotion. Yells for mayday and emergency assistance may be argued.

#### **ADMISSION EXEMPTION: “I’ve got no control! Mayday! Mayday!”**

Under FRE, admissions are considered exemptions. Since there is a debate on whether the accident was due to pilot error or malfunctioning equipment, Ace’s statement be argued by the defense as Ace being at fault.

However, Windy will argue for the admission of her husband’s radio transmission for distress using the “Mayday” established her husband had no control and was plunging to his death due to malfunctioning equipment.

**EXCITED UTTERANCE** - under the FRE, the statement must be made while the declarant is under the stress of the startling event and be trustworthy. The May Day statement that Skyler heard Ace yell may qualify since a nosedive is a frightening experience.

*Some students may include Present Sense Impression as an exception.*

## **2. CHASE'S TRANSCRIPT TESTIMONY AND PICTURES**

**RELEVANCY DISCUSSION- both logical and legal relevancy**

**HEARSAY-** *defined above*

**FORMER TESTIMONY HEARSAY EXCEPTION**

*Chase did testify in a deposition where there was an opportunity to cross-examine. Depositions are given under oath. This is the same action for wrongful death based on product liability. He is not available due to death. The court is likely to admit the deposition. The declarant, Chase is now dead, so under the FRE, he is deemed unavailable. So long it is a certified copy.*

**PICTURES**

*Student should note there were authenticated by Chase at the deposition, so should be admissible here. Ok to discuss "writing" – but that is really a Spring topic.*

## **3. GOLDIE'S TESTIMONY**

**RELEVANCY DISCUSSION**

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

*Goldie's expert testimony tends to establish there was an inferior metal being used that caused the accident. This testimony assists the trier of fact in the causation element and nullifies pilot error.*

**Note:** *This was intended to be more of a discussion on her findings that the copper alloy was inferior. Stipulation- since the parties stipulated to her expert qualifications, this is not an issue.*

**Findings of Fact as opposed to opinion.**

*Hearsay issues*

## **4. NTSB INVESTIGATORY REPORT**

**RELEVANCY DISCUSSION**

**FRE RESIDUAL EXCEPTION – CATCH -ALL**

*Because of the damage to the aircraft and the lack of any survivors, the NTSB factual findings may be considered as the cause of the accident. The facts state that Windy gave the defense reasonable notice of her intention to introduce the report.*

*The requirements are: (1) the statement has equivalent circumstantial guarantees of trustworthiness; (2) it is offered as evidence of a material fact; (3) it is more probative on the point for which it is offered than*

any other evidence that the proponent can obtain through reasonable efforts; (4) admitting it will be in the interests of justice and reasonable notice must be given to the adverse party.

Portions of the NTSB investigatory report may be admissible if trustworthy. If the report conclusions are based on a factual finding from an extensive review of all the documents, it is more likely admissible if the court takes a broad view on this exception.

(Note: The “notice” placed in the question should alert the student that this is asking for the catch-all/residual exception. This exception was used in *Beech Aircraft v Rainey*. Students may discuss hearsay official records, public records, or business records. However, for business records, the “regular course of business” should be discussed.)

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### QUESTION 3

O'KEEFE

Dr. & Mrs. OZ

At 11:30 p.m. Dr. and Mrs. Oz returned to their home from a night out. As Dr. Oz entered the living room, he was attacked by a knife-wielding man coming from the dining room. Dr. Oz and the stranger struggled for some minutes, but the intruder escaped, leaving the doctor wounded on the floor. Mrs. Oz rushed to help her husband. She noticed that Dr. Oz had been stabbed and was bleeding. They got into their car to go to the hospital, with the doctor behind the steering wheel. Proceeding down the curvy road leading from the Oz house, the doctor noticed a man running along the side of the road. As the car drew even with the man, it swerved sharply to the right, striking the man and coming to rest in a ditch at the side of the road. Dr. Oz was slumped over the wheel unconscious. An ambulance called to the scene took both Dr. Oz and the injured pedestrian, Darren, to the hospital. Dr. Oz died of his knife wounds. Darren recovered from his injuries and was subsequently charged with attempted robbery and the murder of Dr. Oz. Darren's defense is mistaken identity.

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

1. At Darren's trial the prosecution offers Mrs. Oz's testimony about the identity of the assailant. She testifies that she was so traumatized by the event, she cannot remember the description of the assailant even after reviewing the police officer's report who took down her statement at the

*hospital immediately after the incident. The prosecutor seeks to introduce her statement to the officer into evidence.*

**Relevance** – *The statement would assist in identifying Dr. Oz’s assailant.*

**Hearsay** – *out of court statement offered for the truth of the matter asserted. Here, the prosecutor is seeking to introduce Ms. Oz’s out of court statement to the police officer for its truth – the identity of the assailant.*

**Past Recollection Recorded**

*A statement is admissible under the past recollection recorded exception to the hearsay rule if: the witness formally had personal knowledge of the fact or event recorded; the witness subsequently prepared a record of the fact (or the witness who did prepare the record can vouch that when he prepared the record, the record was accurate), the record was recorded while the events were still fresh in the witnesses memory; and at trial the witness cannot completely and accurately recall the facts even after reviewing the document.*

*Here, Mrs. Oz made a statement to the police officer about her personal knowledge of the incident and the identity of the assailant; a record was subsequently prepared of that fact by the police officer, the record was recorded when the events were fresh in Ms. Oz’s memory and at trial she could not completely and accurately recall the facts even after reviewing the police officer’s report.*

*Assuming the police officer could verify that he or she accurately transcribed the oral report and Mrs. Oz testifies that she gave an accurate oral report to the officer, this would be admissible. The report can be read into the record but would not be admitted into evidence.*

- 2. The prosecution offers Dr. Oz’s properly authenticated hospital records which indicate Dr. Oz died as a result of his stab wounds. The defense objects to a notation included in the records written by Nurse Nan. The note reads:*

*Dr. Oz regained consciousness and is in great pain and gasping for air. Dr. Oz said he drove his car into the pedestrian because he thinks that is the man who stabbed him.*

**Relevance** – *Dr. Oz’s statement helps establish that Darren was the perpetrator of the robbery and murder.*

**Hearsay** – *Out of court statement offered for the truth of the matter asserted.*

**Multiple Levels of Hearsay:** *The hospital record can be admitted through the business records exception. However, the portions of the record that are attributed to Dr. Oz would need to be redacted unless there is a hearsay exception or exemption that applies.*

**Hospital Record: Business Record Exception:**

*The business record exception will allow the admission of a business record if, 1. The declarant (the ultimate source of the report) had a business duty to report information, 2. The declarant had personal knowledge of the facts or events reported, 3. The record 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.*

*The hospital records are admissible hearsay under the business records exception. The record was made as a memorandum or record of the act; the record was made in the regular course of business; it is the regular course of the business to make such a record at the time of the act or within a reasonable time thereafter; the records are self-authenticating if it is accompanied by a certification from the record's custodian or a "qualified person" attesting to the three foundational requirements for business records described above. Nurse Nan has a business duty to the hospital.*

**Dr. Oz's Statement Contained in the hospital Records:**

*The Prosecution wants to introduce Dr. Oz's statement to for the truth of the matter asserted - that he believed the pedestrian was his assailant. Dr. Oz's statement would need to be redacted from the hospital records unless a hearsay exception applies.*

**Dying Declaration (FRE)**

*For a dying declaration to be admissible, the declarant must be unavailable, the case must be a prosecution for a homicide or a civil case, at the time the declarant made the statement, the declarant must have had a sense of impending death, the statement must relate to the event inducing the declarant's dying behavior and the statement must be factual in nature.*

*The big issues here are: did the declarant have a sense of impending death and is the statement factual in nature? The students can argue it either way as long as it is well reasoned.*

*Dr. Oz has died, so he is unavailable. The prosecution is for Dr. Oz's murder. The statement relates to the event inducing the defendant's dying condition – the identity of who stabbed him.*

**Sense of Impending Death** – *fact pattern indicates Dr. Oz was in pain and gasping for air. However, no direct statement that he thought he was dying.*

**Factual in Nature** – Dr. Oz indicated that he believed that the pedestrian was the person who stabbed him. The word believed can be debated – it was dark, he was suffering from a stab wound. Best analysis is that it would meet this element.

3. The prosecutor seeks to introduce evidence that in 2016, Darren was convicted of an unarmed robbery. The 2016 crime involved David breaking into a house at night. When the occupant of the home, an 80-year-old man, confronted Darren, he punched him in the face breaking his nose.

**Relevance** – This evidence is being offered as circumstantial evidence of identity.

**Prior Bad Acts.** The basic rule is that when a person is charged with a crime, extrinsic evidence of his other crimes or misconduct is inadmissible if such evidence is offered by the prosecution solely to establish a criminal disposition. Although evidence that could lead to a conclusion about someone's character is kept out if offered to show action in conformity with that character on a specific occasion, it can be admitted if it is introduced for other purposes. FRE 404(b) states that such prior acts or crimes may be admissible for other purposes (such as to show motive, opportunity, intent, preparation, knowledge, identity absence of mistake or lack of accident) whenever those issues are relevant in either a criminal or a civil case. Upon request by the accused, the prosecution in a criminal case must provide reasonable notice prior to trial (or during trial if pretrial notice is excused for good cause shown) of the general nature of any of this type of evidence the prosecution intends to introduce at trial.

**Identity.** Here, the non-propensity theory of admissibility is identity. The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. The students should argue for or against its admissibility.

**403 Evaluation.** Because past bad acts evidence is likely to involve a risk of undue prejudice, the trial judge will consider the relationship between its probative value and the risk of undue prejudice. The court will be strongly influenced by the proponent's need for the evidence.

**Limiting Instruction.** The defense counsel will have a right to a limiting instruction. Under Federal Rule 105, the judge must inform the jury that they may not use the evidence as general character evidence; rather the jury must use the evidence only in deciding the issue of identity.

4. In Darren's case in chief, he calls Walter. Walter will testify that he was cellmates with Willie. Willie was in custody on a residential burglary charge that was ultimately dismissed. While they were cell mates, Willie told Walter he (Willie) stabbed the doctor at his house and got away with \$10,000 in gold coins. Willie died before Darren's trial. No other evidence connects Willie to this crime.

**Relevance** – Walter’s testimony is relevant because it supports Darren’s mistaken identity defense - that Willie, not Darren, committed the robbery and murder.

**Hearsay** – out of court statement offered for the truth of the matter asserted.

### **Statement against Interest**

For a statement against interest to be admissible the declarant must be unavailable, the statement must have been against pecuniary, proprietary or penal interest when made. This requires that the declarant subjectively believe that the statement was contrary to his or her interest. Each assertion must be tested to ensure it is dis-serving and in the case of a statement against penal interest, in a criminal case there must be sufficient corroboration to clearly indicate trustworthiness; the declarant must have personal knowledge of the facts.

Here, the main issue is trustworthiness and corroboration. Walter is deceased at the time of trial, so he is unavailable. The statement that he stabbed the doctor and got away with gold coins is clearly against penal interest and it would be clear to anyone making such a statement that it is contrary to that interest. In a criminal case, to ensure trustworthiness, there needs to be some corroboration.

The students should discuss the trustworthiness/corroboration element. Here, we don’t know what Walter’s relationship is, if any to Darren. If there is no relationship, then that would potentially bolster the credibility of Walter’s statement. The fact pattern indicates that no other evidence connects Willie to this crime.



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Applying CEC

**Relevance**

*Good!*

Evidence is relevant if it has any tendency to make a fact more or less probable than the fact would be without the evidence and is material in the determination in the outcome of the action.

Poe is testifying that after he fell through the trapdoor, he yelled for help and Hasty assisted him. Hasty told him that he was sorry, and that the trapdoor was unsafe. The statement made by Poe after he fell through the trapdoor, the cry for help, is relevant because it would make the fact more likely to be true that Poe did, in fact fall through the trapdoor and hurt himself. The ultimate issue in this case is whether Nevermore was negligent and therefore caused the injuries suffered by Poe. With the inclusion of the fact that Poe cried for help, it makes it more probable than not that he did fall through the trapdoor, ultimately being injured as a result. Additionally, Hasty's comment that he was sorry and that the trapdoor was unsafe would be relevant to the extent that it is not unfairly prejudicial to induce a jury to believe that the statement does more harm to the Defendant than assist Poe. Moreover, the statement that Hasty said, that he was sorry and that the trapdoor was unsafe, is relevant due to the fact that if accepted as true, would make it more probable than not that Poe did fall through the trapdoor as a result of the inattentiveness of the Defendant or one of Defendant's agents.

*Great!*

**Hearsay**

*Good*

Out of court statements that are offered for the truth of the matter asserted.

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Poe yelling "Help, I am hurt!" is an out of court statement that the defense would object to. The statement is an assertive communication of a fact that, when accepted for its truth, would show that Poe did fall and hurt himself, directly resulting from the negligence of the Defendant.

### Spontaneous Statement

Good!

A spontaneous statement is an exception of the hearsay rule which requires that a statement was made by the declarant at a stressful or startling event. The declarant, under the stresses caused by the event, made a spontaneous statement concerning the event that they have personal knowledge of.

Good Analysis

Here, Poe's cry for help came from a sudden and startling event, his falling through a trapdoor and plummeting 35 feet, injuring himself. This event, paired with it being completely unexpected by Poe, caused him to suddenly react to the stress induced event. This statement of needing assistance and being hurt would be an exception to the hearsay rule due to its spontaneity stemming from the sudden shock of the fall and injury.

### Contemporaneous Statement

Great Job!

A contemporaneous statement requires that a declarant make a statement explaining, qualifying, or describing an event that they are perceiving through the description of their current conduct as a result of their involvement with the event.

It may be argued that the statement said by Poe, that he was injured and needing help, was his explaining and describing of the current situation that he found himself in following the fall through the trapdoor.

### Statement of then existing physical, mental, or emotional state of mind

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Evidence of a declarant's then existing physical, mental, or emotional state of being is not made inadmissible by the hearsay rule if offered to prove the declarant's then existing state of mind, if at issue, or to explain the declarant's conduct.

Good! Poe's statement that he was hurt was a direct and open statement of his then existing physical condition, he was injured from the fall. This statement would be admissible through the state of mind exception.

### Opposing Party Statement

A part opponent statement, hearsay in California, may be admissible by using the opposing party hearsay exception.

### Vicarious Admission

Good! A statement made by a third party and due to the legal relationship with the Defendant, even if the defendant does not agree with the statement, will be attributed to the defendant as being their own statement.

Hasty, an employee of Nevermore, commented that he was sorry and that the trapdoor was unsafe, this statement will be attributed to Nevermore as their own statement regardless if Nevermore accepts the statement as truth. This statement will more than likely get in via the party opponent statement exception.

### Policy Exclusion Statements Expressing Benevolence and Sympathy

Great! Statements, gestures, or conduct expressing sympathy or benevolence when made to the plaintiff or a member of plaintiff's family is inadmissible to show fault, however, if that statement is paired with an admission of fault, will be admissible.

Hasty's comment that he was sorry and that the trapdoor was unsafe may be barred from being admitted due to the fact that Hasty was expressing his sympathy after having

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witnessed Poe fall thirty five feet and getting injured. However, if the statement that the trapdoor was unsafe may be introduced as a statement expressing fault, then the entire statement of expressing that Hasty was sorry and that the trapdoor was unsafe may be admissible.

*Excellent*

### Conclusion

Poe's statement of calling for help and stating that he was hurt will more than likely be admissible on the basis that certain hearsay exceptions apply. Hasty's statement may make its way in as a party opponent statement, but may be barred based on policy exclusions.

2.

### Relevance

see supra

The facts involving liability insurance, similar claims, and offers to settle the lawsuit are relevant, as they indicate that there is a duty owed to reasonable users of the premises, that the types of injuries that arise from the at issue defective areas may arise, and that there was an injury that stemmed from the incident.

### Hearsay

see supra

The testimony being offered by the insurance agent is hearsay because if it is accepted for its truth that the theatre was insured for all negligence claims that occurred on the theatre's premises and that there were three other claims about the trapdoor and that there was an offering of valuable consideration to Poe to offset the claim, then the jury may accept these statements as admissions of fault. ?

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## **Policy Exclusions**

### **Offering Prove of Liability Insurance**

The offering of a party's whole or partial liability insurance coverage is inadmissible to establish fault. However, if control, ownership, or duty are disputed, proof of liability insurance may be admissible.

Good  
If Poe was simply introducing evidence of the Defendant's liability insurance, then on its own, it would be inadmissible. However, since Nevermore is contesting liability on the fact that the bridge trapdoor was operated and maintained by Trapper Company, a separate entity, then Poe may use the evidence of the Defendant's liability insurance to establish that there was a duty, control, and ownership of the area consisting of the trapdoor. Defendant's insurance agent testified that the theatre was insured for all negligence claims that occurred within the theatre's premises. Since this incident occurred in the theatre, evidence of the theatre's liability insurance may be introduced by Poe to establish that Nevermore, not Trapper Company, did in fact is liable for injuries resulting on the premises.

### **Compromise Offers of a Claim or Negotiations to Compromise a Claim**

Evidence of the furnishing, accepting, promising, or conveying of any valuable consideration to compromise a claim, or any statements said or conduct done in the negotiations to compromise a claim, are inadmissible to establish liability or fault.

Here, the evidence that the insurance agent offered Poe \$600,000 to settle the lawsuit is inadmissible to show that Nevermore was in fact liable for the injury incurred by Poe. Additionally, the rejection of the offer by Poe is inadmissible to show that Poe was not injured from the incident.

### **Offers to Discount a Claim**

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The furnishing, accepting, promising to accept or conveying of any valuable consideration is inadmissible to show that a claim was discounted, or lessened in significance.

Poe's rejection of the \$600,000 offer to settle cannot be used to signify that Poe's injury was not caused by the trapdoor malfunction or to lessen the significance of Poe's alleged injuries.

### **Prior Accident / Similar Occurrence**

Evidence of a prior accident may be admissible to show that there was a defective condition, knowledge of the defective condition, the source of the injury resulted from the accident, provided that the circumstances are similar and not too remote.

Good  
The evidence that three other claims involving the trapdoors in the last year may be admissible to establish that the defendant knew of the condition of the trapdoor, did not repair when it was feasible to do so, and that the type of harm that resulted to Poe is the type of injury to flow from that type of accident. The events of the other claims, as indicated by the insurance, in order for Poe to use them to support his position that Nevermore was negligent, must have resulted from occurrences that are similar to Poe's. If Poe can show that the other claims involving the trapdoor involved individuals falling through the trapdoor on the bridge suspended over the stage, then those prior accidents may be sufficient to indicate that Nevermore, did in fact, have knowledge of the potential harms that may arise from the trapdoor's malfunction, that Nevermore could have repaired the faulty trapdoor to prevent anyone else from falling through, and that the defect in the trapdoor is very dangerous to anyone who has the misfortune to find themselves in a similar position. If Poe can establish that the prior accidents, the three claims, resulted in injuries similar to his as a result of a similar incident, then Poe may look to introduce to support his injury claim.

### **Conclusion**

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The court may admit the proof of liability insurance if Poe can establish that the reason for its admissibility would be to address the issue that control and a duty do not fall on the responsibility of Defendant. Additionally, any evidence of prior claims may be admissible if Poe can establish that the circumstances are similar and not too remote from his own incident, and finally, any evidence of negotiations and rejections of offers to compromise Poe's claim are inadmissible to establish fault.

3.

### **Relevance**

see supra

If evidence were to be introduced that Nevermore removed the bridge trapdoor after the events of Poe's fall, injury and claim, then that evidence would be drastically unfair and prejudicial on the part of Nevermore. Yes, its introduction to establish that the fact of the fall did or did not happen is present, however, would be excluded by the court.

### **CEC 352**

The court, in its discretion, may exclude admissible evidence if its probative value is substantially outweighed by the risk of unfair prejudice, of misleading the jury, or of confusing the issues.

The evidence that Nevermore removed the bridge trapdoor would sway the jury to believe that Nevermore was negligent and caused the injury to Poe.

### **Subsequent Remedial Measures**

*Good* Evidence of subsequent measures that are taken after an event or incident is inadmissible to prove fault, culpable conduct, a defective condition, or that there was a lack of a

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warning existed. However, evidence of subsequent remedial measures is admissible when control, ownership, or feasibility of repair is disputed.

Evidence that Nevermore removed the bridge trapdoor is inadmissible to establish that they were at fault for the injury that resulted to Poe's falling through the trapdoor. If all remedial measures were reprimanded as admissions of fault, then no one would correct any defects or potentially hazardous areas. However, since Nevermore is disputing that the trapdoor is operated and maintained by Trapper Company, then the evidence that Nevermore was the party who removed the bridge may be admissible to establish that they were the ones in control of the area and not Trapper Company.

### **Conclusion**

The evidence that Nevermore removed the bridge trapdoor would be admissible as an exception to the subsequent remedial measures policy exclusion since control of the area consisting of the trapdoor was being disputed, the fact that Nevermore took subsequent measures to correct the issue, rebuts the argument that Trapper Company was in control and not Nevermore.

4.

### **Relevance**

see supra

Evidence of Nevermore's premises liability insurance policy and its additional coverage for the Trapper Company is relevant because it would allow for the duty of care owed to all users of the premises to be expanded to Trapper Company, as well. Also, the evidence of the existence of premises liability insurance, although a policy exclusion, would assist in the determination that the premises does, in fact, owe a duty of care to all patrons.

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**Proof of Liability Insurance**

see supra

Evidence that Nevermore has premises liability insurance is inadmissible to show show fault or the liability of the parties involved, Trapper Company included. If Plaintiffs could introduce evidence that the adverse party has a liability insurance to cover such claims, then there would be an influx of actions that would immediatley establish fault on other parties for having insurance to cover them in those particular situations. Here the evidence that Nevermore has insurance and Trapper Company is covered may not be used by Poe to show that either party was at fault for his injury.



2)

1.

*Great job*

**Relevance**

*Good*

Evidence is relevant if it has any tendency to make a fact more or less probable than the fact would be without the evidence, and is material in the determination of the outcome.

*Great!*

Skylar's testimony that he witnessed the aircraft's severe nose down position, the locked down tail, and the meaning of the mayday transmission, and his observations are extremely relevant as it would help in the determination as to whether the accident was caused by a product defect or from pilot error. Skylar observed firsthand the accident and heard Ace's transmission as it come through the radio. This testimony has the tendency to make the fact that a product defect caused the accident more probable than the argument that human error was the cause.

**Hearsay**

An out of court statement that is offered to prove the truth of the matter asserted.

*Great!*

Skyler's testimony about the mayday transmission may be made admissible through a variety of hearsay exceptions. The statement yelled by Ace, "I've got no control! Mayday!" is being offered to prove that Ace had lost all control of the aircraft and that the crash was not a result of human error. This statement's introduction would be objected to.

**Excited Utterances**

*Great!*

An excited utterance is a statement made by the declarant in a stressful and startling situation, the declarant has personal knowledge of the events, and makes a statement concerning the event or condition they have perceived and did so under the stresses created by the event.

Good!  
Ace's mayday statement may be admissible as an excited utterance because in the sheer terror of having lost control of his aircraft and spiraling straight down into the Earth would have struck fear, anxiety and stress in anyone in that situation. This statement having stemmed from the aforementioned events, would be difficult to mistake as being anything else but an honest, truthful reaction to the events perceived by Ace.

### Present Sense Impression

A statement made by the declarant about an event, condition, or situation, and made in relation to that event during or shortly after perceiving the event.

Good!  
Ace's statement was a declaration of his then impression of the events that he was perceiving and involved in. He made a statement of his loss of control of his aircraft, the fact that he was going down, and in ultimate danger. This statement would be admissible as an exception to the hearsay rule due to falling under the present sense impression exception. Ace's statement of his perception of events was made as the events were occurring before him.

### Dying Declaration

A statement made by a now unavailable declarant, whose statement relates to the dying condition and circumstances that they found themselves in after an abandonment of hope, a sense of impending doom, and imminent death.

Good  
Ace's statements most likely will not qualify as a dying declaration as his statement did not necessarily convey his belief that his death was imminent or the cause of his death, however the mayday message may be argued as being an equivalent to his abandonment of hope and that he was in imminent danger. Also, Ace, an experienced pilot, knowingly made the statement knowing the situation he was in and the consequence of such an accident that was about to occur. However, this statement will possibly not be admitted as a dying declaration.

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### **Prior Identification**

Not hearsay when applying the FRE.

7  
A statement made of an identification of an individual as they were engaged in some sort of activity or occurrence is admissible as a prior identification statement after the witness has testified and is subject to cross-examination.

Skyler's testimony of having witnessed the aircraft's severe nose dive and the locked down tail may be admissible to show that Skyler's testimony is a true and accurate reflection of the events he perceived.

2.

### **Relevance**

see supra

Chase's statements made in his deposition and the pictures that he took at the time of the incident are relevant to show the fact that Ace's aircraft may have been in a nose down position and the tail assembly being in a locked down position did occur ultimately resulting in the death of Ace, as a result of the product error.

### **Hearsay**

see supra

Chase's statements in the deposition and the authentication of the pictures that he took is hearsay evidence. Windy is offering Chase's statements for their truth, that he witnessed the nose dive position of the aircraft and the locked tail assembly. These statements, if taken as true, would be clear indications that a product defect caused the accident and not

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Great!  
human error. However, the exception of former testimony may make the statements made at Chase's deposition admissible.

### Unavailable Witness

Good  
A witness-declarant is unavailable when they have met either of the five following elements: they refuse to testify, they testify to not knowing the subject matter, they are protected by a privilege, they have died or are mentally or physically incapable of testifying, or are beyond the reach of the court.

Chase died before trial. This would make Chase an unavailable witness-declarant.

### Former Testimony

Great!  
Testimony of an unavailable witness is admissible if it resulted from a legal deposition, trial, or hearing, even if from a separate action as the one currently being litigated. The testimony is being offered against the same party who was an adverse at the time the testimony was given and the opposing party had a chance to develop the testimony. The same party who the testimony is being offered against now has similar motives to develop the testimony.

Good  
Chase had testified at a deposition and had authenticated the pictures that he had taken. Due to the fact that Chase died before trial, he is an unavailable witness-declarant. However, the testimony that was taken at the deposition before Chase's death may be introduced by Windy as an exception to the hearsay rule because the adverse party at the time of the deposition is the current party that the testimony is being offered against. Chase is unavailable to testify and because the adverse party had an opportunity to develop his testimony at the deposition, the former testimony is admissible evidence.

### Conclusion

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Chase's former testimony, due to his unavailability, will be admissible evidence as it was made at a prior deposition against the same party it is being offered against after they had proper opportunity to develop the testimony.

3.

### Relevance

see supra

Great!  
Goldie's testimony, as an expert on metallurgist, is crucial to Windy's argument that a product defect caused the accident and not human error. The evidence of the stabilizer trim jackscrew being defective as a result of two separate metals reacting and causing excessive wear in the product makes the fact more probable that the accident was caused by a defective product and not from human error. Goldie's analysis that certain metals were inferior and should not have been used is material to the issue of whether products liability caused the accident, and Ace's death.

### Hearsay

see supra

Goldie's analysis during the six-week long investigation may be hearsay evidence, as all of Goldie's statements and findings of the defective product directly stem from the investigation. Goldie's conclusions may be inadmissible hearsay because they are asserted statements of fact.

### Expert Witness

Goldie's position as an expert witness, however, may be found to be as an exception to the hearsay rule. An expert may testify, based on their knowledge of the subject matter, their adequate findings and testify to their results.

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Missed Stipulation Issue

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4.

**Relevance**

see supra

Good  
The NTSB's investigatory report being a culmination of Goldie's analysis, the witness testimony of Skyler and Chase, the cockpit voice recordings, and the pictures are extremely relevant as to show that there was a product defect and no pilot error caused Ace's death.

**Hearsay**

see supra

The NTSB investigatory report is made inadmissible by the hearsay rule. The report contains statements of facts, that if accepted as true, would directly conclude that there was a defective condition in the aircraft that resulted in Ace's death. However, a business record exception may apply and lead to the admissibility of this statement.

**Business Record**

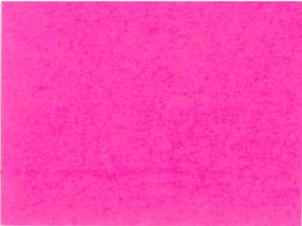
Records of a regularly conducted activity are admissible if prepared by an individual who has a business duty to the organization, has a business duty to make such reports, has present knowledge of the event, making the report is a regularly conducted activity of the business, the report is in written form, and was drafted subsequent to the events and during the regular course of business.

The NTSB report will be admitted as a business record because it details the incident and the NTSB has a duty to make reports of civil aviation accidents. The report was made by the organization who handles the investigation of the accidents and they have direct knowledge of the accident as they are very familiar with the events after having had

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concluded their six-week investigation. The business records hearsay exception is a vessel for the introduction of documents and the NTSB investigatory report meets all criteria of the business records exception. The report was drafted subsequent the event, by an individual who has a business duty to make such reports of civil aviation accidents, and was reduced to written form. This investigatory report which concludes that a product defect existed and no pilot error was the cause of the accident, would be admissible.



3)

1.

### RELEVANCE

Evidence is relevant if it has a tendency to make a fact more or less probable and that fact is of consequence in determining the outcome of the action.

*Good!*

Here, Mrs. Oz's testimony is probative and material because she was in the house at the time of the stabbing. The defense will argue that Mrs. Oz was not in the room when the stabbing occurred and thus cannot provide accurate identification of the assailant. But her testimony still has some tendency to determine the outcome of the case.

### FRE 403 BALANCING TEST

Relevant evidence is excluded if its probative value is substantially outweighed by the dangers of unfair prejudice, confusing the issue, misleading the jury, or undue delay.

Here, Mrs. Oz's testimony is unlikely to unfairly prejudice the defendant.

### COMPETENCY

A witness is competent to testify if he/she has personal knowledge, the ability to recollect, to communicate and speak truthfully.

Here, Mrs. Oz is presumed competent.

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## HEARSAY EXEMPTION - PRIOR IDENTIFICATION

Good  
Hearsay is an out of court statement offered to prove the truth of the matter. Some exemptions, such as prior identification, make a hearsay statement admissible. Prior identification requires that the declarant have personal knowledge and make the identification near the time of the event. It is also required that the declarant testify, however, it does not matter if the declarant cannot remember the identification while on the stand. It's just important that they testify and are available for cross-examination.

Here, it's ok that Mrs. Oz was so traumatized that she could not remember the description of the assailant. What matters is that she made the identification to the police officer at the hospital immediately after the incident and that she is currently on the stand testifying and open to cross-examination.

## PRIOR RECOLLECTION REFRESHED

Prior recollection refreshed is not a hearsay exception. When a witness on the stand cannot remember something, counsel may show the witness something, usually a document (it's even ok if it's hearsay) in order to jog the witness's memory.

Here, the prosecutor showed Mrs. Oz the police officer's report of her statement. It failed to refresh her memory.

## PRIOR RECOLLECTION RECORDED

See hearsay definition supra. An exception to the hearsay rule is prior recollection recorded. Prior recollection recorded is when a declarant is unable to remember what they once said, but they made the past statement with personal knowledge, when the event was

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fresh in their mind or if they didn't make it, they adopted the statement. If prior recollection refreshed fails, a party may enter the statement through the prior recollection recorded into the record, but not into evidence.

Great!

Here, Mrs. Oz made the statement to the police officer after the stabbing. The identification is entered into the record but not into evidence.

2.

## RELEVANCE

Evidence is relevant if it has a tendency to make a fact more or less probable and that fact is of consequence in determining the outcome of the action.

Here, Dr. Oz's properly authenticated hospital records are material and probative to show that he died by stabbing and thus a murder charge against Darren is proper.

## FRE 403 BALANCING TEST

Relevant evidence is excluded if its probative value is substantially outweighed by the dangers of unfair prejudice, confusing the issue, misleading the jury, or undue delay.

Here, it is unlikely that the hospital records will be unfairly prejudicial due to their trustworthiness.

## HEARSAY EXCEPTION - BUSINESS RECORDS

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See hearsay rule supra. A business record is admissible hearsay under the business record exception if it was made in the course of business by someone within the business who had a duty to report and they made the report while it was fresh in their mind.

Here, the medical record was created by the hospital under a duty to accurately record a patient's illnesses, symptoms, etc. The portion of the record concerning Dr. Oz's cause of death is admissible.

#### HEARSAY WITHIN HEARSAY - NAN'S NOTATION - DYING DECLARATION

A dying declaration is admissible if made in a FRE homicide or civil case. The declarant must be unavailable at the time of trial and have made the statement under the imminent sense of death, though he need not actually die.

Here, Dr. Oz had been through a traumatic stabbing and fallen unconscious by the time he got to the hospital. Nan's note read that Dr. Oz regained consciousness and in great pain and gasping for air, said he drove his car into the pedestrian because he thinks it's the main who stabbed him. If Dr. Oz immediately died after the statement, it is likely this statement in the hospital record will be admissible because he had an imminent fear of death, which breeds truthfulness in the declarant.

#### HEARSAY WITHIN HEARSAY - NAN'S NOTATION - STATEMENT AGAINST INTEREST

See hearsay rule supra. The statement against interest exception to hearsay involves a statement by the declarant that is against his penal, proprietary or pecuniary interests. He

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must be unavailable at the time of trial and have made the statement with personal knowledge that the statement is against his interest and without motive.

Here, Dr. Oz's statement noted by Nan might be able to come in under this exception because no one would want to admit to running over a pedestrian unless they were about to die, having nothing to hide. This statement was against Dr. Oz's penal interests and likely admissible.

3.

### RELEVANCE

Evidence is relevant if it has a tendency to make a fact more or less probable and that fact is of consequence in determining the outcome of the action.

Here, evidence of Darren's past unarmed robbery conviction has a propensity to show that he might have committed the attempted robbery on the Ozs.

### FRE 403 BALANCING TEST

Relevant evidence is excluded if its probative value is substantially outweighed by the dangers of unfair prejudice, confusing the issue, misleading the jury, or undue delay.

Here, Darren's past conviction is highly prejudicial against him.

### LIMITING INSTRUCTIONS

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A court may restrict the scope of relevant evidence by instructing the jury on how they may use the evidence in limited circumstances, thus lessening the danger of FRE 403.

Here, the judge can instruct the jury to consider Darren's prior bad acts for other purposes (see below).

### PRIOR BAD ACTS

*Good!* Evidence of the a defendant's prior bad acts are inadmissible to show propensity to act in conformity with the prior bad acts, but they are admissible for other purposes such as motive, intent, absence of mistake, identity, common plan of scheme, knowledge and opportunity.

Here, the prosecution will try to argue that, like the 2016 robbery, Darren committed the robbery at night. However, the defense will argue that the 2016 robbery was unarmed while the Oz robbery involved a knife. The defense will try to argue that the evidence should not come in because there is a lack of identity, motive or common plan to connect the current robbery to Darren. Without more similar facts, it seems likely this will be found as inadmissible evidence.

4.

### RELEVANCE

Evidence is relevant if it has a tendency to make a fact more or less probable and that fact is of consequence in determining the outcome of the action.

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Here, Walter's testimony of Willie's statement fits much better than the prosecution's argument of Darren's past robbery. It seems probative and material in determining a defense for Darren.

#### FRE 403 BALANCING TEST

Relevant evidence is excluded if its probative value is substantially outweighed by the dangers of unfair prejudice, confusing the issue, misleading the jury, or undue delay.

Here, Walter's testimony has significant probative value in Darren's defense and it seems unlikely to create prejudice or confusion.

#### HEARSAY EXCEPTION - STATEMENT AGAINST INTEREST

See hearsay rule supra. The statement against interest exception to hearsay involves a statement by the declarant that is against his penal, proprietary or pecuniary interests. He must be unavailable at the time of trial and have made the statement with personal knowledge that the statement is against his interest and without motive.

Here, what Willie told Walter fits the case much more than the prosecution's argument of Darren's past robbery. For Willie to tell Walter in such detail how he committed a stabbing and theft of a doctor, it would be against his penal interests, yet he did so anyway. It does not appear that there is any motive for Willie to fabricate his statement. Willie is now unavailable to testify. His statement will be admissible.

\* Missed the need for corroboration in a criminal case

**END OF EXAM**