1)

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======== Start of Answer #1 (1909 words) ========

Question 1

Evidence 1: Pat attempts offers evidence to show that Dan had planted a large flower garden on the parcel, etc., in order to repair the pothole that injured him.

Dan would object to the evidence that such evidence is considered a **subsequent precaution.** As a matter of public policy, subsequent precautions are not permitted in order to show negligence on behalf of a Defendant. Because Dan fixing the pothole after the incident is a subsequent precaution, offering the evidence to show negligence is inadmissible.
Therefore, the Judge is likely to determine that this evidence is inadmissible--unless it is entered for some other purpose, such as to impeach the Defendant (see Evidence 3 for possibility of such a purpose).

Evidence 2: Dan attempts to enter into evidence that Dan has meddled with other properties by planting gardens and erecting tool sheds.

Dan would object to the **relevancy** of this evidence. While, all relevant evidence is admissible, generally, evidence that is not material or probative of some fact is inadmissible.
On first blush, this evidence seems mostly irrelevant; however, it is possible that Pat would claim this evidence is admissible to rebut Dan's claim under **Evidence 5 and 6** that the property belonged to another and was not within Dan's control; therefore he is not responsible would be Dan's argument. Evidence of Dan doing other things on another's property is admissible to show that he may have been the person doing the same thing on Ivan's property, despite Dan not being the owner of such property.
Thus, the Judge is likely to determine the evidence is relevant on that limited basis--at least.
Dan would then object on a **bad character evidence basis**. Generally, bad character evidence is inadmissible to show one acted with a particlar trait found in the alleged civil wrong or crime.
Pat can meet this objection by claiming such evidence is **habit of** Dan's use of other's property to erect, repair, damage, etc. Dan's behavior of meddling with the propery of others, erecting garden's and sheds, etc., is so closely related to the current instance, that it is likely to be considered habit and could also help establish that Dan had control over the property, etc. This, again, relates to relevancy as well under Evidence 5 and 6 submitted by Dan.
Thus, the Judge is likely to determine that this evidence is an exception to the character evidence ban and is admissible.

Evidence 3: Pat attempts to offer evidence from Ned that Dan told him he was aware of the pothole before Pat's accidence and that he intended to repair it, but never did.

First and foremost, Dan would object to this evidence as **hearsay.** Hearsay is an out of court statement used for the truth of the matter stated.

Pat could meet this objection by providing a couple of exceptions. Firstly, Pat would say that the hearsay statement falls under the exception of an **admission.** Whereby, a Defendant admits to some aspect of a civil proceeding. In this instance, Dan's admission is as to the elements of Duty and breach thereof, and, as such, falls within the admission exception.

Alternatively, Pat could provide other exceptions for which the statement falls, such as then-present state of mind, where Dan's intent to fix the pothole at such time could be excepted under the hearsay exception; however, it seems that the statements clearly fall within the scope of the admissions exception to hearsay.

Additionally, Dan may try and object that precautions are inadmissible as a matter of extrinsic/public policy. This, however, is inaccurate. If a potential hazard was known and could have been fixed, such evidence is entirely relevant and does not fall within the scope of an extrinsic policy.

The Judge would determine that the hearsay evidence qualifies as an exception as an admission.

More importantly, Pat may also, at this time, attempt to enter into evidence **Evidence 1** in order to impeach Dan should he show evidence which disagrees with the current excepted hearsay exception. The subsequent precauction in Evidence 1 may be admissible to impeach Dan should he say he was unaware of the pothole's existence.

Evidence 4: Pat would attempt to enter into evidence Dan's statement made to Ned that he thought Pat was a bad neighbor and had previously laid traps.

Dan would object to this evidence as hearsay.

Pat would meet the objection by stating it falls within the admissions exception. Such evidence seems to clearly fall within the admissions exception to hearsay; HOWEVER, it is not an admission as to the current charge/civil wrong alleged.

Therefore, such an exception is likely not to work in this instance. The admission would need to be as to the current civil wrong charged (negligence).

Pat may offer alternate exceptions and potential claim the statement Dan's feelings towards Pat as being a bad neighbor fall within the scope of a **then-present state of mind declaration**. At a minimum, the statement concerning Dan's ill feelings towards Pat are admitted under this exception as they clearly

convey Dan's then state of mind and ill-will towards Pat. Such statements are excepted by hearsay; and therefore, at least towards the ill-feelings conveyed in Ned's testimony, this portion of the evidence will be determined admissible.

Dan's "laying traps," however, does not seem to squarely fall within any other exception to hearsay--again because it is not an admission as to a current matter. A court might determine otherwise, but it seems unlikely unless Pat can prove the current accidence was a trap and relate it back to the prior traps. That does not seem to be the case.

Thereafter, Dan would object to the relevance and the evidence as to the ill-will portion of the testimony, which may be subject to the Court's 342 and 403 ruling to determine whether the probative value of such evidence is greater than the prejudicial bias such evidence may create. It seems like if the case is solely a matter of negligence, the ill-will described in the testimony may only cause confusion with the jury. On the other hand, should PAt's complain have alleged any actual intentional torts (which is not stated in the facts) such evidence is likely to be much more probative. As such, however, it seems the Court is likely to determine the evidence is inadmissible due to it's lack of probative value (not showing negligence)

Evidence 5: Dan attempts to enter into evidence county records which indicate the property does not belong to him.

Pat would object to this evidence as hearsay.

Dan would meet this objection by asserting the evidence is a **business record or official record** and falls within a hearsay exception. Business and/or official records are records made by a business, or government agency, while made during the operation of business or by a government agent. Such records seem to obviously fall within either of these exceptions.

The Judge is likely to determine the record is an exception as an official record or business record.

Pat would then object to the relevancy of the evidence.

Dan would meet this objection by showing that control of property is a clear part of showing negligence. If Dan doesn't control the property, he is far less likely to be liable.

Thus, the Judge is likely to find the evidence pertinent, material and therefore relevant as well.

Evidence 6: Dan seeks to call Ivan, his investigator, to testify that Wally admitted to owning the parcel where Pat was injured.

Pat would object, first and foremost, to this evidence as hearsay.

Dan would meet the objection by saying it falls within the exception of a **statement against interest**. A

statement against interest is a hearsay exception whereby one's statements which objectively go against their interests (civil, criminally, or pecuniary) are admissible.
This seems to be a rather grey issue. It is not clear if Wally, who made the statement, is aware that admitting to owning the property may also make him liable for the accident that occurred. Therefore, unless it is determined that it is objective to say someone is Wally's shoes admitting to owning the property who know he was then making himself potentially liable to Pat's action for negligence, it is likely not considered a statement against interest.
Additionally, there is the issue of **availability.** With regards to statements against interest, unavailability is permitted because of the nature of such statements to exonerate a Defendant. Because ownership and control are key in a negligence action, it is clear that Wally's admission may exonerate, or help, Dan. Therefore, a finding of unavailability must be made and Dan must show that he made reasonable efforts to find and locate Wally before attempting to admit this evidence.
Regardless, and as already stated. This evidence doesn't seem to objectively fall within the scope such an exception as it is unlikely that an objective standard could determine that admitting to ownership is also admitting to potential liability of a currently ongoing suit. While an actual knowledge of such liability is required, the test would be objectively. If a judge determined that such a standard has been met, the evidence will come in under the exception. I believe an objective claim to ownership assumes personal liability over it; therefore, it is also likely that a judge would make such an assumption.
The evidence is admissible under the exception and with a showing of unavailability.

Evidence 7: Dan attempts to enter into evidence Pat's medical records which indicated that Pat told the janitor who told the ER doctor, "I saw the pothole all along," etc., and tried to walk over it anyway.

Pat would object to this evidence as multiple hearsay, as to the three parts of alleged hearsay statement: 1) Pat's statements to the Janitor; and 2) the Janitor's statement to the ER Doctor; 3) the doctor's creation of the medical records.

With regards to the first level, Dan would meet the objection by claiming an exception to hearsay through a statement against interest (because Pat is admitting to a fact that may go against his pecuniary interests as to the current case), and/or **contemporaneous statement**. A contemporaneous statement is one which described actions of the declarant. Because Pat fell in the whole, his alleged previous statement that he was aware of it being there and jumped in regardless would describe his actions, etc., and therefore fall within this exception.
With regards to the 2nd level, it does not appear as if Dan can properly meet the objection to hearsay. It is

possible that if Pat testifies that Dan can admit the hearsay evidence as an **inconsistent statement exception.** Until such testimony comes in, it is not apparent that this level of the hearsay can be properly excepted.

If, however, Dan can find an exception for the Janitor's statement to the E.R. doctor OR Pat testifies and it can come in as an inconsistent statement, he could address the 3rd level of hearsay more easily. The Doctor's record (while potential priveleged, but not yet covered) would potentially be considered a business record; HOWEVER, because it is the janitor reporting such information, as to whether or not such a recording it considered a business record, Pat would call into question whether or not the janitor's statements may be untrustworthy. It would be up to the Judge to make this determination.

Regardless, until the 2nd level is properly met, it does not appear that such evidence is presently admissible.

========== End of Answer #1 ==========

2)

======== Start of Answer #2 (2023 words) ========

Question 2

Evidence 1: Prosecution attempts to enter into evidence Tom's 'expert' testimony that his opinion regarding the strangulation of Vic is based on Claire's statement (who is unavailable), Dan's police report concerning the crime scene, and appearance of Vic's body.

Vic would object to this evidence as **multiple hearsay**. Hearsay is an out of court statement submitted for the truth of the matter stated. Here, the multiple levels of hearsay include: 1) Doctor's Claire's non-written autopsy report to Officer Dan; 2) Officer Dan's submitting the report to pathologist Tom; 3) Tom's opinion regarding the reported autopsy report.

With regards to level 1, the Prosecutor would attempt to meet the objection by claiming the unwritten autopsy report is an **official record or business record.** Business and/or official records are records made by a business, or government agency, while made during the operation of business or by a government agent. Such records seem to obviously fall within either of these exceptions.

With regards to this, the Defendant would show that the report was not properly made and/or recorded. The Officer's subsequent report relied on Claire's merely spoken observations. Is likely that merely spoken reports are not common business practices and furthermore are not as trustworthy as the more common documented autopsy reports. Thus, due to there not actually being a written report which would follow the

customs of autopsies, it is not likely that this exception applies.

Additionally, this first level of hearsay is also subject to confrontation, which the Defendant would bring in should the 1st level of hearsay be admitted as an official record (which is unlikely). ***Melendez-Diaz*** sets forth that with regards to reports prepared by and/or for governmental agencies to be used against criminal defendants invoke confrontation when they are testimonial and thus testimony of the preparer (although there is no preparer) requires the Defendant to confront Claire. Because Claire is unavailable (which does not matter), the Court will rely on ***Crawford*** to determine whether the statements by Claire are testimonial which would then finish the argument for establishing the right to confrontation. Testimonial statements include all statements made for the purposes of trial.

Because such autopsy reports seem to be usually prepared for the purpose of trial, it is most likely under *Melendez-Diaz and Crawford* that the Court will determine the statements are testimonial and unless Dr. Claire is produced, the Defendant's right to confrontation is violated.

Thus, it appears that the first level of hearsay is inadmissible, unless Claire is found and can properly testify.

Although it seems that the discussion can stop here, should there be any way a prosecutor could get around Confrontation (unlikely), they will then also be met with an objection to the level **2 hearsay**. Ace would claim, at least federally, that an officer's report is inadmissible against a Defendant unless accompanied by the officer's testimony. Here, there is no such indication that the officer is testifying; thus, federally, the second level of hearsay is also inadmissible. Additionally, there may be the a like confrontation issue with regards to this evidence as an official record in California. As mostly stated previously, official records for the purpose of trial, call into question the Confrontation rights of the Defendant. Therefore, the Defendant has a right to confront the officer in California as well.

Despite the already over-encumbering burden on the prosecutor to produce Claire (who is to no consequence unavailable) and the officer in order for the level 2 hearsay to come in, etc., the Defendant would also object to the level 3 hearsay.

Here, the prosecutor may have an easier time meeting this objection. They, again, would state that it is an official record, or business record. Generally, **opinions** are admissible to accompany an official or business record when such opinion is made by an expert in the field and when the opinion is as to observable facts, etc. Therefore, Tom's opinion regard the prior testimony seems, in and of itself, good to come in so long as it is through his own testimony to meet any confrontation issues.

Despite the opinion evidence to be seemingly on good grounds within the official and business records exceptions, unless the first tier of hearsay is accompanied by Claire's testimony, it appears that the Defendant's right to confrontation is violated, and, as such, using *Melendez-Diaz,* such evidence is inadmissible against the Defendant in its entirety.

Evidence 2: The prosecution seeks to enter into evidence Cowboy Bob's testimony that he taught Ace how to rope cows and was loaned an unreturned rope.

Ace would object to the relevancy of this **evidence**. While, all relevant evidence is admissible, generally, evidence that is not material or probative of some fact is inadmissible.

The prosecution would seek to claim that the evidence is relevant to with regards to the fact that because Vic was strangled, evidence of Ace's ability to use a rope, etc., may be admissible for the limited purpose of showing he is quite capable of having been the one to hurt the victim with a rope in such a manner. There is, however, the issue of the prosecution potentially not being able to get Evidence 1 in which is the only apparent evidence that shows the victim was strangled. Ultimately, if the prosecution is unable to get the evidence that shows Vic was strangled in, they will be further hard pressed to show the Court that this evidence is relevant as to Vic's death. Both pieces are highly connected due to the inferences used in suggesting that Ace's roping classes are probable of the murder and/or his ability to use a rope, etc. Ultimately, the Court is likely to rely on 352 and 403, whereby the Judge will look at the probative value of this evidence compared to it's prejudicial effect, which may include the confusion such evidence may bring to the jury. Without being able to properly show strangulation through evidence 1, this evidence is likely not going to come in as it will only confuse the issue. Should the prosecutor show that Vic was strangled through some other probative evidence, the Judge is more likely to determine this evidence as probative of the aforementioned facts.

Additionally, there is the potential that Ace could additionally object to this evidence on a **bad character evidence** basis. Bad character evidence is inadmissible to show that the Defendant has a character trait that was found in the alleged crime (in this case, the ability to use a rope, which presumably caused the alleged murder).

The prosecutor would rely on non-character evidence (§1101(b)), to submit the evidence for a non-character purpose of knowledge, and/or ability to commit the crime should the Defendant feign ignorance, etc., or just merely for the narrow purpose ability to use the rope.

This would like properly meet any character evidence issue objected to, but still have issues with aforementioned relevancy.

Ace later seems to admit to owning the rope; thus, at a minimum such evidence is now admissible and relevant.

Evidence 3: The defense seeks to enter into evidence testimony of Fred that Ace told him he hated the roping class, hated Bob, and that he threw the rope into the garbage as is was unworthy of being recycled.

The prosecution would object to several portions of this testimony as hearsay. Firstly that Fred claims Ace told him that he hated roping class and Bob.

Ace would say that this evidence falls within the hearsay exception of state of mind declarations, potentially excited utterances--depending on the circumstances asserted--and contemporaneous statements. State of mind declarations are those that describe a then-present state of mind, while excited utterances purport to describe actions while under the stress of excitement, and contemporaneous statements are those describe the declarant's actions (but comtemporaneous statements require availability).

Additionally, even though Ace is available to testify as to everything asserted by Fred, his right to the 5th amendment should provide for unavailable--should the issue come up. At a minimum, the state of mind declarations seems to fit Ace's opinion concerning the roping class and his hate for Bob, while excited utterances is more of an iffy exception due to the stress of excitement not being present and contemporaneous statements do not apply because Ace is unavailable as stated.

Therefore, this portion of the evidence is admissible as a state of mind declaration.

With regards to throwing away the rope (and not his opinion of the class itself), state of mind does not really apply to the entire statement. While it does state his opinion of the rope, etc., it goes beyond that to describe him actually throwing away the rope; therefore, the state of mind exception will not go so far was to apply to this entire statement due to the actions present. Additionally, because contemporaneous statements require availability to establish trustworthiness, this exception will not apply unless Bob actually saw Ace throw away the rope, or unless Ace testifies.

Thus, it doesn't appear as this evidence falsely squarely within the hearsay exception, even though it does describe some state of mind. Judge determines it inadmissible.

Evidence 4: The Defendant attempts to enter into evidence from Mary that she believes Ace is a good guy, etc.

The prosecution would object to this evidence as being under the ban for character evidence.

Ace would rely on the **Mercy Rule, which** permits a Defendant to provide opinion and reputation evidence as to his good character and any probable fact with regards to the alleged charge.

Therefore, evidence that the Mary never saw Ace use a rope and that Ace is a mellow guy is all admissible under the Mercy Rule.

Evidence 5: Cross Examination of Mary: Ace's past record

Ace would object to the prosecution's cross examination which brings up Ace's past record which is bad character evidence.

The prosecution would meet the objection by showing that, 1) Ace opened himself up to bad character evidence by relying on the Mercy Rule, which now allows the prosecution to rebut Mary's opinion that Ace is mellow; and 2) The prosecution is allows to, in **good faith**, attempt to impeach Mary's **credibility** by asking her if she in calling Ace mellow knew about his past record which indicates he his, actually, not so mellow. This is a way the prosecution gets around entering specific acts.

Such evidence on cross is admissible; however, the judge may limit the evidence for the jury only to show lack of credibility on behalf of Mary, and not necessarily indicate that he was actually convicted of such crimes, etc.

Additionally, Mary is not impeached by the specific acts; therefore, the prosecution may not enter those acts into evidence for any other purpose, as was the prosecutor's intent, as it is bad character evidence for such purpose other than impeachment on cross.

Evidence 5: Cross Examination of Mary: Ace's wearing blue jeans and cowboy attire.

Ace would object to such evidence regarding its relevancy.

The prosecutor would need to show that such evidence is relevant for the limited purpose for 1) impeaching Ace with regards to his hearsay statements that he hated roping and cowboy classes; and 2) for potentially showing that he may have worn it to pretend to act like a cowboy, hence the strangulation death, etc.

On a relevancy basis, such evidence seems probable of those facts, but is still subject to a 352 and 403 analysis by the Court. The Court would way the prejudicial effect of the evidence against it's probative value. Depending on a finding of whether such evidence confused the issue or wastes time, it seems like the probative value is higher than such effects, so it will, at least, get past this analysis to come in.

Ace would also object to this as hearsay.

Prosecution would claim it is a non-assertive conduct, and is therefore non-hearsay. Ace did not mean for his conduct to be a replacement for words, despite being as to his state of mind; thus, non-assertive conduct is NOT hearsay because it is not a replacement for words.

Thus, Mary's testimony as to the attire would come in and all objections are overruled.

═══ End of Answer #2 ═══

END OF EXAM