

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.

Answer A to Question 3

Preliminary Matters

Proposition 8 not applicable

Proposition 8 is an amendment to the California Constitution that states, in part, that all relevant evidence is admissible in a criminal trial. However, the present action is a civil action for negligence and thus Proposition 8 does not apply.

Standard of Relevance

In CA, evidence is relevant if it has any tendency to make disputed fact of consequence to the determination of the action more or less probable.

Discretion to Exclude under CEC 352

Under CEC 352, a judge has discretion to exclude evidence where its probative value is substantially outweighed by risk of unfair prejudice, waste of time, or confusion of the issues.

1. Dan's statement to Paula about Insurance

At the scene, Dan told Paula "I have plenty of insurance to cover your injuries."

Logical Relevance

Dan's statement is relevant in a couple of different ways. It might tend to show that D was driving negligently because he knew he was covered by insurance, and it may also show ability to pay a substantial judgment. Finally, it also indicates an admission of fault because D's insurance company would only pay for P's injuries if D was at fault. Thus, by admitting that his insurance would cover her, D implied he felt he was at fault. This is relevant because it tends to show that D was actually at fault and knew it immediately.

Legal Relevance

Insurance to Prove Negligence or Ability to Pay

Proof of D's insurance to show that D was engaged in negligent conduct or that D has ability to pay a substantial judgment is inadmissible for public policy reasons. We want to encourage people to have insurance and thus we do not allow it to be used against them in court. Thus, D's statement about his insurance should not be admitted to show that he was negligent or has the ability to pay a substantial judgment.

Use as Acknowledgment of Fault

However, the statement is still relevant as an admission of fault. Thus, it should be admitted unless the court finds that the danger of undue prejudice to D substantially outweighs its probative value. The statement will be harmful to D's case for sure, but mere harm is not substantial unfair prejudice. If D made this statement at the scene, he should be required to explain it and he can attack the probative value. The statement should have been admitted to show D believed he was at fault but it should not be admitted for the above improper purposes. A limiting instruction should have been given upon D's request to ensure it was only used for the limited purposes of showing D believed he was at fault.

Offer to Pay Medical Expenses

There is a public policy exclusionary rule for offers to pay medical expenses. Under the CEC admissions of fault made in conjunction with an offer to pay medical expenses are also inadmissible. Thus, D can argue his statement was an offer to pay P's medical expenses. However, P can argue that a statement that his insurance would cover her medical expenses is not really an offer to pay and thus his acknowledgement of fault should not be excluded. P seems to have the better argument on this point.

Hearsay

An out-of-court statement offered to prove the truth of the matter asserted is hearsay and is inadmissible unless it falls within an exception. Here, D's statement was made out of court at the scene of the accident. However, if used to show D believed he was

at fault, it is now being offered to prove the truth of the matter asserted - that D has insurance that will cover P's injuries. Thus, it is not hearsay if used for this limited purpose.

Even if offered for the truth of the matter asserted, under the CEC there is a hearsay exception for party admissions. Because D, the defendant here, made the statement, it would be admissible under the party admission hearsay exception.

Conclusion on Item #1: admission was proper for the purpose of showing that D believed he was at fault immediately after the accident but not to show that D was negligent or that D has the ability to pay a substantial judgment. The statement is non-hearsay or admissible as a party admission.

2. Paula's Statement to the Physician

Logical Relevance

Paula's statement tends to show that her right leg was injured and also tends to show how D was negligent - that he failed to yield to her right of way.

Hearsay

See hearsay definition above. P's statement to the physician was made out of court while at the hospital getting treatment. P's statement is best divided up into two distinct portions: (1) that her right leg hurts, and 2) that Dan failed to yield to her right of way. Both portions of her statement are presumably being offered for their truth - that she suffered an injury to her right leg and that Dan didn't yield to her right of way. As such, P's statement is hearsay and is inadmissible unless it falls within a hearsay exception.

Portion 1 – Statement About Injury to P's Right Leg

Present Physical Condition

A statement of present physical condition or of present state of mind is admissible as a hearsay exception. P's statement to the physician described her present physical condition. At the time she was seeing her doctor, her right leg was hurting her and her

statement described this present physical condition. Thus, the statement is admissible as a present physical condition.

Excited Utterance

An excited utterance is a statement relating to a startling condition made while the declarant is still under the stress caused by the condition. Here, P was injured in a car accident, which is a startling condition. However, the statement was made 3 hours after the car accident. Thus, P may not have still been under the stress caused by the accident at the time the statement was made. Perhaps if P's injuries were sufficiently severe, she could make a strong argument that she was still under the stress of the accident. It's a close call but P's statement is probably not admissible as an excited utterance.

Statement Pertaining to Medical Diagnosis or Treatment

Unlike the exception under the Federal Rules, California's exception for a statement made in connection with the receipt of medical treatment is very narrow and only applies to a child describing an incident of neglect or child abuse. Thus, P's statement is not admissible under California's narrow exception.

Portion 2 – Statement about D Failing to Yield

Present Physical Condition

Although made in connection with her description of her present physical condition, the second part of P's statement does not itself describe a present physical condition. Thus, it should not be admitted with the first portion under the present physical condition exception.

Excited Utterance

Following the same analysis above, the second part of P's statement may be admissible as an excited utterance. However, P would have to establish the preliminary fact that despite the passage of 3 hours she was still in a state of excitement as a result of the accident.

Exclusion under CEC 352

However, even if the second portion of P's statement to the physician were admissible under a hearsay exception, it should probably be excluded under CEC 352. It's not clear what the statement was based on. If she observed D's failure to yield, she can testify to that directly rather than admitting it this way. Thus, the probative value is minimal since we don't know the basis for P's statement. And it will probably be duplicative of P's actual testimony at trial and it's somewhat prejudicial to D because it asserts that D breached a duty without giving him an opportunity to cross-examine P when she made the statement. Thus, the second portion of the statement should be excluded under CEC 352 even if it is found to fall within a hearsay exception.

3. Officer's Accident Report

Logical Relevance:

The contents of the report tend to show that D drove out in front of P's car and was thus negligent and that D was responsible for the accident.

Report - Hearsay

The officer's report is hearsay because it is an out-of-court statement that was made by the officer prior after [sic] the accident and it is being offered to prove its contents - that a witness saw D pull out in front of [P] and that the officer concluded that Dan was at fault.

Public Records Exception

The CEC has a public records exception for records made by public employees in the course of their duties. However, the court may exclude the record if it does not appear trustworthy. Here, the police report is an ordinary record made in the course of a police officer's duties. Thus, it may be admitted under the public records exception. However, the police report contains a statement from a bystander which is hearsay and the public records exception does not permit that statement because the bystander had no duty to communicate the information to the police officer. The business records exception does not cover records including conclusions on complex issues. If the same requirement is

applied to the public records exception, Officer's conclusion that D was at fault may not be admitted under the exception.

Part A - Unnamed Bystander's Statement

Bystander's Statement - Hearsay

The bystander's statement is hearsay because it was made out of court at the scene of the accident and it is being offered to prove its content that D pulled in front of P's car. Thus, it is inadmissible unless it falls within a hearsay exception.

Excited Utterance

See definition above. The bystander witnessed a startling event: a car accident which he apparently saw at close proximity. The police report also indicates that the officer arrived only 3 minutes after the accident and the bystander made the remark to the police officer immediately upon his arrival. Thus, it is likely that the bystander would have still been under the stress of witnessing the accident when the statement was made. Thus, the bystander's statement falls within the excited utterance exception.

Present Sense Impression

The CEC's present sense impression exception is narrow in that it only applies to statements explaining the conduct of the declarant while engaged in that conduct. Here, the car accident wasn't the bystander's own conduct so the statement would not be admissible as a present sense impression.

Part B - Conclusion and Basis

Lay Opinion

The opinion of a lay witness is only admissible if it is a rational conclusion based on the witness's firsthand observations, is helpful to the jury, and does not require expertise or knowledge unknown to the general public. Here, the police report explains that the officer's conclusion as to fault is based on the bystander's statement, interviews with both parties, and the skidmarks. The officer's conclusion thus seems to be reasonably based on his own observations. The conclusion would also be helpful to the jury who

may not be able to understand the relevance of the skidmarks. However, it's not clear exactly how the officer formed his conclusion. If the skidmarks were an important factor, the analysis would seem to require some expertise not possessed by the general public. Thus, the opinion should not have been admitted as lay opinion because it relies on the officer's special expertise in accident reconstruction and analysis.

Expert Opinion

Expert opinion is admissible if it is helpful to the jury, the witness is qualified as an expert, the expert witness is reasonably certain of his conclusion, the analysis is supported by a proper factual analysis and is the result of reliable principles reliably applied to the facts. Here, P cannot establish the admissibility of the officer's conclusions as an expert opinion. First, the officer was never qualified as an expert and thus it is not clear whether he knows anything about analyzing skidmarks. Second, it is not clear whether the officer was reasonably certain of his conclusion or was just making his best guess based on what he observed. Third, we don't know what method of analysis the officer used. California has retained the Kelley-Frye standard which requires that the expert's methods be generally accepted by experts in the field. It is unclear how the officer analyzed the skidmarks and, thus, it is not possible to know if the officer's methods were generally accepted. In conclusion, the officer's conclusions could not be admitted as expert opinion.

Legal Relevance - CEC 352

Relevant evidence may [be] excluded where its probative value is substantially outweighed by risk of unfair prejudice. Even if the officer's conclusions were admissible as lay opinion or expert opinion, the conclusions in the police report should be excluded under CEC 352. The report is extremely vague in stating the basis for the officer's conclusions. For instance, it is not clear what the officer learned in his interviews of Dan and Paula that led him to the conclusion that Paula was at fault. And, as discussed above, the officer fails to describe how the skidmarks led him to conclude that D was at fault. For these reasons, the officer's conclusions have minimal probative value. On the other hand the conclusions in the report are very prejudicial to D because they state

that he is at fault and he is unable to cross-examine the officer who made them since he will not be testifying at trial. Thus, the risk of unfair prejudice substantially outweighs what little probative value the conclusions offer and the conclusions should have been excluded under CEC 352.

4. Hank's Greeting Card

Logical Relevance

The greeting card shows that P had a reason to rush home - to get an early start on their trip to the mountains and possibly that Hank would have been upset with P had she not hurried home. If P was rushing, it's more likely she may have been negligent, which is relevant to D's counterclaim and to D's defense that P was contributorily negligent.

Hearsay

See hearsay definition above. Henry's statements in the card are out-of-court statements because he wrote them up the morning of the accident. However, it does not appear that D is offering them for the truth of the matter.

Non-Hearsay - To Show Effect on Listener

Out-of-court statements are not barred by the hearsay rule if offered for some other purpose such as to prove the declarant's state of mind or to show the effect on the listener. Here, D is not offering the greeting card to prove that they were going to the mountains for the weekend. Rather, D is offering the card to show its likely effect on Paula - that it made her want to get home quickly and that she may not have been driving carefully as a result. Thus, the greeting card should be admitted as non-hearsay for this purpose.

Authentication

Physical evidence and writings must be authenticated before they may be admitted into evidence. Authentication requires such proof that is sufficient for a jury to find that the evidence is what the proponent claims it to be. Here, the greeting card was properly

authenticated by one of the paramedics who had seen the greeting card when treating Paula after the accident. Thus, it was properly admitted into evidence.

5. Wilma's Note

Hearsay

Wilma's note is an out-of-court statement because she wrote it down at the scene of the accident. Presumably it is being offered to prove the truth of the matter asserted, i.e., that P was speeding and that P was negligent. Because the note is hearsay, it is inadmissible unless it falls within an exception.

Excited Utterance

An excited utterance is a statement relating to a startling condition made while the declarant is still under the stress caused by the startling condition. Wilma witnessed the accident, which was a startling event. According to Dan's testimony, Wilma handed him the note immediately after the accident. Thus, it seems that Wilma wrote the note immediately upon witnessing the accident when she was probably still under the stress caused by witnessing the accident at close proximity. As such, the statement may be admitted as an excited utterance.

Lay Opinion re: Speeding

Lay opinions must be based on the witness's personal observations, helpful to the jury, and not based on special expertise. Wilma's note contains the assertion that Paula was speeding. This is a lay opinion because it is based on Wilma's observations (recall, Wilma states she "saw the whole thing") and does not communicate the facts directly to the jury. We don't know, for instance, whether Wilma was driving 80 miles per hour or 50 miles per hour. However, this type of lay opinion is usually permissible because it is helpful to the jury. The jury will understand that, under the circumstances, P appeared to be driving very fast. Thus, the opinion regarding P's speeding should be admitted.

Lay Opinion re: Negligence

Wilma's opinion that P was negligent is probably not admissible. This opinion would not be helpful to the jury because it's not clear what Wilma based this opinion on. If it was based merely on the speeding, then there's no need to admit the conclusion regarding negligence because the opinion regarding speeding was already admitted. If it was based on other things, then it cannot be shown to be based on Wilma's firsthand observations. Thus, the opinion regarding P's negligence should not be admitted.

Authentication

Dan, the recipient of the note, could properly authenticate it before it was admitted to evidence. Assuming that the foundation was established, the note would be admissible upon Dan's authentication.

CEC 352

The circumstances surrounding the note are strange. Unless Wilma was mute, it is unclear why she would write out a note rather than just make a verbal statement to Dan. In addition, the note is rather conclusory and as such it does not assist the jury much in ascertaining whether or not P was driving negligently. On the other hand, there is some unfair prejudice because P has no opportunity to cross-examine Wilma or to even depose Wilma prior to trial. This is a close call, but the note should probably [be] excluded under CEC 352 because its probative value is substantially outweighed by its prejudice to Paula.

Answer B to Question 3

Because this case takes place in California state court, the court will use the California Evidence Code as the basis for the admissibility of evidence. Further, because this is a civil case, the rules regarding California's Proposition 8 will not be applied to the evidence.

1. Dan's statement to Paula about the insurance

Relevance

For evidence to be admissible, it must be factually and legally relevant. In California, factual relevance is evidence that would tend to make a matter in dispute more or less probable. Here, it is in dispute whether Dan was liable. Therefore, Dan's statement that "he has plenty of insurance to cover the injuries" will be logically relevant to making the matter of Dan's negligence more probable.

Legal relevance means that the probative value of the evidence outweighs any prejudicial impact that the evidence may have. While Dan's comment may be slightly prejudicial in implicating him in the matter, it is highly probative because it establishes that he could have been liable. Therefore, the comment will be found to be legally relevant.

However, evidence can be excluded if a court finds that it has the tendency to confuse the issues and mislead the jury. The defendant's comment could only establish that he has the ability to pay, and not that he was negligent in the accident. However, such evidence is unlikely to be confusing, and would not be subject to exclusion on this basis alone.

Reliability

Evidence must be reliable, and based on the witness' personal knowledge in order to be admissible. Here, Paula heard Dan make the comment that he has plenty of insurance. Therefore, the evidence is reliable.

Evidence of Medical Insurance

According to the California Evidence Code, evidence of liability insurance is inadmissible in a civil trial to prove that the defendant was at fault or that the defendant has the ability to pay, because public policy concerns dictate that we should encourage persons to have insurance. Therefore, Paula's testimony that Dan said he had plenty of insurance to cover the injuries should not have been admitted.

Offers to pay for injuries

In California, offers to pay another person's medical costs are inadmissible in court to show that the defendant was at fault, or that the defendant had the ability to pay. In addition, any statements made in connection with the offer to pay for medical expenses are similarly excluded. Paula is likely introducing the evidence to show that Dan was at fault, and this is why he offered to pay her costs. Therefore, Dan's statement that he can pay for Paula's injuries should not be admitted.

Statements of sympathy

In a civil case, a defendant's statements of sympathy made at the scene of the accident are inadmissible to show fault; however, any accompanying statements can be admitted against the defendant. Here, however, Dan was not making a statement of sympathy, but only stating that he had liability insurance to cover the injuries. Therefore, this rule will not be applicable to the statement.

Statements to settle

In California, any statements made with regards to a settlement offer are inadmissible to show guilt or liability. However, in order for this exception to apply, the plaintiff must have filed a lawsuit against the defendant. Because Dan's statements were made at the scene of the accident, this rule will also not apply.

Hearsay

Hearsay is any out-of-court statement offered to prove the truth of the matter stated therein. Hearsay is generally inadmissible in court. In this case, Dan's statement was made out of court, and is being offered to show that Dan was liable; therefore, it will be inadmissible hearsay unless an exception applies.

In California, an admission by a party opponent is an exception to the hearsay rule. An admission includes any statement made by the opposing party that is a prior acknowledgement of any fact in the case. Here, Dan made a prior statement that he could pay for Paula's injuries. Therefore, the statement is an admission by a party opponent, and would fall under the hearsay exception.

However, as stated above, the evidence will be inadmissible, because of the public policy rule governing the exclusion of statements made in connection with proof of insurance and statements offering to pay for the plaintiff's injuries.

2. Paula's statement to the physician

Relevance

Paula's statement to the physician is factually relevant because it shows that she suffered from physical harm, and because it establishes that Dan was negligent. Further, it is legally relevant, because while it is prejudicial to Dan in establishing that he

was negligent, it is highly probative because it shows that Paula suffered from physical injury, and it shows that Dan did not yield to the right-of-way, and thus was the party at fault in the accident.

Reliability

Paula has personal knowledge of the statement to the physician, because she made the statement.

Hearsay

Hearsay is any out-of-court statement offered to prove the matters stated therein. Here, Paula is introducing the evidence to show that she was injured and that she was negligent. Thus, it will be inadmissible hearsay unless one of the exceptions apply.

Statements of a past physical condition made to a doctor in the course of treatment

California will admit statements made to a doctor and that were necessary to receiving treatment. However, this exception only applies to minors who make the statements in connection to a claim of child abuse or neglect. Therefore, this exception will not apply.

Statement of a then-existing physical or mental condition

A statement made by the defendant of a then-existing physical condition is an exception to the hearsay rule. Paula can argue that her statement that her leg hurts the most was a statement of a then-existing physical condition, because her leg was hurting while she made the statement. However, the statement that Dan failed to yield to the right of way will not be admissible under this exception because it constitutes a past belief, and therefore, is not a then-existing state of mind.

Statement of a past physical condition if the physical condition is at issue in the case

California also permits a statement of past physical condition if it is at issue in the case. However, in order for this exception to apply, the declarant must be unavailable, and here, Paula is in the court. Therefore, this exception will not apply.

Excited utterance

The excited utterance exception permits the admission of a statement of a declarant who experienced an exciting or startling event and [is] still speaking under the stress of such excitement. In this case, Paula's comment was made 3 hours after the accident. This suggests that the statement was too remote for Paula to still be under the excitement. Further, no statements indicate that she was still under the stress of the accident. Therefore, her statements will not be admissible as an excited utterance.

Present sense impression

A present sense impression is a statement made contemporaneously while witnessing the event. California only recognizes this exception to the extent that it applies to the conduct of the declarant, but not with regards to anyone else. Here, the statement was not made contemporaneously because it was made 3 hours after the accident. Further, it states the conduct of Dan and thus would not fall under the exception.

As a result, the court should have admitted her statement that her leg hurts the most because it was a statement of a then-existing physical condition. However, the further comment about Dan should be excluded because it is inadmissible hearsay.

3a. Officer's accident report relating to the unnamed bystander's statement

Relevance

The statement is logically relevant because the unnamed bystander's statement establishes that Dan caused the accident. Furthermore, it is legally relevant because it is highly probative in establishing who was at fault, and this probative value will outweigh any prejudicial impact of the testimony.

Reliability

The bystander personally witnessed the scene; therefore, he has personal knowledge with regards to his statement. Further, the police officer has personal knowledge as to the matters which he entered into the police report, because he wrote the police report.

Hearsay

The police report is an out-of-court statement being offered to prove the matters stated therein. Furthermore, the bystander's statement was an out-of-court statement that is being offered to prove the truth of the matters stated therein--that Dan was negligent. Thus, there are two levels of hearsay in the police report. Both levels of hearsay must fall within a hearsay exception in order to be admissible in court.

Excited utterance

The excited utterance exception permits the admission of a statement of a declarant who experienced an exciting event and is speaking under the stress of such excitement. The bystander made this statement three minutes after the accident occurred. It is likely that he was still under the stress of the excitement, because such a short time had elapsed, and he had run to the police officer in order to tell him the

statement. Therefore, the bystander's comment will be admissible under the excited utterance exception to the hearsay rule.

Public records exception to the hearsay rule for the police reports

In California, the public records exception to the hearsay requires that the record be made by a public employee in accordance with his duties, that the matters were recorded at or near the scene of the accident, that the official had personal knowledge of the matters contained in the record, and that the record was made under circumstances indicating trustworthiness.

Here, the record was made by a public officer while he was carrying out his duties. Further, he made the report at the scene of the accident, and made the record according to his observations and interviews. Therefore, the factors indicating trustworthiness were present. As a result, the report is admissible under the public records exception.

3b. Officer's accident report relating to his conclusion and its basis

Relevance

The conclusion and its basis are relevant to establish that Dan was negligent. Further, it is highly probative in establishing who was at fault, and the probative value of this determination far outweighs any prejudicial impact that it may have. Therefore, the evidence is admissible.

Expert witness opinion

Expert opinion is admissible in court if 1) the testimony is helpful, 2) the witness is qualified, 3) the witness is relatively certain of his statements, 4) the witness' testimony has a sound factual basis, and 5) the opinion was reliably based on matters

that were reliably applied. Lay opinion is an opinion by a person that is rationally related to that person's perception of the incident. Lay opinion does not include legal opinions of negligence and causation.

In this case, Officer is making an expert opinion because he is testifying as to the legal conclusions of the case. This is not conclusion on which a layperson would be able to testify. Therefore, Officer must establish his credentials as an expert. His testimony is certainly helpful to the jury, because it allows the jury to ascertain who was negligent. However, it is not clear if Officer is qualified to make such a legal conclusion (that Dan caused the accident) or that officer is relatively certain of his statements. Further, Officer is not present in court to be cross-examined; therefore, a judge will not be able to make the determination that Officer is competent to testify as an expert witness. While the skidmarks and the interviews may provide a sound basis to establish that Dan caused the accident, Officer has not been qualified as an expert, therefore, the evidence is inadmissible.

As a result, the police report will only be admissible as to the contents of the bystander's comments, but not as to Officer's conclusion and its basis.

4. Hank's greeting card

Relevance

The statement is relevant because it establishes that Paula was in a hurry on the way home, and as a result may have been driving too quickly. Further, the greeting card is probative in establishing that Paula was at fault in the accident.

Authentication

All physical evidence must be authenticated in order to be admissible. Here, the paramedic testified that she recognized the greeting card as the same greeting card that

she found in Paula's pocket. Therefore, the greeting card has been properly authenticated as belonging to Paula.

However, the note in the greeting card also must be authenticated to establish that it was indeed Hank who wrote the note. Circumstantial evidence can establish such authentication. The court may find that because it was found in Paula's pocket while she was being treated, and was signed by a man with the same name as her husband, Hank. Therefore, the note in the card has been properly authenticated.

Hearsay

Paula could argue that the note should be excluded because it is inadmissible hearsay. However, Dan could argue that the statement in the note is not being offered for the truth of the matter. It is not being introduced to show that Paula was getting an early start on the weekend trip, but rather to show that Paula was on notice that she needed to hurry, and to show the effect on the hearer (Paula) upon hearing that she had to get an early start on her weekend. Therefore, the statement is non-hearsay because it is not being offered to prove the matters stated therein, but rather to show the effect of the card on Paula.

Dan could further argue that the statement is an admission by a party opponent. However, the statement was made by Hank, and not Paula, and, therefore, this exception will not apply.

5. Wilma's note

Relevance

The note is highly relevant because it establishes that Paula was speeding during the accident, and thus was negligent. Further, it is probative to the issue of

Paula's fault, and this probative value would outweigh any prejudicial impact that the note would have.

Authentication

All real evidence must be authenticated in order to be presented in court. Here, Dan will likely authenticate the note as the same note that he received while he was waiting for the ambulance.

Reliability

Even if a court believes that Wilma saw the whole thing, the statement in the note is inadmissible lay opinion. Lay opinion must be 1) helpful to the jury, 2) based on the person's perception, and 3) the opinion is rationally related to the perception.

Here, Wilma is making a legal conclusion as to Paula's negligence. A layperson cannot testify as [to] legal conclusions such as negligence. Therefore, Wilma's statement as to Paula's negligence will be inadmissible as inadmissible lay opinion.

Hearsay

The note would also be inadmissible hearsay because it is an out-of-court statement that is being offered to prove the matters stated therein, that Paula was speeding and that Paula was negligent. The note may be admissible if it falls under any of the recognized exceptions to the hearsay rule.

Excited utterance

There are no facts indicating that Wilma wrote this note when she was under the stress of having viewed the accident. Further, it is unclear how much time had passed since the accident had occurred and Wilma wrote the note. Therefore, the statement in the note would not qualify as an excited utterance.

Present Sense Impression

As stated above, California only recognizes a present sense impression to the extent that it describes the declarant's conduct. Here, Wilma is describing Paula's conduct therefore, this exception will not apply.