

### Question 3

While driving their cars, Paula and Dan collided and each suffered personal injuries and property damage. Paula sued Dan for negligence in a California state court and Dan filed a cross-complaint for negligence against Paula. At the ensuing jury trial, Paula testified that she was driving to meet her husband, Hank, and that Dan drove his car into hers. Paula also testified that, as she and Dan were waiting for an ambulance immediately following the accident, Dan said, "I have plenty of insurance to cover your injuries." Paula further testified that, three hours after the accident, when a physician at the hospital to which she was taken asked her how she was feeling, she said, "My right leg hurts the most, all because that idiot Dan failed to yield the right-of-way."

Officer, who was the investigating police officer who responded to the accident, was unavailable at the trial. The court granted a motion by Paula to admit Officer's accident report into evidence. Officer's accident report states: "When I arrived at the scene three minutes after the accident occurred, an unnamed bystander immediately came up to me and stated that Dan pulled right out into the path of Paula's car. Based on this information, my interviews with Paula and Dan, and the skidmarks, I conclude that Dan caused the accident." Officer prepared his accident report shortly after the accident.

In his case-in-chief, Dan called a paramedic who had treated Paula at the scene of the accident. Dan showed the paramedic a greeting card, and the paramedic testified that he had found the card in Paula's pocket as he was treating her. The court granted a motion by Dan to admit the card into evidence. The card states: "Dearest Paula, Hurry home from work as fast as you can today. We need to get an early start on our weekend trip to the mountains! Love, Hank."

Dan testified that, as he and Paula were waiting for the ambulance immediately following the accident, Wilma handed him a note. Wilma had been identified as a witness during discovery, but had died before she could be deposed. The court granted a motion by Dan to admit the note into evidence. The note says: "I saw the whole thing. Paula was speeding. She was definitely negligent."

Assuming all appropriate objections were timely made, should the court have admitted:

1. Dan's statement to Paula about insurance? Discuss.
2. Paula's statement to the physician? Discuss.
3. Officer's accident report relating to:
  - a. The unnamed bystander's statement? Discuss.
  - b. Officer's conclusion and its basis? Discuss.
4. Hank's greeting card? Discuss.
5. Wilma's note? Discuss.

Answer according to California law.

## Question 3

### *California Evidence*

While driving their cars, Paula and Dan collided and each suffered personal injuries and property damage. Paula sued Dan (Civil suit) for negligence in a California state court (California law applies) and Dan filed a cross-complaint for negligence against Paula. At the ensuing jury trial, Paula testified (Paula’s credibility is in issue) that she was driving to meet her husband, (The examiners likely use the word “husband” to introduce a potential marital privilege) Hank, and that Dan drove his car into hers. Paula also testified that, as she and Dan were waiting for an ambulance immediately following the accident, (Call 1.) Dan said, (Dan is the defendant and therefore a party. This is an admission) “I have plenty of insurance (Evidence of insurance inadmissible to prove negligence) to cover your injuries.” (Dan is offering Paula money to cover her loss) (Call 2.) Paula further testified that, three hours after the accident, (This is not contemporaneous or spontaneous of the accident) when a physician at the hospital to which she was taken asked her how she was feeling, she said, “My right leg hurts the most, (Pertinent to Paula’s then existing pain and bodily health) all because that idiot Dan failed to yield the right-of-way.” (This part of the statement was made under circumstances that indicate its lack of trustworthiness)

(Call 3.) Officer, who was the investigating police officer (Officer is acting within the scope of his duty as a public employee) who responded to the accident, (The investigation is occurring in the regular course of Officer’s business) was unavailable at the trial. The court granted a motion by Paula to admit Officer’s accident report into evidence. Officer’s accident report states: “When I arrived at the scene three minutes after the accident occurred, (Three minutes is immediately after. Thus, it is contemporaneous with the event) an unnamed bystander immediately came up to me and stated that Dan pulled right out into the path of Paula’s car. (Call 3.b.) Based on this information, my interviews with Paula and Dan, and the skidmarks, I conclude (Possibly expert opinion on the matter) that Dan caused the accident.” Officer prepared his accident report shortly after the accident. (Made near the time of the event)

(Call 4.) In his case-in-chief, Dan called a paramedic who had treated Paula at the scene of the accident. Dan showed the paramedic a greeting card, and the paramedic testified that he had found the card in Paula’s pocket as he was treating her. (The paramedic’s testimony authenticates the card) The court granted a motion by Dan to admit the card into evidence. The card states: “Dearest Paula, (His wife) Hurry home from work as fast as you can today. (The card may be used to show the effect it had on Paula when she read it) We need to get an early start on our weekend trip to the mountains! Love, Hank.” (Paula may be able to exclude this evidentiary evidence based on California’s privilege for confidential marital communications)

(Call 5.) Dan testified that, as he and Paula were waiting for the ambulance immediately following the accident, Wilma handed him (Dan has personal knowledge of the events) a note. (Dan’s testimony is sufficient to authenticate the note) Wilma had been identified as a witness during discovery, (Not sure what this means but it may have to do with the fact Paula had an opportunity to question Wilma) but had died before she could be deposed. (Unavailable) The court granted a motion by Dan to admit the note into evidence. (The original is being introduced into evidence. No problems as to secondary evidence) The note says: (Hearsay) “I saw the whole thing. Paula was speeding. She was definitely negligent.” (The note is relevant as to who Wilma believed was at fault in causing the accident. However, there is no hearsay exception to admit it. The note seems to indicate a lack of trustworthiness)

## A Discussion Worthy of Attention

Evidence is the only subject that requires quick issue spotting, hitting the rules and moving on. The key to evidence questions is to address each item of evidence one at a time. Focus on what that exact statement or situation entails. This evidence essay asked specific questions regarding statements and documentary evidence. The calls of the question were a key to what the examiners were asking for. Since there were many issues and a long fact pattern an efficient answer would quickly touch upon the main issues and cluster the minor ones. *See* Call 5. for an example of how to group many issues together. Don't waste time copying and pasting rules as there is never a need to repeat yourself.

*Model Answer* by One-Timers ©

### 1. Dan's statement to Paula about insurance

Dan's statement that he has plenty insurance to cover Paula's injuries is inadmissible to prove Dan's liability or that he was negligent.

*Hearsay*

Under California Evidence Code (CEC) § 1200 hearsay is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.

Here, Dan's statement to Paula was made out of court and is being used to prove its truth.

*Admission*

CEC §1220 allows evidence of a statement offered against the declarant in an action to which he is a party as an exception to the hearsay rule.

Dan is the defendant and cross-complainant in this civil suit. Since he is a party and the statement he made to Paula is being offered against him, it is an admission. However, it is subject to policy exclusions.

*Evidence Excluded by Extrinsic Policies – Liability Insurance*

CEC §1155 states evidence that a person was, at the time a harm was suffered by another, insured against loss arising from liability for that harm is inadmissible to prove negligence or other wrongdoing.

Here, Paula suffered personal injuries and property damage. If Dan's statement: "I have plenty of insurance to cover your injuries," is being used to prove that Dan was negligent when their cars collided, it shall be inadmissible for that purpose. This is a policy based exclusion.

### *Evidence Excluded by Extrinsic Policies – Medical Expenses*

CEC § 1152(a) states evidence that a person, from humanitarian motives, has offered money or any other thing to another who has sustained loss or damage, is inadmissible to prove his liability for the loss or damage or any part of it.

In addition to the liability exclusion above, Dan could even argue that this was a statement offering money to Paula from thoughtful humanitarian motives. Here, Dan essentially offered money (or any other thing) by assuring Paula that his insurance will cover her injuries. He may have done this out of compassion to alleviate her concerns as she just suffered personal injury and property damage. As a result, the statement is inadmissible to prove Dan was negligent or liable for Paula’s damages.

#### **2. Paula’s statement to the physician**

Paula’s statement that her “right leg hurts” should be admitted as it is pertinent to her then existing physical pain. However, the second part of the statement that “Dan failed to yield the right-of-way” lacks trustworthiness and should be excised.

#### *Relevance*

CEC § 210 defines relevant evidence as evidence having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

Here, Paula’s personal injuries and the cause of those injuries are a disputed fact that is of consequence to this civil action. Thus, it is relevant.

#### *Personal Knowledge*

Under CEC § 702 the testimony of a witness concerning a particular matter is inadmissible unless she has personal knowledge of the matter. A witness’ personal knowledge may be shown by any admissible evidence, including her own testimony.

Here, Paula is testifying as to what she said and has personal knowledge of her statement.

#### *Hearsay*

Here, Paula’s statement to the physician is being used to show that Dan was at fault in the accident. Thus, it is being used for its truth and is hearsay subject to an exception.

#### *Statements of Physical State*

Under CEC §1250(a) evidence of a statement of the declarant’s then existing physical sensation (including pain or bodily health) is not made inadmissible by the hearsay rule when the evidence is offered to prove the declarant’s physical sensation at that time when it is itself an issue in the action.

Here, Paula may use the statement (at least the first part of it concerning her leg hurting) to prove her physical state. Since her injuries are in issue, the statement about her leg should be admitted.

### *Lack of Trustworthiness*

CEC § 1252 excludes evidence of a statement if the statement was made under circumstances such as to indicate its lack of trustworthiness.

When Paula made the statement, she had every reason to fabricate to the physician that Dan was at fault. The statement, in no way, would be helpful to diagnosis or treatment. Who caused the injury is really irrelevant as to her pain. Thus, the part about Dan failing to yield should be excluded as it lacks trustworthiness.

### *Spontaneous and Contemporaneous Statements*

CEC § 1240 (spontaneous statement by declarant) and § 1241 (contemporaneous statements) do not apply as Paula made the statement to the physician three hours after the accident. It was neither spontaneous nor contemporaneous with the collision.

### **3. Officer's accident report relating to:**

The Officer's accident report is relevant as it has the tendency to prove who the Officer believed was at fault. Additionally, the Officer has personal knowledge of the contents of what he wrote in his own report.

### *Unavailable*

CEC § 240 defines unavailable to mean that the declarant is exempt on privilege, dead or unable to attend or unable to be compelled to testify.

Here, the facts state Officer is unavailable. While the reason is not explained, it must be taken as true. Thus, Officer is unavailable.

### *Authenticate – Identification*

CEC §1400 states a writing can be authenticated by the introduction of evidence sufficient to sustain a finding that it is what the proponent of the evidence claims it is.

Here, Paula must introduce evidence sufficient to sustain a finding that the police report is the one that Officer wrote. This is required before it may be received in evidence.

### *Best Evidence (Secondary Evidence)*

CEC § 1520 states the content of a writing may be proved by an admissible original.

Here, the secondary evidence rule does not pose any obstacles as the original is being produced. However, the police report is hearsay. It was made out of court and is admissible only if an exception applies.

### *Business Records*

Under CEC § 1271 evidence of a writing made as a record of an event is not made inadmissible by the hearsay rule when offered to prove the event if the writing was made in the regular course of a business; the writing was made at or near the time of the event; the custodian or other qualified witness testifies to its identity and the mode of its preparation; and the sources of information and method and time of preparation were such as to indicate its trustworthiness.

In this case, Officer made the writing in the regular course of his investigation. He responded to the accident and wrote an accident report based on his findings, his interviews with Paula and Dan and the skidmarks. He prepared the report shortly after the accident. Paula will need to introduce evidence of the report's identity and mode of preparation which shouldn't be a hindrance. Finally, the report is trustworthy. There is no reason to doubt its veracity and Officer is not biased in this civil suit. Thus, it is a business record and an exception to the hearsay rule.

### *Official Records and Writings*

CEC §1280 states evidence of a writing made as a record of an event is not made inadmissible by the hearsay rule when offered in any civil proceeding to prove the event if all of the following applies: the writing was made by and within the scope of duty of a public employee; the writing was made at or near the time of the event; the sources of information and method and time of preparation were such as to indicate its trustworthiness.

Here, similar to the business records exception above, Officer made the report within the scope of his duties as a public employee. Officer gathered information and interviewed witnesses as is likely part of his job. Thus, the report is an official record.

#### **a. The unnamed bystander's statement**

The unnamed bystander has personal knowledge of the accident as he witnessed the collision. However, the statement was made out of court and is being used for its truth. Thus, an exception to the hearsay rule must apply to allow it into evidence.

### *Spontaneous Declaration*

CEC §1240 states evidence of a statement that purports to narrate, describe, or explain an event perceived by the declarant and made spontaneously while the declarant was under the stress of excitement caused by such perception is an exception to the hearsay rule.

Here, the bystander made the statement three minutes after the accident occurred. The statement described and explained the event as perceived by the bystander. It was seemingly made spontaneously while the bystander was still under the stress of excitement caused by the collision. Thus, it should qualify as a spontaneous declaration; an exception to the hearsay rule.

**b. Officer's conclusion and its basis**

*Expert Opinion*

Under CEC § 720 a person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert.

On these facts it is not entirely clear if Officer has special knowledge, skill or experience. He is an investigating police officer and has likely responded to several accident scenes and has written many reports. If the judge qualifies Officer's report as that of an expert in vehicle collisions the jury may consider such opinion.

CEC § 801 states if a witness is testifying as an expert, his testimony is limited to such an opinion as is related to a subject that is sufficiently beyond common experience to assist the trier of fact; and based on matter (including his special knowledge, skill, experience, training, and education) perceived by the witness or made known to him before the hearing, that is of a type that reasonably may be relied upon by an expert in forming an opinion.

Here, Officer's report may state his opinion as to any subject that is beyond common experience of the jury. The conclusion of Officer was based on matters made known to Officer before the trial. Thus, it may be proper expert opinion.

*Lay Opinion*

CEC § 800 states if a witness is not testifying as an expert, his testimony in the form of an opinion is limited to an opinion that is rationally based on the perception of the witness; and helpful to a clear understanding of his testimony.

Here, if Officer is not considered an expert, his conclusion is nevertheless helpful to the jury to understand who caused the accident. Officer made this opinion based on his perception, interviews and other information. Thus, it should be a proper lay opinion.

*Ultimate Issue*

CEC § 805 states testimony in the form of an opinion is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.

Here, Officer's conclusion embraces the ultimate issue, that being who is at fault. Hence, if it is a proper opinion it will be admitted.

#### 4. Hank's greeting card

The card is relevant to show that Paula may have rushed home and drove negligently. Also, the card was authenticated when the paramedic testified that he found it in Paula's pocket.

##### *Effect on the Reader*

A statement is not hearsay if it is offered to show its effect on the person who read the statement. Thus, if a statement is offered to show that the person who read it acted a certain way, it is not hearsay.

Here, Hank's card stated to Paula that she should hurry home as fast as she can so that the couple could get an early start on their weekend. The effect it had on Paula is that she likely rushed home and drove careless and negligent. Since the card may be used to show that Paula acted a certain way, it will be admissible.

##### *Privilege for Confidential Marital Communications*

CEC § 980 states a spouse has a privilege during the marital relationship and afterwards to refuse to disclose, and to prevent another from disclosing, a communication if he claims the privilege and the communication was made in confidence between him and the other spouse while they were husband and wife.

Here, Paula may be able to exclude the card stating that it is a confidential marital communication. The facts state Paula and Hank are married. Paula may try and prevent the paramedic from disclosing the contents of the card on the basis the communication was made in confidence between the married couple. Should that argument succeed the court may exclude the card from evidence. *Note:* It is also unlikely that either Paula or Hank waived the privilege as they did not consent to its disclosure.

#### 5. Wilma's note

The note is relevant as it indicates who was negligent. Wilma claims to have seen the accident so she has personal knowledge of it. The note has been authenticated through Dan's testimony and the court admitted the original so no problems as to secondary evidence is found. However, Wilma is unavailable, Paula did not depose her and the note is hearsay.

The note seems to lack indicia of trustworthiness, does not fit into an exception to the hearsay rule and Wilma is unavailable. Couple all that with the fact that Wilma has not been deposed by Paula are all reasons why the court erred in admitted the note into evidence.

Answering each call of the question specifically and addressing each issue within it as well as numbering precisely and making logical coherent arguments supported by the law **7%**

- 1. Dan’s statement to Paula about insurance **15%****

*Hearsay*

*Admission*

*Evidence Excluded by Extrinsic Policies – Liability Insurance*

*Evidence Excluded by Extrinsic Policies – Medical Expenses*

- 2. Paula’s statement to the physician **16%****

*Relevance*

*Personal Knowledge*

*Hearsay*

*Statements of Physical State*

*Lack of Trustworthiness*

*Spontaneous and Contemporaneous Statements*

- 3. Officer’s accident report relating to: **22%****

*Unavailable*

*Authenticate – Identification*

*Best Evidence (Secondary Evidence)*

*Business Records*

*Official Records and Writings*

- a. The unnamed bystander’s statement **7%****

*Spontaneous Declaration*

- b. Officer’s conclusion and its basis **11%****

*Expert Opinion*

*Lay Opinion*

*Ultimate Issue*

- 4. Hank’s greeting card **14%****

*Effect on the Reader*

*Privilege for Confidential Marital Communications*

- 5. Wilma’s note **8%****

*Hearsay - Lacks Trustworthiness*